

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**NOTICE OF MANUFACTURER
DEFENDANTS' MOTION TO
DISMISS**

TO: Adam M. Slater, Esq.
Plaintiffs' Liaison Counsel
Mazie Slater Katz & Freeman, LLC
103 Eisenhower Parkway
Roseland, NJ 07068

PLEASE TAKE NOTICE that on November 2, 2020, or a date to be determined by the Court after October 16, 2020, Arrow Pharm Malta Ltd., Aurobindo Pharma, Ltd., Aurolife Pharma, LLC, Hetero Drugs, Limited, Hetero Labs, Ltd., Mylan Laboratories Ltd., Mylan Pharmaceuticals Inc., Teva Pharmaceuticals Industries Ltd., Torrent Pharmaceuticals Ltd., and Zhejiang Huahai Pharmaceutical Co., Ltd. (collectively, "Manufacturing Defendants"), and Aurobindo Pharma USA, Inc., Hetero USA, Inc., and Princeton Pharmaceutical Inc. (collectively, "FDA Liaison Defendants"), by and through lead counsel for all

Defendants in the above-captioned action, Duane Morris LLP, Greenberg Traurig, and Pietragallo Gordon Alfano Bosick & Raspanti, LLP, shall move before the Honorable Robert B. Kugler, United States District Judge of the United States District Court for the District of New Jersey, for entry of an Order dismissing the Master Personal Injury Complaint (ECF No. 122), the Consolidated Second Amended Economic Class Action Complaint (ECF No. 398), and the Consolidated Amended Medical Monitoring Class Action Complaint (ECF No. 123) pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

PLEASE TAKE FURTHER NOTICE that in support of this motion, Manufacturing Defendants and FDA Liaison Defendants shall rely on the accompanying Memorandum of Law (and the Compendiums of Charts and Unpublished and Unreported Authorities appended thereto) and all papers later submitted with Manufacturing Defendants and FDA Liaison Defendants' reply in further support of their motion to dismiss.

PLEASE TAKE FURTHER NOTICE that, for the Court's convenience, two proposed forms of Order are submitted herewith, one proposing the dismissal of the Complaints in full and one proposing the dismissal of the Complaints in part.

PLEASE TAKE FURTHER NOTICE that the undersigned attorneys for Defendants request oral argument on this motion.

Respectfully submitted,

/s/ Seth A. Goldberg

Seth A. Goldberg, Esq.
Lead Counsel and Liaison
Counsel for Defendants

DUANE MORRIS LLP

Seth A. Goldberg, *Lead Counsel and*
Liaison Counsel for Defendants

Barbara A. Schwartz

Coleen W. Hill (DE #6287)

Nathan B. Reeder

30 South 17th Street

Philadelphia, Pennsylvania 19103

Tel.: (215) 979-1000

Fax: (215) 979-1020

SAGoldberg@duanemorris.com

BASchwartz@duanemorris.com

NBReeder@duanemorris.com

Attorneys for Zhejiang Huahai
Pharmaceutical Co, Ltd., Prinston
Pharmaceutical Inc., and Solco
Healthcare US, LLC

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

Clem C. Trischler, *Lead Counsel for*
Defendants

Jason M. Reefer

38th Floor, One Oxford Centre Pittsburgh,
Pennsylvania 15219

Tel: (412) 263-2000

Fax: (412) 263-2001

CCT@PIETRAGALLO.com

JMR@PIETRAGALLO.com

*Attorneys for Mylan Laboratories, Ltd.
and Mylan Pharmaceuticals, Inc.*

GREENBERG TRAURIG

Lori G. Cohen, *Lead Counsel for
Defendants*

Victoria D. Lockard
Steven M. Harkins
Terminus 200
3333 Piedmont Rd., NE,
Suite 2500
Atlanta, Georgia 30305
Tel: (678) 553-2385
Fax: (678) 553-2386
cohenl@gtlaw.com
lockardv@gtlaw.com
harkinss@gtlaw.com

Gregory E. Ostfeld
77 West Wacker Drive,
Suite 3100
Chicago, Illinois 60601
Tel: (312) 476-5056
ostfeldg@gtlaw.com

Brian H. Rubenstein
1717 Arch Street
Suite 400
Philadelphia, Pennsylvania
Tel: (215) 988-7864
Fax: (214) 689-4419
rubensteinb@gtlaw.com

*Attorneys for Teva Pharmaceuticals
USA, Inc., Teva Pharmaceutical
Industries Ltd., Actavis LLC, and Actavis
Pharma, Inc.*

Dated: July 17, 2020

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

This Document Relates to All Actions

**ORDER GRANTING
MANUFACTURER
DEFENDANTS' MOTION TO
DISMISS IN FULL**

THIS MATTER having come before the Court upon Manufacturer Defendants' Motion to Dismiss, joined by FDA Liaison Defendants, on notice to liaison counsel for Plaintiffs, and the Court having reviewed the submissions of the parties, any replies thereto, and having heard argument, and for good cause appearing:

It is, on this _____ day of _____ 2020,

ORDERED AND ADJUDGED that Manufacturer Defendants' Motion to Dismiss the Complaints is **GRANTED IN FULL**.

IT IS FURTHER ORDERED that the Consolidated Second Amended Economic Class Action Complaint, ECF No. 398, Consolidated Amended Medical

Monitoring Class Action Complaint, ECF No. 123, and Master Personal Injury Complaint, ECF No. 122, are hereby **DISMISSED** as to all Defendants.

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel of record within ____ days of Defendants' liaison counsel's receipt of this Order.

Dated: _____

Hon. Robert B. Kugler, U.S.D.J.

Motion Opposed _____

Motion Unopposed _____

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**ORDER GRANTING
MANUFACTURER
DEFENDANTS' MOTION TO
DISMISS IN PART**

THIS MATTER having come before the Court upon Manufacturer Defendants' Motion to Dismiss, joined by FDA Liaison Defendants, on notice to Liaison Counsel for Plaintiffs, and the Court having reviewed the submissions of the parties, any replies thereto, and having heard argument, and for good cause appearing:

It is, on this _____ day of _____ 2020,

ORDERED AND ADJUDGED that Manufacturer Defendants' Motion to Dismiss the Complaints is **GRANTED IN PART**.

IT IS FURTHER ORDERED, the Complaints are dismissed with respect to the Manufacturer Defendants and FDA Liaison Defendants as follows:

With respect to Defendants named in the Complaints:

a) ☐ All Defendants in the ELMC and MMMC to whom Plaintiffs have failed to trace their injuries are **DISMISSED**, *see* Charts at 10 (ELMC) & 11 (MMMC).

b) ☐ As to all Defendants in the ELMC, MMMC, and PIMC, all claims under the laws of States not represented by any Plaintiff are **DISMISSED**, *see* Charts at 12 (ELMC) & 13 (MMMC).

c) ☐ Defendants Hetero USA, Inc. and Princeton Pharmaceutical Inc. are **DISMISSED** as to all claims in the ELMC, MMMC, and PIMC.

d) Defendant Aurobindo Pharma USA, Inc. is **DISMISSED** as to the following claims in the ELMC: ☐ Counts XV and XVI for Negligence and ☐ Counts XVII and XVIII for Negligence *Per Se*; in the MMMC, ☐ Count IV for Products Liability – Manufacturing Defect; and in the PIMC: ☐ Count I for Strict Liability – Manufacturing Defect and ☐ Count III for Strict Liability Design Defect.

With respect to specific counts of the ELMC:

a) Counts I and II for Breach of Express Warranties are **DISMISSED** on the following grounds: ☐ preemption or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 8 (preemption) and 37–38, 39–41, 42, and 46–48 (express warranty).

b) Counts III and IV for Breach of Implied Warranties of Merchantability and Fitness are **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 35–36 and 43–45 (implied warranty).

c) Counts V and VI under the Magnuson-Moss Warranty Act are **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption).

d) Counts VII and VIII for Fraud (Affirmative Misrepresentation, Omission, and Concealment) are **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a

claim under Rule 12(b)(6), *see* Charts at 8 (preemption), 16–19 (subsumption), and 20–21 and 22 (fraud).

e) Counts IX and X for Negligent Misrepresentation and Omission are **DISMISSED** on the following grounds: ☐ preemption or ☐ subsumption by product liability statutes, *see* Charts at 8 (preemption) and 16–19 (subsumption).

f) Counts XI and XII for Violation of State Consumer Protection laws are **DISMISSED** on the following grounds: ☐ preemption or ☐ subsumption by product liability statutes, *see* Charts at 8 (preemption) and 16–19 (subsumption).

g) Counts XIII and XIV for Unjust Enrichment are **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 49, 50–51, and 52–56 (unjust enrichment).

h) Counts XV and XVI for Negligence are **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 32–34 (negligence).

i) Counts XVII and XVIII for Negligence *Per Se* are **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 8 (preemption), 16–19 (subsumption), and 29–30 and 31 (negligence *per se*).

With respect to specific claims of the MMMC:

a) Count I for Negligence is **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 32–34 (negligence).

b) Count II for Negligence *Per Se* is **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 9 (preemption), 16–19 (subsumption), and 29–30 and 31 (negligence *per se*).

c) Count III for Medical Monitoring is **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim

under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 57–58, 59, and 60 (medical monitoring).

d) Count IV for Products Liability–Manufacturing Defect is **DISMISSED** on the following grounds: ☐ primary jurisdiction or ☐ subsumption by product liability statutes, *see* Charts at 16–19 (subsumption).

e) Count V for Failure to Warn is **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 9 (preemption), 16–19 (subsumption), & 28 (failure-to-warn).

f) Count VI for Violation of the Magnuson-Moss Warranty Act is **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption).

g) Count VII for Breach of Implied Warranty of Merchantability is **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 35–36 and 43–45 (implied warranty).

h) Count VIII for Breach of Express Warranty is **DISMISSED** on the following grounds: ☐ preemption or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 9 (preemption) and 37–38, 39–41, 42, and 46–48 (express warranty).

i) Count IX for Fraud/Fraudulent Concealment is **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 9 (preemption), 16–19 (subsumption), and 20–21 and 22 (fraud).

With respect to specific claims of the PIMC:

a) Count I for Strict Liability – Manufacturing Defect is **DISMISSED** on the following grounds: ☐ primary jurisdiction or ☐ subsumption by product liability statutes, *see* Charts at 16–19 (subsumption).

b) Count II for Strict Liability – Failure to Warn is **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 28 (failure-to-warn).

c) Count III for Strict Liability – Design Defect is **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 7 (preemption) and 23–27 (design defect).

d) Count IV for Negligence is **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 32–34 (negligence).

e) Count V for Negligence *Per Se* is **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 7 (preemption), 16–19 (subsumption), and 29–30 and 31 (negligence *per se*).

f) Count VI for Breach of Express Warranty is **DISMISSED** on the following grounds: ☐ preemption or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 7 (preemption) and 37–38, 39–41, 42, and 46–48 (express warranty).

g) Count VII for Breach of Implied Warranty is **DISMISSED** on the following grounds: ☐ primary jurisdiction, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 35–36 and 43–45 (implied warranty).

h) Count VIII for Fraud is **DISMISSED** on the following grounds: ☐ preemption, ☐ subsumption by product liability statutes, or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 7 (preemption), 16–19 (subsumption) and 20–21 and 22 (fraud).

i) Count IX for Negligent Misrepresentation is **DISMISSED** on the following grounds: ☐ preemption or ☐ subsumption by product liability statutes *see* Charts at 7 (preemption) and 16–19 (subsumption).

j) Count X for Breach of Consumer Protection Statutes is **DISMISSED** on the following grounds: ☐ preemption or ☐ subsumption by product liability statutes, *see* Charts at 7 (preemption) and 16–19 (subsumption).

k) Count XI for Wrongful Death is **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption).

l) Count XII for Survival Actions is **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption).

m) Count XIII for Loss of Consortium is **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption).

n) Count XIV for Punitive Damages is **DISMISSED** on the following grounds: ☐ subsumption by product liability statutes or ☐ failure to state a claim under Rule 12(b)(6), *see* Charts at 16–19 (subsumption) and 61–67 (punitive damages).

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel of record within ____ days of Defendants’ Liaison Counsel’s receipt of this Order.

Dated: _____

Hon. Robert B. Kugler, U.S.D.J.

Motion Opposed _____

Motion Unopposed _____

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**MANUFACTURER DEFENDANTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION TO DISMISS**

TABLE OF CONTENTS

	Page
INTRODUCTION	1
FACTUAL BACKGROUND.....	4
I. VALSARTAN RECALLS IN THE UNITED STATES	4
II. PLAINTIFFS’ ALLEGATIONS.....	6
ARGUMENT	7
I. LEGAL STANDARDS	7
II. THE ELMC AND MMMC SHOULD BE DISMISSED FOR LACK OF ARTICLE III STANDING.....	8
A. The ELMC Does Not Allege an Injury-in-Fact.	10
B. The ELMC and MMMC Fail to Plead Injuries Traceable to All Defendants.....	15
C. Plaintiffs Lack Standing to Bring Claims Across All States.	16
III. MOST OF THE COMPLAINTS’ STATE-LAW CLAIMS ARE PREEMPTED AND THE COURT SHOULD ABSTAIN FROM DECIDING THE REMAINDER UNDER PRIMARY JURISDICTION.	17
A. Most of the Complaints’ State-Law Claims are Disguised Attempts to Privately “Enforc[e]” or “Restrain Violations” of the FDCA.	17
1. The Complaints’ Conduct-Based Claims Are Preempted Because They Depend on Proving Violations of the FDCA.	21
2. The Complaints’ Representation-Based Claims Are Preempted Because They Depend on Proofs that Defendants Made False Statements About Their Compliance with the FDCA.	24

B.	The Court Should Dismiss or Abstain from Deciding the Complaints’ Remaining Claims Because the FDA Has Primary Jurisdiction Over Those Claims.	27
IV.	THE COMMON LAW CLAIMS OF NEW JERSEY AND SIMILARLY-SITUATED PLAINTIFFS ARE SUBSUMED BY STATE PRODUCT LIABILITY STATUTES.	32
A.	The NJPLA and Similar Statutes Subsume the PIMC and MMC’s Claims.	33
B.	The NJPLA Subsumes the ELMC’s Claims.	33
V.	THE COMPLAINTS’ INDIVIDUAL CLAIMS SHOULD BE DISMISSED UNDER RULE 12(B)(6) BASED ON CLAIM-SPECIFIC PLEADING DEFECTS.....	35
A.	The Complaints’ Fraud Claims Should be Dismissed.	35
1.	The Complaints Do Not Satisfy the Heightened Pleading Requirement for Fraud.....	35
2.	The Complaints Do Not Sufficiently Plead that Defendants Knew Any Representations Were False.	36
B.	The PIMC and MMC Fail to Allege Design Defect and Failure-to-Warn Product Liability Claims.	38
1.	The PIMC Inadequately Alleges a Design Defect Claim.....	39
2.	The PIMC and MMC Inadequately Allege Failure-to-Warn Claims.	41
C.	Plaintiffs’ Negligence <i>Per Se</i> Claims Must be Dismissed.....	43
1.	The ELMC and MMC Do Not State Claims for Negligence <i>Per Se</i>	43
2.	The Complaints’ Negligence <i>Per Se</i> Claims are Not Cognizable Under the Law of Multiple States.....	43
D.	The Complaints’ Negligence Claims Should Be Dismissed.....	44

E.	The Complaints Do Not State Cognizable Breach of Implied and Express Warranty Claims.	44
1.	State Law Privity Requirements Compel Dismissal of Plaintiffs’ Express and Implied Warranty Claims.	45
2.	The Implied Warranty Claims in the ELMC and MMC Fail for Lack of Injury or Loss of Functionality.	46
3.	All Express Warranty Claims Fail Under State Law.....	47
a.	The Complaints Fail to Allege That Any Warranty Formed the Basis for Any Bargain.....	47
b.	The Complaints Do Not Identify Specific Language, Sources, and Effective Time Periods to Establish Express Warranties.	48
c.	Representations About Safety or Efficacy of VCDs Do Not Create Express Warranties.....	49
4.	State Law Pre-Suit Notice Requirements Compel Dismissal of the Complaints’ Express and Implied Warranty Claims.	49
5.	The Complaints’ Magnuson-Moss Warranty Act Claims Fail.	49
F.	The ELMC’s Unjust Enrichment Claims Are Inadequately Pleaded.	50
G.	The MMC Fails to Allege a Claim for Medical Monitoring.	53
H.	The PIMC’s Claims for Wrongful Death, Survival Actions and Loss of Consortium, and Demand for Punitive Damages, Fail as a Matter of Law	54
1.	The PIMC’s Claims for Wrongful Death, Survival Actions, and Loss of Consortium Should Be Dismissed	54
2.	The PIMC Does Not State a Plausible Claim for Punitive Damages.....	54

VI. THE COMPLAINTS FAIL TO STATE CLAIMS FOR RELIEF
AGAINST FDA LIAISONS. 57

CONCLUSION 59

TABLE OF AUTHORITIES

Federal Cases

<i>Abicht v. PLIVA, Inc.</i> , No. 12-1278, 2013 WL 141724 (D. Minn. Jan. 9, 2013).....	18
<i>Amarin Pharma, Inc. v. ITC</i> , Nos. 2018-1247, 2018-114 (3d Cir. Mar. 27, 2018).....	18-19
<i>Amarin v. ITC</i> , 923 F.3d 959 (Fed. Cir. 2019)	26
<i>Arlandson v. Hartz Mountain Corp.</i> , 792 F. Supp. 2d 691 (D.N.J. 2011)	34, 48, 52
<i>Asahi Metal Indus. Co. v. Super. Ct. of Cal.</i> , 480 U.S. 102 (1987).....	9
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	8, 50, 55, 59
<i>In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.</i> , 588 Fed. App’x 171 (3d Cir. 2014)	48-49
<i>Avram v. Samsung Electronics Am., Inc.</i> , Nos. 2:11-6973, 2:12-976, 2013 WL 3654090 (D.N.J. July 11, 2013)	45
<i>Becker v. Smith & Nephew, Inc.</i> , No. 14-5452, 2015 WL 268857 (D.N.J. Jan. 20, 2015).....	40
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. at 544, 555 (2007).....	48, 50, 55
<i>Bell v. Boehringer Ingelheim Pharms., Inc.</i> , No. 17-1153, 2018 WL 928237 (W.D. Pa. Feb. 15, 2018).....	40
<i>Bosch v. Bayer Healthcare Pharm., Inc.</i> , 13 F. Supp. 3d 730 (W.D. Ky. 2014)	41
<i>Bourbia v. S.C. Johnson & Son, Inc.</i> , 375 F. Supp. 3d 454 (S.D.N.Y. 2019)	51
<i>Bowman v. RAM Med., Inc.</i> , No. 10-4403, 2012 WL 1964452 (D.N.J. May 31, 2012).....	13, 46
<i>Boyd v. Johnson & Johnson</i> , No. 09-cv-3135, 2010 WL 2265317 (D.N.J. May 31, 2010)	34

<i>Bristol-Myers Squibb Co. v. Super. Ct. of Cal.</i> , 137 S. Ct. 1773 (2017).....	9
<i>Buckman Co. v. Pls.’ Legal Comm.</i> , 531 U.S. 341 (2001)	<i>Passim</i>
<i>Calender v. NVR Inc.</i> , 548 F. App’x 761 (3d Cir. 2013).....	33
<i>Cartillar v. Turbine Conversions, Ltd.</i> , 187 F.3d 858 (8th Cir. 1999)	45
<i>Cheyney State Coll. Faculty v. Hufstedler</i> , 703 F.2d 732 (3d Cir. 1983)	28-29
<i>Clements v. Sanofi-Aventis, U.S., Inc.</i> , 111 F. Supp. 3d 586 (D.N.J. 2015)	32
<i>Cole v. NIBCO, Inc.</i> , No. 3:13-cv-07871, 2015 WL 2414740 (D.N.J. May 20, 2015).....	32
<i>Cooper v. Medimetriks Pharms., Inc.</i> , No. 18-11987, 2019 WL 1370414 (D.N.J. Mar. 25, 2019).....	16
<i>Crouch v. Johnson & Johnson Consumer Cos., Inc.</i> , No. 09-cv-2905, 2010 WL 1530152 (D.N.J. Apr. 15, 2010).....	34
<i>Crozier v. Johnson & Johnson Consumer Cos., Inc.</i> , 901 F. Supp. 2d 494 (D.N.J. 2012)	46
<i>D’Addario v. Johnson & Johnson</i> , No. 3:10-cv-15627, 2020 WL 3546750 (D.N.J. June 30, 2020).....	1, 50
<i>Danon v. Vanguard Group, Inc.</i> , 686 F. App’x 101 (3d Cir. 2017).....	38
<i>Davis v. Wells Fargo</i> , 824 F.3d 333 (3d Cir. 2016)	5
<i>Doe v. Solvay Pharmaceuticals, Inc.</i> , 350 F. Supp. 2d 257 (D. Me. 2004)	45
<i>Donovan v. Pub. Policy Ctr. of New Jersey</i> , No. 05-1181, 2006 WL 1373230 (D.N.J. May 17, 2006)	5
<i>Dopico v. IMS Trading Corp.</i> , No. 14-cv-1874, 2018 WL 4489677 (D.N.J. Sept. 18, 2018)	49
<i>Duffy v. Charles Schwab & Co., Inc.</i> , 123 F. Supp. 2d 802 (D.N.J. 2000)	52

<i>Dunbar v. Medtronic, Inc.</i> , No. 14-01529, 2014 WL 3056026 (C.D. Cal. June 25, 2014)	23
<i>Farina v. Nokia Inc.</i> , 625 F.3d 97 (3d Cir. 2010)	18
<i>Finkelman v. Nat’l Football League</i> , 810 F.3d 187 (3d Cir. 2016)	10, 15
<i>Fishman v. Gen. Elec. Co.</i> , No. 2:12-cv-00585, 2013 WL 1845615 (D.N.J. Apr. 30, 2013)	48
<i>Forslund v. Stryker Corp.</i> , No. 09-2134, 2010 WL 3905854 (D. Minn. Sept. 30, 2010)	41
<i>Gelboim v. Bank of Am. Corp.</i> , 574 U.S. 405 (2015)	8
<i>Gisvold v. Merck & Co.</i> , 62 F. Supp. 3d 1198 (S.D. Cal. 2014)	32
<i>Glick v. Leatt Corp.</i> , No. 4:17-cv-00291, 2018 WL 9439696 (S.D. Iowa May 3, 2018), <i>aff’d sub nom. Glick v. W. Power Sports, Inc.</i> , 944 F.3d 714 (8th Cir. 2019)	41
<i>Global Naps, Inc. v. Bell Atl.-N.J., Inc.</i> , 287 F. Supp. 2d 532 (D.N.J. 2003)	28
<i>Hackett v. G.D. Searle & Co.</i> , 246 F. Supp. 2d 591 (W.D. Tex. 2002)	23
<i>Hammer v. Vital Pharms., Inc.</i> , No. 11-4124, 2012 WL 1018842 (D.N.J. Mar. 26, 2012)	46
<i>Hidalgo v. Johnson & Johnson Consumer Co., Inc.</i> , 148 F. Supp. 3d 285 (S.D.N.Y. 2015)	15
<i>Hindermeyer v. B. Braun Med. Inc.</i> , 419 F. Supp. 3d 809 (D.N.J. 2019)	32-33
<i>Hoffman v. Nutraceutical Corp.</i> , No. 12-5803, 2013 WL 2650611 (D.N.J. June 10, 2013)	46
<i>Horn v. Thoratec Corp.</i> , 376 F.3d 163 (3d Cir. 2004)	18
<i>Horowitz v. AT&T, Inc.</i> , No. 3:17-cv-4827, 2018 WL 1942525 (D.N.J. Apr. 25, 2018)	9
<i>Hubert v. Gen. Nutrition Corp.</i> , No. 2:15-cv-01391, 2017 WL 3971912 (W.D. Pa. Sept. 8, 2017)	11, 14

<i>Hughes v. Chattem, Inc.</i> , 818 F. Supp. 2d 1112 (S.D. Ind. 2011)	12
<i>Indiana ex rel. Zoeller v. Pastrick</i> , 696 F. Supp. 2d 970 (N.D. Ind. 2010)	52
<i>Iowa Network Servs. v. AT&T Corp.</i> , No. 3:14-cv-3439, 2019 WL 4861438 (D.N.J. Oct. 2, 2019).....	31-32
<i>James v. Johnson & Johnson Consumer Co., Inc.</i> , No. 2:10-cv-03049, 2011 WL 198026 (D.N.J. Jan. 20, 2011).....	11, 13-14
<i>Johansson v. Cent. Garden & Pet Co.</i> , 804 F. Supp. 2d 257 (D.N.J. 2011)	50
<i>In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.</i> , 903 F.3d 278 (3d Cir. 2018).....	13-14
<i>Jovine v. Abbott Labs., Inc.</i> , 795 F. Supp. 2d 1331 (S.D. Fla. 2011)	51
<i>In re Katrina Canal Breaches Litig.</i> , 309 F. App'x 836 (5th Cir. 2009).....	8
<i>Kelley v. Corrections Corp. of Am.</i> , 750 F. Supp. 2d 1132 (E.D. Cal. 2010)s.....	55
<i>Koronthaly v. L'Oreal USA, Inc.</i> , 374 F. App'x 257 (3d Cir. 2010).....	10, 12
<i>Leonard v. Medtronic, Inc.</i> , No. 1:10-cv-03787, 2011 WL 3652311 (N.D. Ga. Aug. 19, 2011)	23
<i>Levinson v. Johnson & Johnson</i> , 09-cv-3317, 2010 WL 421091 (D.N.J. Feb. 1, 2010)	34
<i>Lewkut v. Stryker Corp.</i> , 724 F. Supp. 2d 648 (S.D. Tex. 2010).....	25
<i>In re Magnesium Oxide Antitrust Litig.</i> , No. 10-cv-5943, 2011 WL 5008090 (D.N.J. Oct. 20, 2011).....	16
<i>Marie v. McGreevey</i> , 314 F.3d 136 (3d Cir. 2002)	54
<i>Markland v. Insys Therapeutics, Inc.</i> , 758 F. App'x 777 (11th Cir. 2018) (per curiam)	19, 22
<i>MCI Commc'n Corp. v. AT&T Co.</i> , 496 F.2d 214 (3d Cir. 1974).....	29

<i>MDNet, Inc. v. Parmacia Corp.</i> , 147 F. App'x 239 (3d Cir. 2005)	36
<i>Medley v. Johnson & Johnson Consumer Cos.</i> , No. 2:10-cv-2291, 2011 WL 159674 (D.N.J. Jan. 18, 2011).....	12
<i>Mink v. Smith & Nephew, Inc.</i> , 860 F.3d 1319 (11th Cir. 2017).....	21
<i>Mladenov v. Wegmans Food Markets, Inc.</i> , 124 F. Supp. 3d 360 (D.N.J. 2015).....	48
<i>Monk v. Wyeth Pharm., Inc.</i> , No. 16-cv-1273, 2017 WL 2063008 (W.D. Tex. May 11, 2017).....	23
<i>Moore v. Medeva Pharms., Inc.</i> , No. 01-311-M, 2004 WL 57084 (D.N.H. Jan. 13, 2004).....	58
<i>Mut. Pharm. Co. v. Bartlett</i> , 570 U.S. 472 (2013).....	39
<i>Mylan Labs., Inc. v. Matkari</i> , 7 F.3d 1130 (4th Cir. 1993)	26
<i>In re Nat'l Prescription Opiate Litig.</i> , 956 F.3d 838 (6th Cir. 2020).....	2, 9
<i>Novartis Pharms. Corp. v. Leavitt</i> , 435 F.3d 344 (D.C. Cir. 2006)	18
<i>Otsuka Pharma Co. v. Torrent Pharm. Ltd.</i> , 118 F. Supp. 3d 646 (D.N.J. 2015).....	5
<i>In re Packaged Seafood Prod. Antitrust Litig.</i> , 242 F. Supp. 3d 1033 (S.D. Cal. 2017)	53
<i>PDK Labs, Inc. v. Friedlander</i> , 103 F.3d 1105 (2d Cir. 1997)	26
<i>Perez v. Nidek Co.</i> , 711 F.3d 1109 (9th Cir. 2013)	25
<i>PhotoMedex, Inc. v. Irwin</i> , 601 F.3d 919 (9th Cir. 2010)	26
<i>PLIVA, Inc. v. Mensing</i> , 564 U.S. 604 (2011)	38
<i>Rapid Models & Prototypes, Inc. v. Innovated Sols.</i> , 71 F. Supp. 3d 492 (D.N.J. 2014)	36
<i>Raritan Baykeeper v. NL Indus., Inc.</i> , 660 F.3d 686 (3d Cir. 2011)	28

<i>In re Refrigerant Compressors Antitrust Litig.</i> , 731 F.3d 586 (6th Cir. 2013)	8
<i>Reiter v. Cooper</i> , 507 U.S. 258 (1993)	28
<i>Rivera v. Wyeth-Ayerst Labs.</i> , 283 F.3d 315 (5th Cir. 2002)	11
<i>Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.</i> , 902 F.2d 222 (3d Cir. 1990)	26
<i>Santiago v. Warminster Tp.</i> , 629 F.3d 121 (3d Cir. 2010)	59
<i>In re Schering Plough Corp. Intron/Temodar Consumer Class Action</i> , 678 F.3d 235 (3d Cir. 2012)	7
<i>Shaulis v. Nordstrom, Inc.</i> , 865 F.3d 1 (1st Cir. 2017).....	52
<i>Sheeran v. Blyth Shipholding S.A.</i> , No. 1:14-cv-5482, 2015 WL 9048979 (D.N.J. Dec. 16, 2016).....	2, 50
<i>Shuker v. Smith & Nephew, PLC</i> , 885 F.3d 760 (3d Cir. 2018).....	54
<i>Shukh v. Seagate Tech., LLC</i> , 873 F. Supp. 2d 1087 (D. Minn. 2012)	55
<i>Sich v. Pfizer Pharm.</i> , No. 1:17-cv-2828, 2017 WL 4407930 (D.N.J. Oct. 4, 2017) (Kugler, J.)	8
<i>Simmons v. Stryker Corp.</i> , No. 08-3451, 2008 WL 4936982 (D.N.J. Nov. 17, 2008)	48
<i>Snyder v. Dietz & Watson, Inc.</i> , 837 F. Supp. 2d 428 (D.N.J. 2011)	36
<i>Snyder v. Farnam Co., Inc.</i> , 792 F. Supp. 2d 712 (D.N.J. 2011)	47
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016)	7
<i>Sweezy v. C.R. Bard Inc.</i> , No. 3:19-cv-2172, 2020 WL 1237394 (N.D. Tex. Mar. 12, 2020)	23
<i>Thornton v. AstraZeneca Pharm. LP</i> , No. 1:17-cv-652, 2017 WL 2255776 (N.D. Ga. May 15, 2017).....	41
<i>Torres-Hernandez v. CVT Prepaid Sols., Inc.</i> , No. 3:08-cv-1057, 2008 WL 5381227 (D.N.J. Dec. 17, 2008).....	29

<i>Walters v. Carson</i> , No. 11-6545, 2012 WL 6595732 (D.N.J. Dec. 17, 2012)	48
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990)	10-11
<i>Williams v. Purdue Pharma Co.</i> , 297 F. Supp. 2d 171 (D.D.C. 2003)	13
<i>In re Zimmer Nexgen Knee Implant Prod. Liab. Litig.</i> , No. 11-c-5468, 2012 WL 3582708 (N.D. Ill. Aug. 16, 2012)	8

State Cases

<i>Anderson v. Owens-Corning Fiberglas Corp.</i> , 53 Cal. 3d 987 (1991)	42
<i>In re Bard IVC Filters Prods. Liab. Litig.</i> , No. 15-md-02641, 2018 WL 4356638 (D. Ariz. Sept. 12, 2018)	23
<i>In re Digitek Prods. Liab. Litig.</i> , No. 2:08-md-01968, 2009 WL 2433468 (S.D. W. Va. Aug. 3, 2009)	8
<i>In re Fosamax (Alendronate Sodium) Prod. Liab. Litig. (No. II)</i> , No. 08-008, 2011 WL 5903623, at *6 (D.N.J. Nov. 21, 2011)	24
<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , No. 14-md-2543, 2015 WL 3619584 (S.D.N.Y. June 10, 2015)	8
<i>Giardina v. Bennett</i> , 545 A.2d 139 (N.J. 1988)	54
<i>Kinney v. Butcher</i> , 131 S.W.3d 357 (Ky. Ct. App. 2004)	56
<i>Kopel v. Kopel</i> , 229 So. 3d 812 (Fla. 2017)	53
<i>In re Lead Paint Litig.</i> , 924 A.2d 484 (N.J. 2007)	33
<i>Mobil Oil Corporation v. Ellender</i> , 968 S.W.2d 917 (Tex. 1998)	56
<i>Pisano v. Extendicare Homes, Inc.</i> , 77 A.3d 651 (Pa. Super. Ct. 2013)	54
<i>Sinclair v. Merck & Co., Inc.</i> , 948 A. 2d 587 (N.J. 2008)	33
<i>Wahlcometroflex, Inc. v. Baldwin</i> , 991 A.2d 44 (Me. 2010)	51

Federal Statutes

15 U.S.C. § 2310(e)	50

15 U.S.C. § 2311(d)	49
21 U.S.C. § 321	29
21 U.S.C. § 337(a)	<i>Passim</i>
21 U.S.C. § 351	19
21 U.S.C. § 371	29
21 U.S.C. § 372	29
21 U.S.C. § 375	29
21 U.S.C. § 393(a)	29

State Statutes

Fla. Stat. § 768.72(2)(b)	56
N.J.S.A. § 2A:15–5.12(a)	55
N.J.S.A. § 2A:58C-1(b)(3)	32

Rules

Rule 8	1-2, 50-51
Rule 9	2, 36
Rule 12	2, 8
Rule 12(b)	7, 9, 35
Rule 12(b)(2)	3, 9
Rule 12(b)(6)	57
Rule 12(h)(1)(A)	9

Regulations

21 C.F.R.	58
21 C.F.R. §§ 7.40–7.59	30

21 C.F.R. § 10.25(b)	29
21 C.F.R. § 202.1(l)(2).....	38
21 C.F.R. § 207.40(c).....	58
21 C.F.R. § 207.69(b)	58

Treatises

63 Am. Jur. 2d Prods. Liab. § 631	24
63 Am. Jur. 2d Prods. Liab. § 651	24
Black’s Law Dictionary (10th ed. 2014)	19
Restatement (Second) of Torts, § 402A.....	39, 42
Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 14 (2010).....	21
Restatement (Third) of Torts	22
Restatement (Third) of Torts: Prod. Liab. § 2 (1998).....	42
Restatement (Third) of Torts: Prod. Liab. § 6 (1998).....	3, 39-40, 42
Restatement (Third) of Torts: Liab. for Econ. Harm § 9 (2019).....	24

Non-Periodical Publications

FDA “Orange Book”	28
<i>https://www.fda.gov/news-events/press-announcements/fda-statement-agencys-list-known-nitrosamine-free-Valsartan-and-arb-class-medicines-part-agencys</i>	5
<i>https://www.fda.gov/news-events/press-announcements/fda-statement-fdas-ongoing-investigation-valsartan-impurities-and-recalls-and-update-fdas-current</i>	6
<i>https://www.fda.gov/news-events/press-announcements/statement-agencys-ongoing-efforts-resolve-safety-issue-arb-medications</i>	5-6

INTRODUCTION

Plaintiffs have filed three master complaints (“Complaints”)¹ seeking to assert claims for personal injury, economic loss or medical monitoring on behalf of themselves or putative classes of consumers allegedly exposed to nitrosamine-containing valsartan and valsartan combination drugs (collectively, “VCDs”).² Rather than supply the requisite “short and plain statement” of claims for relief contemplated by Rule 8, the Complaints exemplify shotgun pleading. They collectively span nearly 1,700 paragraphs and close to 400 pages, asserting approximately three dozen claims between them on behalf of dozens of individual plaintiffs and putative statewide and nationwide classes of consumers directed against over 40 separate defendants (“Defendants”) lumped together in group allegations.³ The claims encompass federal and state statutory law, common law and

¹ The Complaints are referred to as the “PIMC,” for the Master Personal Injury Complaint (ECF No. 122), the “ELMC,” for the Consolidated Second Amended Economic Class Action Complaint (ECF No. 398), and the “MMMC,” for the Consolidated Amended Medical Monitoring Class Action Complaint (ECF No. 123).

² On December 18, 2019, this MDL was expanded by the JPML to include losartan and irbesartan. ECF No. 285. Master complaints asserting claims arising out of alleged impurities in losartan and irbesartan have not yet been filed. Consequently, Defendants’ three omnibus Motions to Dismiss challenge only the claims involving valsartan. Defendants reserve their right to file motions to dismiss any master complaints filed as to losartan and irbesartan.

³ The Complaints should be dismissed for this reason alone. *See D’Addario v. Johnson & Johnson*, No. 3:10-cv-15627, 2020 WL 3546750, at *6 (D.N.J. June 30, 2020) (“Courts in this district generally agree that this type of ‘group pleading’ does

equitable theories traversing federal law and the common law of all 50 states, the District of Columbia, and Puerto Rico—many of which are unrepresented by any plaintiff.

Huge swaths of Plaintiffs’ claims are unsustainable as a matter of law, and their sheer volume threatens to encumber these proceedings with years of wholly unnecessary discovery and motion practice. Neither Defendants nor the Court should be burdened by jurisdictionally and facially insufficient claims, which comprise the bulk of the Complaints yet cannot meet the threshold pleading obligations under the Federal Rules of Civil Procedure. Plaintiffs are not permitted to treat these proceedings as “some kind of judicial border country, where the rules are few and the law rarely makes an appearance.” *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020). Rules 8, 9, and 12 are not “merely hortatory” in multi-district litigation; they must be followed. *Id.*

Accordingly, the Manufacturer Defendants⁴ bring this motion to dismiss to

not satisfy Rule 8, because it does not place Defendants on notice of the claims against each of them.”) (quoting *Sheeran v. Blyth Shipholding S.A.*, No. 1:14-cv-5482, 2015 WL 9048979, at *3 (D.N.J. Dec. 16, 2016)).

⁴ Plaintiffs’ pleadings oversimplify the complexities of the generic drug distribution process by blurring key distinctions between Manufacturer Defendants and downstream Defendants such as distributors and re-packagers. These downstream Defendants have no involvement in the manufacturing process; nor do they advertise or make statements about generic drugs to consumers. Subject to these distinctions, all distributors and re-packagers in the MDL join in the Manufacturer Defendants’ arguments for dismissal. Additionally, Aurobindo Pharma, USA, Inc. (“APUSA”),

clear away Plaintiffs’ deficient claims (the “Motion”), as follows:

- **Lack of Standing:** The Court should dismiss the ELMC in its entirety for failure to allege an injury-in-fact.⁵ The Court should further dismiss all Defendants in the ELMC and MMMC to whom Plaintiffs have failed to trace their injuries, and all claims alleged under the laws of states not represented by any Plaintiff. *See* Charts at 10–13. The Court should also permit Defendants contesting personal jurisdiction to file and to be heard on their motions, as required by Rule 12(b)(2). *See infra* n.12; Charts at 14–15.
- **Preemption and Primary Jurisdiction:** The Court should dismiss the Complaints’ claims for negligence *per se*, strict liability design defect, breach of express warranty, fraudulent and negligent misstatement, and state consumer protection acts, as preempted by federal law. *See* Charts at 7–9. Then, based on primary jurisdiction, the Court should dismiss or stay, and abstain from deciding, Plaintiffs’ claims for breach of implied warranty, strict liability failure-to-warn, negligence and

Hetero USA, Inc. (“Hetero USA”), and Princeton Pharmaceutical Inc. (“Princeton”) (collectively, the “FDA Liaison Defendants”) join in the Manufacturer Defendants’ arguments for dismissal and further move to dismiss Plaintiffs’ claims as discussed at Section VI herein. Further, concurrently with this submission, the Pharmacy Defendants and Wholesaler Defendants are submitting motions to dismiss, and Manufacturer Defendants hereby join in those briefs and incorporate them by reference.

⁵ Throughout this brief, the Manufacturer Defendants refer to charts summarizing deficient allegations or identifying various state law authorities. Those charts are attached hereto in a Compendium of Charts Referenced in Manufacturer Defendants’ Memorandum of Law in Support of Manufacturer Defendants’ Motion to Dismiss (“Charts”). All authorities cited in the Charts are hereby expressly incorporated by reference into Manufacturer Defendants’ motion to dismiss and this memorandum of law in support thereof. For the Court’s convenience, all non-reported and unpublished cases cited in this brief or the Charts are compiled in two compendiums submitted herewith: (1) Compendium of Unreported or Unpublished Authorities Cited in Manufacturer Defendants’ Memorandum of Law in Support of Their Motion to Dismiss; and (2) Compendium of Unreported or Unpublished Authorities Cited in the Manufacturer Defendants’ Compendium of Charts.

manufacturing defect until the U.S. Food & Drug Administration (“FDA”) completes its pending agency action relating to VCDs.

- **Subsumption:** The Court should dismiss the common law and state consumer protection act claims of all New Jersey Plaintiffs because their claims are subsumed by the New Jersey Products Liability Act (“NJPLA”), together with the claims of all Plaintiffs from states with similar statutes. *See* Charts at 16–19.
- **Claim-Specific Deficiencies:** The Court should dismiss or stay most of the Complaints’ myriad enumerated claims, *e.g.*, fraud, unjust enrichment, negligence *per se*, punitive damages, based on their claim-specific legal and facial deficiencies. *See* Charts at 20–67.

For each of these reasons, the Court should dismiss the Complaints in whole or, at least, in part. Holding Plaintiffs to their pleading obligations now will end this action, or greatly simplify the pleadings by eliminating unviable claims and pave the way for a more focused, just and efficient proceeding.

FACTUAL BACKGROUND

I. VALSARTAN RECALLS IN THE UNITED STATES

These cases arise out of certain voluntary recalls of VCDs in the United States. VCDs are the generic versions of the branded angiotensin II receptor blocker (“ARB”) drugs Diovan®, Diovan HCT®, Exforge®, and Exforge HCT®, which are all primarily used to treat hypertension and lessen the risk of adverse cardiovascular events. PIMC ¶ 9.

On July 13, 2018, Defendant Zhejiang Huahai Pharmaceutical Co, Ltd. announced the first voluntary recall of VCDs, followed by other Manufacturer Defendants, after discovering that certain valsartan active pharmaceutical ingredient

(“API”) contained trace amounts of N-nitrosodimethylamine (“NDMA”). *Id.* ¶¶ 170 & n.63, 177 & n.70. Some VCDs were further recalled starting in November 2018 for potentially containing trace amounts of N-Nitrosodiethylamine (“NDEA”). *Id.* ¶ 180 & n.73.

NDMA and NDEA are common organic chemical compounds called “nitrosamines” to which humans can be exposed through ingestion of water and various foods. PIMC ¶¶ 150, 179. Nitrosamines are potential byproducts of the manufacturing process for valsartan API,⁶ but not all batches of ARBs contain nitrosamines.⁷

In announcing its investigation into the nitrosamine impurities in VCDs, FDA acknowledged that “NDMA’s properties make it difficult to find[,]” and that, until the recall, the FDA had not developed a test that could identify nitrosamines in

⁶ See FDA Statement on the Agency’s List of Known Nitrosamine-Free Valsartan and ARB Class Medicines (April 4, 2019), accessible at <https://www.fda.gov/news-events/press-announcements/fda-statement-agencys-list-known-nitrosamine-free-Valsartan-and-arb-class-medicines-part-agencys>. The Court may take judicial notice of FDA’s public records. *Otsuka Pharma Co. v. Torrent Pharm. Ltd.*, 118 F. Supp. 3d 646, 655 n.7 (D.N.J. 2015). This Court can also consider materials expressly incorporated into the Complaints (*see, e.g.*, ELMC at nn.6, 48, 52, 73) and integral to Plaintiffs’ claims. *See Davis v. Wells Fargo*, 824 F.3d 333, 351 (3d Cir. 2016); *Donovan v. Pub. Policy Ctr. of New Jersey*, No. 05-1181, 2006 WL 1373230, at *2 (D.N.J. May 17, 2006).

⁷ See FDA’s Assessment of Currently Marketed ARB Drug Products, accessible at <https://www.fda.gov/news-events/press-announcements/statement-agencys-ongoing-efforts-resolve-safety-issue-arb-medications>.

valsartan.⁸ Given the very low risk of any injury that might occur from nitrosamine exposure in VCDs, FDA emphasized that patients should keep taking their current VCDs, even if it has been recalled, until they speak with their physicians because the risk of not taking their VCDs “greatly outweighs the potential risk of exposure to trace amounts of nitrosamines.”⁹

FDA has since “clarified the risk and scope of exposure” to patients:

[T]he actual risk to patients is likely much lower than our estimates, which reflect a scientific assessment of the highest possible exposure. We initially estimated that if 8,000 people took the highest valsartan dose (320 mg) containing [NDMA] from the recalled batches daily for four years, there may be one additional case of cancer over the lifetimes of those 8,000 people. In reality, the vast majority of patients exposed to NDMA through ARBs received much smaller amounts of the impurity than this worst-case scenario, and, since not all ARBs are affected, it’s very likely that a patient taking an ARB for four years would not have always received one of the affected products.¹⁰

II. PLAINTIFFS’ ALLEGATIONS

The PIMC asserts claims on behalf of consumers who allegedly purchased

⁸ See FDA’s Statement on FDA’s ongoing investigation into valsartan impurities and recalls and an update on FDA’s current findings (Aug. 30, 2018), *accessible at* <https://www.fda.gov/news-events/press-announcements/fda-statement-fdas-ongoing-investigation-valsartan-impurities-and-recalls-and-update-fdas-current>.

⁹ See Statement on the Agency’s Ongoing Efforts to Resolve Safety Issue with ARB Medications (Aug. 28, 2019), *accessible at* <https://www.fda.gov/news-events/press-announcements/statement-agencys-ongoing-efforts-resolve-safety-issue-arb-medications>.

¹⁰ See *supra* n.9.

and consumed VCDs and developed cancer they attribute to those products. *See* Charts at 4 (identifying claims asserted in PIMC). The ELMC brings claims on behalf of consumers who allegedly purchased nitrosamine-containing VCDs and third party payors who purchased or made reimbursements related to such VCDs. ELMC ¶ 4; *see* Charts at 5 (identifying claims asserted in ELMC). The MMMC asserts medical monitoring claims on behalf of a putative nationwide class of individuals who allegedly purchased and consumed nitrosamine-containing VCDs and allege “clinical and genetic injury” that they claim increases their risk of developing cancer. MMMC ¶¶ 1, 10-19 390; *see* Charts at 6 (identifying claims asserted in MMMC).

ARGUMENT

I. LEGAL STANDARDS

A motion to dismiss for lack of standing is brought under Rule 12(b)(1) because standing is a prerequisite to the Court’s subject matter jurisdiction under Article III. *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). A facial challenge to standing is evaluated under the same legal standard as a Rule 12(b)(6) motion. *Id.* Plaintiff “bears the burden of establishing” standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is

plausible on its face.”” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Plaintiffs are required to allege well-pleaded, non-conclusory facts supporting each element of each of their claims. *See Sich v. Pfizer Pharm.*, No. 1:17-cv-2828, 2017 WL 4407930, at *2 (D.N.J. Oct. 4, 2017) (Kugler, J.).

Operative and administrative master complaints¹¹ are both subject to dismissal under Rule 12. *See, e.g., In re Katrina Canal Breaches Litig.*, 309 F. App’x 836, 839 (5th Cir. 2009); *In re Digitek Prods. Liab. Litig.*, No. 2:08-md-01968, 2009 WL 2433468 (S.D. W. Va. Aug. 3, 2009). Rule 12 tests the sufficiency of the allegations in an administrative master complaint that are common to all plaintiffs, and tests the sufficiency of the operative master complaint itself. *See In re Zimmer Nexgen Knee Implant Prod. Liab. Litig.*, No. 11-c-5468, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012); *In re Refrigerant Compressors*, 731 F.3d at 590.

II. THE ELMC AND MMMC SHOULD BE DISMISSED FOR LACK OF ARTICLE III STANDING.

The ELMC and MMMC fail to satisfy their threshold burden of pleading

¹¹ An operative master complaint supersedes prior individual complaints, merging those actions for the duration of the MDL. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 (2015). An administrative master complaint summarizes the claims presented in individual actions for purposes of managing the MDL, with individual complaints retaining separate legal existence. *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-2543, 2015 WL 3619584, at *7 (S.D.N.Y. June 10, 2015); *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590 (6th Cir. 2013). Here, the PIMC is administrative, and the ELMC and MMMC are operative.

Article III standing because they fail in whole or in part to allege the requisite elements of an injury-in-fact and traceability and seek to assert claims under the laws of states in which Plaintiffs do not reside and were not injured. For these reasons, the Court should dismiss Plaintiffs’ claims in whole or in part under Rule 12(b)(1) for lack of standing.¹²

“[T]o survive a motion to dismiss for lack of standing, a plaintiff ‘must allege

¹² The Court directed that Defendants’ Motions to Dismiss should exclude challenging personal jurisdiction under Rule 12(b)(2), and has instructed Defendants to prioritize briefing other substantive issues (while preserving the issue of personal jurisdiction for later). Defendants reserve all applicable personal jurisdiction defenses pursuant to Rule 12(h)(1)(A), but again respectfully urge the Court to grant leave and to set a schedule for Defendants to file a supplemental 15-page memorandum addressing their personal jurisdiction defenses now, so as to avoid potential legal error as to Defendants with viable personal jurisdiction defenses. Defendants are mindful of this Court’s order, but as the Sixth Circuit recently observed in *In re Nat’l Prescription Opiate Litig.*, 956 F.3d at 844, “Civil Rule 12(b) states that ‘a party *may* assert’ the defenses enumerated therein ‘by motion,’ which means that the district court may *not* refuse to adjudicate motions properly filed under that Rule.” *Id.* at 846 (emphases in original). As one example of the significance and breadth of the personal jurisdiction issues in this case, the ELMC and MMMC name several out-of-state Defendants from whom *none* of the named class representative Plaintiffs allege that they made purchases in New Jersey, as required for this Court to exercise personal jurisdiction. *See* Charts at 14–15; *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780–1781 (2017); *Horowitz v. AT&T, Inc.*, No. 3:17-cv-4827, 2018 WL 1942525, at *15 (D.N.J. Apr. 25, 2018). The Complaints also name overseas Defendants lacking the requisite jurisdictional connection to the United States altogether, over whom this Court lacks personal jurisdiction. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 112–116 (1987). These facial challenges to personal jurisdiction are determinable on the pleadings and involve straightforward defects that the Court can and should decide now to eliminate improperly joined defendants and claims.

facts that affirmatively and plausibly suggest that it has standing to sue.’ Speculative or conjectural assertions are not sufficient.” *Finkelman v. Nat’l Football League*, 810 F.3d 187, 194 (3d Cir. 2016) (citation omitted). To satisfy Article III standing, a plaintiff must allege: “(1) an injury-in-fact that is actual or imminent and concrete and particularized, not conjectural or hypothetical, (2) that is fairly traceable to the defendant’s challenged conduct, and (3) is likely to be redressed by a favorable judicial decision.” *Koronthaly v. L’Oreal USA, Inc.*, 374 F. App’x 257, 259 (3d Cir. 2010). Plaintiffs have not met their burden.

A. The ELMC Does Not Allege an Injury-in-Fact.

The ELMC is devoid of allegations of non-speculative harm sufficient to allege an injury-in-fact, which requires a plaintiff to “allege an injury to himself that is ‘distinct and palpable,’ as opposed to merely ‘[a]bstract,’ and the alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotations omitted). The ELMC makes no allegation of physical injury or product malfunction and it provides no basis for the Court to value any purported economic injury. At most, Plaintiffs allege regret and distress as a result of ingesting VCDs they fear might cause them harm in the future. *See* ELMC ¶ 372. They further allege the VCDs were “worthless” and thereby caused them financial harm. These allegations, however, fall well short of the threshold to plead Article III standing based on an injury-in-fact.

The only allegation in the ELMC that approaches an assertion of physical harm is that consumers were allegedly “exposed to a non-bargained for carcinogenic agent with mutagenic properties that operates at the cellular and sub-cellular levels, and ***may give rise to future potential health consequences***[.]” *Id.* (emphasis added). However, “the fear of future injury is legally insufficient to confer standing.” *James v. Johnson & Johnson Consumer Co., Inc.*, No. 2:10-cv-03049, 2011 WL 198026, at *2 (D.N.J. Jan. 20, 2011); *see also Hubert v. Gen. Nutrition Corp.*, No. 2:15-cv-01391, 2017 WL 3971912, at *8 (W.D. Pa. Sept. 8, 2017) (“[A]pprehension concerning future health consequences is insufficient to establish an injury-in-fact.”). Given FDA’s clarification of “the risk and scope of exposure” to patients resulting from taking the allegedly impure VCDs, *see supra* at 9, any allegation of future injury is implausible.

The ELMC also does not and cannot allege that the VCDs stopped working due to the alleged impurity. On the contrary, it concedes “FDA advised people to continue taking” the allegedly impure VCDs because of “the risks associated with untreated high blood pressure.” *Id.* ¶ 373. Absent an allegation that Plaintiffs were injured by the VCDs or failed to receive their anticipated medical benefit, plaintiffs lack a theory of injury-in-fact based on a failure to receive the bargained-for benefit. *See Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320–321 (5th Cir. 2002) (holding plaintiffs lacked an injury-in-fact as to a withdrawn prescription painkiller because

they did not allege that they themselves were injured by the prescription drug at issue or that it was defective as to them); *Medley v. Johnson & Johnson Consumer Cos.*, No. 2:10-cv-2291, 2011 WL 159674, at *2 (D.N.J. Jan. 18, 2011) (holding plaintiffs lacked an injury-in-fact from their purchase of baby shampoo containing a toxic ingredient because “the product worked as intended, meaning that the hair of Plaintiff’s children was cleansed, and their eyes and skin were not irritated”); *Hughes v. Chattem, Inc.*, 818 F. Supp. 2d 1112, 1119 (S.D. Ind. 2011) (holding plaintiffs did not “come[] close to establishing an injury in fact” as a result of purchasing supplements based on report showing “they *may* experience future harm from their limited exposure to hexavalent chromium, and . . . now wish[ing] they had not purchased” the supplements).

That leaves the ELMC’s conclusory assertion that the VCDs were “worthless” due to the nitrosamine impurity. At the outset, because the ELMC lacks any allegation of physical injury or failure of the anticipated benefit, it has no plausible factual basis for the assertion that Plaintiffs purchased a “worthless” medication. Without an allegation that the VCDs “failed to work for [their] intended purpose or [were] worth objectively less than what one could reasonably expect,” Plaintiffs cannot demonstrate a concrete injury-in-fact. *Koronthaly*, 374 F. App’x at 259. A plaintiff “who has entirely consumed a product that has functioned for her as expected” does not “suffer an economic injury solely because she now sincerely

wishes that she had not purchased that product[.]” *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 280-81 (3d Cir. 2018). The ELMC does nothing more than “pair a conclusory assertion of money lost with a request that a defendant pay up,” leaving “no economic injury” giving rise to standing. *Id.* at 288.

But even if the ELMC articulated an objective basis to conclude the VCDs were worth objectively less, it still alleges no facts from which the Court could value the purported economic injury. To establish an economic injury-in-fact, a plaintiff must “allege facts that would permit a factfinder *to value the purported injury* at something more than zero dollars without resorting to mere conjecture.” *Id.* at 285 (emphasis added). That allegation is missing here. Once a product has been purchased and consumed, and has functioned as intended without causing any adverse health consequences, the user can hypothesize no factual basis to value an actual injury. *See James*, 2011 WL 198026, at *2; *Bowman v. RAM Med., Inc.*, No. 10-4403, 2012 WL 1964452, at *1, *3 (D.N.J. May 31, 2012); *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 172, 176 (D.D.C. 2003).

Numerous authorities demonstrate the failure of the ELMC’s valuation of its injury as a “worthless” product. In *Johnson & Johnson Talcum Powder*, the Third Circuit rejected a plaintiff’s claim that she was economically injured because she would not have purchased baby powder if she had known it could lead to an

increased risk of developing ovarian cancer. *Johnson & Johnson Talcum Powder*, 903 F.3d at 282. Because the plaintiff did not allege that she had developed ovarian cancer, nor that she herself suffered an increased risk of developing ovarian cancer, the court held she lacked standing to seek monetary damages because she “failed to allege that the economic benefit she received from that powder was *anything* less than the price she paid.” *Id.* at 290.

Likewise, in *James*, the court rejected the plaintiffs’ argument that they were economically harmed merely because they bought and used baby shampoo that was allegedly tainted with methyl chloride and thereafter “feared for the future safety of their children.” *James*, 2011 WL 198026, at *2. While the court acknowledged it was probably true that the plaintiffs would not have purchased or used the baby shampoo if they had known about the alleged toxicity, “the conclusion that ‘consequently, [p]laintiffs have been economically damaged’ simply does not follow.” *Id.* (citation omitted). The court explained:

Once the product had been consumed, however, there was no economic injury for Plaintiffs to complain of, and the fear of future injury is legally insufficient to confer standing. Plaintiffs received the benefit of their bargain so long as there were no adverse health consequences, and the product worked as intended, meaning that the hair of Plaintiffs’ children was cleansed, and their eyes and skin were not irritated.

Id.; see also *Hubert*, 2017 WL 3971912, at *8.

This case is no different. The ELMC’s allegation that allegedly impure VCDs “may give rise to future health consequences” is insufficient to render the products

objectively worth less than what consumers paid. ELMC ¶ 372. The ELMC does not allege physical harm or any kind of malfunction. Nor could it, since the VCDs performed as expected and aided Plaintiffs by lowering their blood pressure and the risk of adverse health consequences arising from hypertension. For that reason, the ELMC fails to allege non-conclusory facts to support a plausible claim that Plaintiffs did not receive the benefit of their bargain or suffered any cognizable injury-in-fact capable of being valued above zero dollars.

B. The ELMC and MMMC Fail to Plead Injuries Traceable to All Defendants.

The ELMC and MMMC also fail to allege that Plaintiffs’ purported harms are “properly attributed” to *all* Defendants’ alleged conduct, and thus have failed to satisfy the requirement of traceability for Article III standing. *Finkelman*, 810 F.3d at 194. Complaints must connect *each* defendant to at least one injured plaintiff to satisfy this element. *See Hidalgo v. Johnson & Johnson Consumer Co., Inc.*, 148 F. Supp. 3d 285 (S.D.N.Y. 2015) (“[F]or every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant, and at that point standing is satisfied and only then will the inquiry shift to a class action analysis.”) (citing 1 Newberg on Class Actions § 2:6 n.3 (4th ed. 2002)).

The ELMC and MMMC assert all claims in lumped fashion against all Defendants. Yet there are many Defendants against whom no specific factual allegations are made, much less an allegation that these Defendants manufactured

(or in the case of downstream Defendants, later supplied or sold) the VCDs purchased or consumed by any named Plaintiff. ELMC ¶¶ 11–34; MMMC ¶¶ 9–19. Because no named Plaintiff traces his or her alleged harm to the conduct of any of these Defendants, the claims against them should be dismissed for lack of standing. Defendants in this category are listed in the Charts at 10–11.

C. Plaintiffs Lack Standing to Bring Claims Across All States.

A class representative only has standing to sue under the laws of a state where she resides or was injured. *Cooper v. Medimetriks Pharms., Inc.*, No. 18-11987, 2019 WL 1370414, at *4, (D.N.J. Mar. 25, 2019); *In re Magnesium Oxide Antitrust Litig.*, No. 10-cv-5943, 2011 WL 5008090 (D.N.J. Oct. 20, 2011). The ELMC and MMMC allege that the class representatives reside in 21 states¹³ and do not allege that their purported injuries occurred in any other states. Nevertheless, both Complaints assert claims under the laws of all 50 states, Washington, D.C., and Puerto Rico. ELMC ¶¶ 441, 457, 545; MMMC ¶¶ 444, 459, 472. Accordingly, the claims asserted in the ELMC and MMMC under the laws of the other 31 states and territories for which no allegations establishing standing have been asserted,

¹³ Specifically, the ELMC and MMMC class representatives allege that they live in California, Connecticut, Illinois, Indiana, Florida, Georgia, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and West Virginia. ELMC ¶¶ 11–34; MMMC ¶¶ 9–19.

identified in the Charts at 12–13, should be dismissed.

III. MOST OF THE COMPLAINTS’ STATE-LAW CLAIMS ARE PREEMPTED AND THE COURT SHOULD ABSTAIN FROM DECIDING THE REMAINDER UNDER PRIMARY JURISDICTION.

Many of the Complaints’ state-law claims are preempted as improper attempts to enforce the Federal Food, Drug, and Cosmetic Act (“FDCA”) under state law. Only the federal government has the authority to enforce the FDCA. *See* 21 U.S.C. § 337(a). Private litigants are forbidden to bring “proceedings for the enforcement, or to restrain violations, of” the FDCA under Section 337(a) of the statute. *Id.* That prohibition applies with equal force to attempts by private litigants to enforce the FDCA indirectly under state law. *See id.* § 337(b). Because most of the Complaints’ claims ultimately depend on proving a violation of the FDCA, they are squarely preempted by Section 337(a). The Court should abstain from deciding the remaining claims because they raise issues within FDA’s specialized expertise under the primary jurisdiction doctrine.

A. Most of the Complaints’ State-Law Claims are Disguised Attempts to Privately “Enforc[e]” or “Restrain Violations” of the FDCA.

Both direct and indirect attempts to privately enforce the FDCA are preempted under Section 337(a). *See Buckman Co. v. Pls.’ Legal Comm.*, 531 U.S. 341, 353 (2001). If a state-law first claim depends on establishing a violation of the FDCA, or relies on a concept or standard that only exists by virtue of the FDCA, it is

preempted as a private attempt to “enforc[e]” or “restrain violations” of the FDCA.

Congress tasked the federal government alone with balancing the complicated scientific, economic, public health and safety considerations involved in enforcing the FDCA. *See Farina v. Nokia Inc.*, 625 F.3d 97, 124 (3d Cir. 2010). In recognition of this legislative judgment, a unanimous Supreme Court has interpreted Section 337(a) to impliedly preempt state-law claims where “the existence” of the FDCA “is a critical element” of the state-law claim. *Buckman*, 531 U.S. at 353. FDA has cautioned that private litigants cannot “circumvent this straightforward prohibition” on private enforcement of the FDCA “by wrapping their FDCA enforcement claims inside some *other* cause of action.” Corrected Brief for the United States as Amicus Curiae Supporting Appellee at 7, 10, *Amarin Pharma, Inc. v. ITC* (Fed. Cir. Mar. 27, 2018) (2018-1247, 2018-114) (“FDA Amicus”).¹⁴ Such claims are, “at bottom, still an action ‘for the enforcement’ or ‘to restrain violations’ of the FDCA.” *Id.* at 10; *see also Abicht v. PLIVA, Inc.*, No. 12-1278, 2013 WL 141724 at *2–3 (D. Minn. Jan. 9, 2013).

A prohibited “proceeding ‘for the enforcement’ of the FDCA is one that seeks ‘[t]o give force or effect’ and ‘compel obedience to’ the FDCA.” FDA Amicus at 10

¹⁴ “[T]he FDA’s preemption determinations are significant,” and are entitled to deference. *Horn v. Thoratec Corp.*, 376 F.3d 163, 170–71 (3d Cir. 2004) (citing express preemption provision); *accord Novartis Pharms. Corp. v. Leavitt*, 435 F.3d 344, 349 (D.C. Cir. 2006).

(citing Black’s Law Dictionary (10th ed. 2014) (defining “to enforce”)). Similarly, a “proceeding to ‘restrain violations’ of the FDCA seeks to prove and redress such violations.” *Id.* Thus, “to give meaningful effect to Congress’s mandate” in Section 337(a), the FDCA “precludes those private proceedings that rely on alleged violations of the FDCA as a necessary component of their cause of action and that seek to redress or restrain those FDCA violations.” *Id.* at 10–11 (quoting § 337(a)).¹⁵ In short, if the state-law claim depends on concepts or standards that exist “solely” because of the FDCA, it does not flow from a pre-existing state-law duty and is preempted. *Buckman*, 531 U.S. at 352–353; *see also Markland v. Insys Therapeutics, Inc.*, 758 F. App’x 777, 779–80 (11th Cir. 2018) (per curiam).

The Complaints here attempt to do what Congress has prohibited: They dress up their allegations as state-law negligence *per se*, strict liability, warranty, and fraud claims, but these claims are really just attempts to privately enforce the FDCA’s core prohibition on the manufacture and sale of purportedly “adulterated” drugs. 21 U.S.C. § 351 (defining “adulterated”); *id.* § 331(a)–(b) (prohibiting manufacture and sale of adulterated drugs). These claims are not based on conduct that *also* violates

¹⁵ The Solicitor General similarly argued to the Supreme Court that Section 337(a) “precludes a private party from pursuing a claim that requires proof of a ‘violation of FDCA requirements’ and thus exists ‘solely by virtue of the FDCA.’” Brief for the Federal Respondent ITC in Opposition at 12, *Amarin Pharma, Inc. v. ITC* (19–152) (Nov. 4, 2019), 2019 WL 5784708, at *12 (quoting *Buckman*, 531 U.S. at 352–353).

the FDCA, but depend on proving a violation of the FDCA *itself*, or proving a violation of a concept or standard that exists solely due to the FDCA. The claims depend on establishing that Defendants violated the FDCA by selling or manufacturing “adulterated drugs”—drugs that are, *inter alia*: non-compliant with cGMPs, *see id.* § 351(a)(1); different from their approved brand-name counterpart, *see id.* § 351(b); or mixed with a substance that reduces their quality, *see id.* § 351(d). Some claims also depend on establishing that Defendants violated the FDCA’s requirements pertaining to the “duty of sameness” of generic drugs, *id.* § 355(j)(2)(A)(i)–(v), and drug labeling, *see id.* § 321(m). All such claims are preempted.

The Complaints’ preempted claims fall into two general categories: (1) claims based on Defendants’ alleged *conduct*; and (2) claims based on Defendants’ alleged *misstatements* and *omissions*. The Complaints’ negligence *per se* and design defect claims fall in the first category, alleging that Defendants manufactured a product that utilized methods that did not comply with the FDCA. *See infra* Part III.A.1; Charts at 7–9. The Complaints’ breach of express warranty, fraudulent misstatement, negligent misstatement, and state consumer protection law claims are in the second category, alleging that Defendants represented that their products complied with the FDCA when they did not, or Defendants failed to affirmatively notify the public of

the drug’s noncompliance with the FDCA.¹⁶ *See infra* Part III.A.2; Charts at 7–9. Both depend on establishing a violation of the FDCA or, at the very least, on a factual basis that exists solely because of the FDCA, not state law.

1. The Complaints’ Conduct-Based Claims Are Preempted Because They Depend on Proving Violations of the FDCA.

The Complaints’ state-law claims relying on allegedly unlawful conduct are preempted because they depend on establishing a violation of the FDCA’s sameness, cGMP manufacturing, and design requirements.

Negligence *Per Se*.¹⁷ Negligence *per se* is the clearest example of a private attempt to enforce the FDCA masquerading as a state-law claim. Indeed, one of its core elements is proof that the defendant broke a law or regulation that was enacted for safety purposes. *See* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 14 (Am. Law Inst. 2010).

Here, the Complaints rely entirely on allegations that Defendants’ conduct

¹⁶ The Complaints also allege that Defendants failed to warn of the dangers of their products. *See, e.g.*, PIMC ¶ 443; MMMC ¶ 438. To the extent that claim is premised on a failure to warn FDA, it is on all fours with the “fraud-on-the-FDA” claim in *Buckman*, 531 U.S. at 348, and is preempted. *E.g.*, MMMC ¶ 438 (“Defendants failed to warn . . . [the] regulatory communities[] of the potential or actual contamination of the Valsartan with NDMA and NDEA, as soon as this was suspected or known.”); *see also* *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1330 (11th Cir. 2017) (holding claim that defendant “failed to tell the FDA those things required by federal law” preempted under *Buckman*).

¹⁷ ELMC Counts 17 ¶¶ 587–94 and 18 ¶¶ 595–602; PIMC Count 5 ¶¶ 466–480; MMMC Count 2 ¶¶ 406–413.

violated several requirements of the FDCA, including the sameness requirement and the cGMP provisions.¹⁸ The disclaimer that, “Plaintiff is not seeking to enforce these federal provisions,” PIMC ¶ 474, combined with a vague reference to “common law obligations,” *id.* ¶ 469, does not salvage what is an overt attempt to enforce the FDCA. The Complaints have not identified *any* standard of care other than the standards supplied by the FDCA, and cannot make out a negligence *per se* claim without an underlying statutory violation. *See* Restatement (Third) of Torts: § 14 cmt. a; *see infra* Part V(C). To the extent the Complaints suggest that Defendants sold a “misbranded” or “new” drug because the label “omit[ted] ingredients,” ELMC ¶¶ 171, 180, that too is simply an attempt to enforce the FDCA’s sameness requirements.

Because noncompliance with the FDCA is a “critical element,” the Complaints’ negligence *per se* claims are preempted by Section 337(a).¹⁹ Courts

¹⁸ *E.g.*, ELMC ¶ 592 (“Each Defendant failed to comply with federal cGMPs and federal adulteration standards.”); PIMC ¶ 467 (“Defendants violated federal statutes and regulations, including but not limited to the statutes cited herein.”); MMMC ¶ 408 (“Each Defendant owed a duty to Plaintiffs and the Class to ensure that the VCDs it sold in the United States were therapeutically equivalent to brand Diovan and complied with cGMPs and were not adulterated or misbranded.”).

¹⁹ To the extent the Complaints’ negligence and strict liability manufacturing defect claims rely on the FDCA to establish that a duty existed or the standard of care was breached, those claims are also preempted. *See, e.g., Markland*, 758 F. App’x at 779–780. Plaintiffs’ negligence and manufacturing defect claims, if allowed to proceed, must be limited to claims that derive from an independent state-law duty.

across the country have endorsed this view.²⁰

Strict Liability – Defective Design.²¹ The PIMC’s defective design claim is an invalid private attempt to enforce the FDCA under the guise of state products liability law. It alleges without elaboration that Defendants’ design failed to comply with the FDA-approved design and “caused consumers to suffer injuries.” *E.g.*, PIMC ¶¶ 455–456. Putting aside the claim’s facial deficiencies, *see infra* Part V(B)(1), the defective design claim is preempted. Charitably, it asserts that Defendants should have but did not comply with the FDA-approved design for valsartan. *See* PIMC ¶ 456. This dressed-up attempt by private parties to enforce compliance with the FDA-approved design is prohibited. *See* 21 U.S.C. § 337(a). As there is no independent state-law obligation for a drug manufacturer to comply with

²⁰ *See, e.g., Dunbar v. Medtronic, Inc.*, No. 14-01529, 2014 WL 3056026, at *6 (C.D. Cal. June 25, 2014) (“[A] negligence per se claim alleging violation of the FDCA is nothing more than a private right of action under the FDCA for damages. Since the latter is not available as a result of § 337(a), the Court finds that the former is preempted as well.”); *Leonard v. Medtronic, Inc.*, No. 1:10-cv-03787, 2011 WL 3652311, at *7 (N.D. Ga. Aug. 19, 2011) (same); *Swezey v. C.R. Bard Inc.*, No. 3:19-cv-2172, 2020 WL 1237394, at *1 (N.D. Tex. Mar. 12, 2020) (“Texas courts . . . refuse to recognize a cause of action for negligence per se based on violations of the [FDCA] and FDA regulations.”) (quoting *Monk v. Wyeth Pharm., Inc.*, No. 16-cv-1273, 2017 WL 2063008, at *8 (W.D. Tex. May 11, 2017)); *Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 594 (W.D. Tex. 2002); *In re Bard IVC Filters Prods. Liab. Litig.*, No. 15-md-02641, 2018 WL 4356638, at *2 (D. Ariz. Sept. 12, 2018) (collecting at least ten cases).

²¹ PIMC Count 3 ¶¶ 450–459.

an FDA-approved design for a generic drug, the claim is solely attributable to and dependent upon the FDCA and FDA's corresponding regulatory requirements.²²

2. The Complaints' Representation-Based Claims Are Preempted Because They Depend on Proofs that Defendants Made False Statements About Their Compliance with the FDCA.

The Complaints' state-law claims relying on alleged misstatements and omissions by Defendants are preempted because they are mere variants on preempted fraud-on-the-FDA claims: They depend on violations of the FDCA's sameness, cGMP manufacturing, and labeling requirements.

Breach of Express Warranty, Fraudulent Misstatement, and Negligent Misstatement.²³ The Complaints allege that Defendants falsely warranted or represented that their VCDs complied with the FDCA when they did not, and that Defendants failed to affirmatively notify the public of their noncompliance with the FDCA.²⁴ These fraud-on-the-public claims alleging false statements of compliance

²² To the extent the Complaints allege that the FDA-approved design itself was defective, that claim is preempted under the impossibility doctrine, since Defendants could not deviate from the FDA-approved design for valsartan. *See In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, No. 08-008, 2011 WL 5903623, at *6 (D.N.J. Nov. 21, 2011).

²³ ELMC Counts 1 ¶¶ 435–445; 2 ¶¶ 446–454; 7 ¶¶ 491–503; 8 ¶¶ 504–516; 9 ¶¶ 517–529; and 10 ¶¶ 530–542; PIMC Counts 8 ¶¶ 497–509 and 9 ¶¶ 510–519; MMC Count 9 ¶¶ 477–490.

²⁴ In general, each of these causes of action require proof that Defendants made false representations about the products, either in the form of warranties, statements, or statements made false due to omission. *See* 63 Am. Jur. 2d *Prods. Liab.* §§ 631, 651 (express warranty); Restatement (Third) of Torts: Liab. for Econ. Harm § 9 (Am.

with the FDCA’s requirements fail as mere variants of the fraud-on-the-FDA claims held preempted in *Buckman*. Such claims are entirely dependent on the FDCA.

By their own allegations, the Complaints’ express warranty, fraudulent misstatement, and negligent misstatement theories require Plaintiffs to establish that the VCDs did not comply with the FDCA’s sameness or cGMP requirements.²⁵ Noncompliance with the FDCA is thus a “critical element” of these claims. *See Perez v. Nidek Co.*, 711 F.3d 1109, 1119 (9th Cir. 2013) (holding fraud by omission claim impliedly preempted because issue of FDCA compliance depended on questions of federal law that “rest within the enforcement authority of the FDA, not this Court.” (internal quotation marks and citation omitted)); *see also Lewkut v.*

Law Inst. 2019) (fraudulent misstatements); *id.* § 5 (2019) (negligent misstatements). For purposes of this section, misrepresentation and omission are analyzed together as species of misstatements.

²⁵ As illustrative examples, the ELMC alleges that Defendants expressly warranted that their products “were compliant with cGMP and not adulterated or misbranded,” ELMC ¶ 439, but Defendants breached that express warranty because the product “was not manufactured in compliance with cGMP and was adulterated or misbranded,” *id.* ¶ 440. Similarly, the ELMC alleges that Defendants fraudulently misrepresented that their products were “therapeutically equivalent to their RLDs and/or complied with cGMPs and/or were not adulterated and/or misbranded,” *id.* ¶ 493, when in fact the products “were not therapeutically equivalent to their RLDs and did not comply with cGMPs and/or were adulterated, misbranded, and/or unapproved,” *id.* ¶ 494. And the PIMC alleges that Defendants “had a duty to disclose their dangerous and irresponsible practices of improperly designing, manufacturing, selling, marketing, and distributing drugs that did not have FDA approval[.]” PIMC ¶ 501.

Stryker Corp., 724 F. Supp. 2d 648, 659–60 (S.D. Tex. 2010) (finding claims based on alleged “adulterated” device preempted by § 337).

Representations as to compliance with the FDCA cannot serve as the basis for a claim under another law. *See Amarin v. ITC*, 923 F.3d 959, 969 (Fed. Cir. 2019) (holding false-advertising claim precluded because the claim “require[d] proving a violation of the FDCA itself”); *see also* FDA Amicus at 17–20 (citing *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919 (9th Cir. 2010); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 227–28 (3d Cir. 1990); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997)).

There is no difference between enforcing the FDCA directly (which is legally prohibited) and what the Complaints attempt to do here: hold Defendants liable for noncompliance with the FDCA based on purported warranties and representations about compliance with the FDCA (which is also legally prohibited). To hold otherwise would invite private enforcement by simply alleging that Defendants represented that they complied with the FDCA but did not. And because FDA-approved drug labels and labeling *always* represent compliance with the FDCA, every drug case could conceivably qualify for Plaintiffs’ strategy here to avoid the impact of *Buckman* and its progeny.

State Consumer-Protection Laws.²⁶ The ELMC and PIMC assert claims under state consumer protection laws. The allegations are conclusory, so it is unclear what theory of liability those Complaints allege. Nevertheless, to the extent they intend to rely on Defendants’ supposed misstatements concerning compliance with the FDCA to establish violations of state consumer-protection statutes, those claims are preempted for the same reasons as the express warranty and misstatement claims.²⁷

B. The Court Should Dismiss or Abstain from Deciding the Complaints’ Remaining Claims Because the FDA Has Primary Jurisdiction Over Those Claims.

Even though the Complaints’ remaining claims do not expressly depend on establishing a violation of the FDCA, the Court should dismiss or stay Plaintiffs’ claims for breach of implied warranty, strict liability failure-to-warn consumers, negligence, and manufacturing defect under the primary jurisdiction doctrine. The resolution of these claims is inextricably linked with pending FDA regulatory action, and the Court should abstain from intruding into FDA’s expertise until the agency completes its investigation and related regulatory action.

The primary jurisdiction doctrine applies where claims “contain some issue

²⁶ ELMC Counts 11 ¶¶ 543–548 and 12 ¶¶ 549–554; PIMC Count 10 ¶¶ 520–579.

²⁷ For example, the PIMC alleges rather broadly that Defendants violated state consumer protection statutes when they, *inter alia*, “falsely marketed the drugs taken by Plaintiffs as generic versions and bio-equivalents of Diovan.” PIMC ¶ 521.

within the special competence of an administrative agency.” *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). It “calls for judicial abstention in cases where protection of the integrity of a regulatory scheme dictates primary resort to the agency which administers the scheme.” *Global Naps, Inc. v. Bell Atl.-N.J., Inc.*, 287 F. Supp. 2d 532, 549 (D.N.J. 2003) (quoting *Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 736 (3d Cir. 1983)). In determining its applicability, courts consider four factors: (1) whether the question “is within the conventional experience of judges” or instead “involves technical or policy considerations within the agency’s particular field of expertise”; (2) whether the question “is particularly within the agency’s discretion”; (3) whether there exists “a substantial danger of inconsistent rulings”; and (4) whether a “prior application to the agency has been made.” *Raritan Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (quoting *Global Naps*, 287 F. Supp. 2d at 549). All four factors favor abstention here.

First, though certain of the Complaints’ breach of implied warranty, failure-to-warn, and negligence claims purport to be based on traditional state-law duties, the Complaints frame these claims in terms of technical drug manufacturing and safety issues. The Complaints’ allegations require investigation into whether Defendants’ VCDs are bioequivalent in their pharmacokinetic profiles to the brand or reference listed drugs (“RLDs”), should be “A/B rated” and listed in FDA’s “Orange Book,” are manufactured in accordance with cGMPs, meet FDA’s safety,

quality, purity, identity, and strength standards, and conform to FDA-approved labeling.²⁸

These are matters outside the Court’s conventional expertise and squarely within FDA’s specialized expertise and legislative mandate. *See* 21 U.S.C. §§ 321, 371-72, 375, 393(a). FDA “has primary jurisdiction to make the initial determination on issues within its statutory mandate[.]” 21 C.F.R. § 10.25(b). “[T]he possibility that a conflict may arise if a court were to decide a matter inextricably intertwined with an intensive regulatory scheme requires judicial abstention in such cases.” *Torres-Hernandez v. CVT Prepaid Sols., Inc.*, No. 3:08-cv-1057, 2008 WL 5381227, at *3 (D.N.J. Dec. 17, 2008) (citing *Cheyney State Coll.*, 703 F.2d at 736; *MCI Commc’n Corp. v. AT&T Co.*, 496 F.2d 214, 220 (3d Cir. 1974)).

Second, the questions raised by the Complaints also lie squarely within FDA’s discretion. Plaintiffs concede, as they must, that FDA is primarily responsible for many discretionary matters underlying Plaintiffs’ allegations, including the generic drug approval framework, maintaining the “Orange Book,” the promulgation and enforcement of cGMPs, the regulation governing the “quality control unit,” the interim safety limit for NDMA, the regulation governing sampling and testing of in-

²⁸ PIMC ¶¶ 193, 210, 222, 224–235, 266–347; ELMC ¶¶ 168–174, 179–187, 201, 224–302, 352–354, 376; MMMC ¶¶ 130–126, 141–150, 154–155, 164, 186–265, 318–320, 342.

process materials and drug products, warning letters, inspections, recalls, and labeling, and the preparation and content of medication guides.²⁹ Each discretionary subject area calls for application of the primary jurisdiction doctrine to permit FDA to address these important issues and carry out its responsibilities, which are unique among domestic regulatory agencies.

Further supporting primary jurisdiction abstention in this MDL is the role of ongoing recalls in the Complaints. FDA has discretion with respect to the commencement, classification, conduct, and termination of recalls. *See* 21 C.F.R. §§ 7.40–7.59. The Complaints rest on allegations pertaining to the recall of the Manufacturer Defendants’ VCDs, and the allegation that these recalls are just the “tip of the iceberg” with further recalls yet to occur. *E.g.*, PIMC ¶¶ 8, 169–185, 391; ELMC ¶¶ 2, 346–350, 405; MMMC ¶¶ 313–316, 381. The primary jurisdiction doctrine strongly militates in favor of the Court’s abstention, yielding to the discretion entrusted to FDA by Congress to investigate and determine outcomes on key issues, including those enumerated above, which are predominantly within its jurisdiction.

Third, the Complaints’ remaining claims give rise to a substantial danger of inconsistent rulings. The Complaints seek to adjudicate whether any of Defendants’

²⁹ *See, e.g.*, PIMC ¶¶ 170, 186, 193, 219–222, 224–226, 232, 235, 278, 289, 295, 320, 334, 338, 346–347.

generic VCDs contain NDMA or NDEA and whether Defendants have complied with cGMPs and numerous other statutory and regulatory requirements under FDA’s primary authority, praying for declaratory, injunctive and monetary relief as to Plaintiffs and their putative classes. At the same time, according to the Complaints’ allegations, FDA remains actively engaged in ongoing regulatory action with additional action possible in the future.³⁰ There is an unavoidable risk that this Court may be asked to enter interim or permanent relief, commence discovery, make dispositive rulings, or otherwise take consequential action that may contradict FDA’s action with respect to Defendants’ VCDs. This places the Court at risk of steering a course materially at odds with FDA’s own actions. Because the issues before this Court are “factually and legally intertwined” with those “pending resolution” before FDA, abstention on primary jurisdiction grounds is fully appropriate. *Iowa Network Servs. v. AT&T Corp.*, No. 3:14-cv-3439, 2019 WL 4861438, at *6 (D.N.J. Oct. 2, 2019) (citation omitted)).

Fourth, FDA has an ongoing, multidisciplinary investigation underway to evaluate and address potential impurities in valsartan.³¹ *See supra* n.9. Where an issue before the Court is “presently pending” before FDA, that weighs in favor of

³⁰ *See, e.g.*, PIMC ¶¶ 182; ELMC ¶¶ 5, 354; MMMC ¶ 316.

³¹ *See, e.g.*, PIMC ¶¶ 8, 169–185, 391; ELMC ¶¶ 2, 346–350, 405; MMMC ¶¶ 313–316, 381.

abstention. *See Gisvold v. Merck & Co.*, 62 F. Supp. 3d 1198, 1204 (S.D. Cal. 2014).

The Court should avoid unnecessarily stepping into FDA's shoes.

Accordingly, because "all primary jurisdiction factors are present in this action," dismissal or a stay is appropriate until FDA completes all pending and future proceedings and actions addressing the same subject matters as are involved in these cases and this MDL. *Iowa Network Servs.*, 2019 WL 4861438, at *6.

IV. THE COMMON LAW CLAIMS OF NEW JERSEY AND SIMILARLY-SITUATED PLAINTIFFS ARE SUBSUMED BY STATE PRODUCT LIABILITY STATUTES.

Many Plaintiffs' state common law claims are subsumed under their applicable states' product liability acts ("PLAs"). The New Jersey Products Liability Act ("NJPLA"), for example, subsumes "*any cause of action* 'for harm caused by a product, irrespective of the theory of the underlying claim,'" except for breach of express warranty.³² *Clements v. Sanofi-Aventis, U.S., Inc.*, 111 F. Supp. 3d 586, 596–598 (D.N.J. 2015) (emphasis added) (quoting N.J.S.A. § 2A:58C-1(b)(3)). The NJPLA supplies "one unified, statutorily defined theory of recovery for harm caused

³² Likewise, state consumer protection claims, including statutory claims, arising out of alleged product defects are subsumed by the NJPLA. *See Hindermeyer v. B. Braun Med. Inc.*, 419 F. Supp. 3d 809, 819 (D.N.J. 2019) (collecting cases holding NJPLA subsumes claims for statutory consumer fraud, breach of warranty, negligence and fraud-based claims arising out of alleged deceptively designed medical device); *Cole v. NIBCO, Inc.*, No. 3:13-cv-07871, 2015 WL 2414740, at *5–7 (D.N.J. May 20, 2015) (holding consumer fraud, tort, breach of warranty, and unjust enrichment claims subsumed by NJPLA and Tennessee PLA).

by a product[.]” *In re Lead Paint Litig.*, 924 A.2d 484, 503 (N.J. 2007). Except for breach of express warranty, “all claims for harm caused by a product under New Jersey law, *regardless of the theory underlying the claim*, are governed by the [NJPLA],” and the NJPLA “is the *exclusive remedy* for such actions and other claims are subsumed within the statutory cause of action.” *Calender v. NVR Inc.*, 548 F. App’x 761, 764 (3d Cir. 2013) (emphases added).

Many of the states represented in this MDL have similar PLAs that subsume common law claims. The Court should dismiss all state common law claims subsumed by state PLAs, a complete list of which is set forth in the Charts at 16–19.

A. The NJPLA and Similar Statutes Subsume the PIMC and MMC’s Claims.

All state law claims (except for breach of express warranty) brought by New Jersey and MMC Plaintiffs are subsumed by the NJPLA and should be dismissed. The PIMC’s claims are subsumed because they emanate from physical harm. *See Hindermeyer v. B. Braun Med. Inc.*, 419 F. Supp. 3d 809, 822–23 (D.N.J. 2019). Medical monitoring claims, like those set forth in the MMC, are also subsumed. *See Sinclair v. Merck & Co., Inc.*, 948 A. 2d 587, 593–595 (N.J. 2008). Other states’ statutes have a similar effect. *See* Charts at 16–19.

B. The NJPLA Subsumes the ELMC’s Claims.

The NJPLA also subsumes any common law claims, including economic loss claims, where “the heart of [] matter is the *potential* for [physical] harm [to

plaintiffs]” and any alleged economic damage arises from this potential danger to plaintiffs’ health.³³ *Levinson v. Johnson & Johnson Consumer Cos., Inc.*, No. 09-cv-3317, 2010 WL 421091 (D.N.J. Feb. 1, 2010) (emphasis added), *reconsidered on other grounds* 2010 WL 3024847 (D.N.J. Aug. 2, 2010) (dismissing complaint); *Arlandson v. Hartz Mountain Corp.*, 792 F. Supp. 2d 691, 706 (D.N.J. 2011). Applying this principle, New Jersey courts have held the NJPLA subsumes economic loss claims predicated on allegations that carcinogenic impurities rendered a product “useless.” *See Crouch v. Johnson & Johnson Consumer Cos., Inc.*, No. 09-cv-2905, 2010 WL 1530152, at *7 (D.N.J. Apr. 15, 2010) (holding claims for economic loss arising out of allegedly contaminated bath products were subsumed); *Boyd v. Johnson & Johnson Consumer Cos., Inc.*, No. 09-cv-3135, 2010 WL 2265317 (D.N.J. May 31, 2010) (same) *reconsidered on other grounds* 2010 WL 3024845, at *6 (D.N.J. Aug. 2, 2010) (dismissing complaint).

“[A]rticulating a claim in terms of pure economic harm” does not “convert[] the underlying defective product claim into an independent and unrelated [issue]” and “cannot be used to obviate the [NJPLA].” *Crouch*, 2010 WL 1530152, at *7.

³³ Although the “potential for harm” may bring the ELMC’s claims within the analytical purview of the NJPLA, it is not sufficient to allege any *actual*, non-speculative Article III economic injury. *See supra* Part II.A; *Crouch*, 2010 WL 1530152, at *4 (dismissing economic loss claims involving certain chemicals for lack of standing because “any potential injury is too remote, hypothetical and/or conjectural . . .”).

The same is true here; the “heart” of the ELMC is the “potential” for harm posed by VCDs allegedly containing nitrosamine impurities. *See* ELMC ¶¶ 170, 372; MMC ¶¶ 1, 293. The result is the same for other states’ product liability statutes. *See* Charts at 16–19.

V. THE COMPLAINTS’ INDIVIDUAL CLAIMS SHOULD BE DISMISSED UNDER RULE 12(B)(6) BASED ON CLAIM-SPECIFIC PLEADING DEFECTS.

The preceding sections address deficiencies in the Complaints that apply across multiple claims or Complaints. Most or all of the Complaints’ 32 individual claims also contain claim-specific legal and facial deficiencies further supporting their dismissal. These defects are too numerous to catalog in any single motion, but the Manufacturing Defendants will address key deficiencies in each set of claims warranting their dismissal.

A. The Complaints’ Fraud Claims Should be Dismissed.

All three Complaints contain variants of fraud claims based on Defendants’ purported misrepresentation of the properties of their VCDs. These claims are all defective because they fail to allege fraud with sufficient particularity and fail to allege scienter or knowledge.

1. The Complaints Do Not Satisfy the Heightened Pleading Requirement for Fraud.

The Complaints fail to allege *any* factual basis for their fraud claims, much less particularized facts satisfying the “heightened specificity requirements” for

fraud under Rule 9(b). *MDNet, Inc. v. Parmacia Corp.*, 147 F. App'x 239, 245 (3d Cir. 2005). To meet Rule 9(b)'s requirements, plaintiffs must provide factual allegations detailing the “who, what, when, where, and how” of a fraud claim. *Rapid Models & Prototypes, Inc. v. Innovated Sols.*, 71 F. Supp. 3d 492, 504 (D.N.J. 2014). Moreover, a fraud claim will be dismissed where a “Plaintiff lumps all [defendants] together as having engaged in wrongful conduct without specifying which defendant was responsible for which actions.” *Snyder v. Dietz & Watson, Inc.*, 837 F. Supp. 2d 428, 450 (D.N.J. 2011).

Here, the Complaints are devoid of specific facts alleging how any consumer was defrauded by any Defendant because of the alleged nitrosamine impurities in VCDs. The Complaints do not allege any misstatements on the part of any individual or Defendant with any specificity, *i.e.*, who, what, where, and when. And the Complaints routinely lump all Defendants together without pleading particular facts regarding the alleged misconduct of each. Accordingly, the Complaints' fraud claims should be dismissed in their entirety.

2. The Complaints Do Not Sufficiently Plead that Defendants Knew Any Representations Were False.

The Complaints also fail to satisfy the element of knowledge or scienter to state a claim for fraud. Plaintiffs allege that Defendants knew or “should have

known” of their putative false representations.³⁴ But that is not the standard for fraud. Though the scienter or knowledge requirement is expressed somewhat differently among states, all states require actual knowledge, or, in some instances, recklessness. *See* Charts at 20–21, 22. The Complaints cannot satisfy any version of this element.

The Complaints do not allege, beyond conclusory averments, that Defendants knew their VCDs contained nitrosamines. For example, the Complaints allege that “there are indications that Defendants had actual knowledge” and that “Defendants knowingly . . . introduced adulterated and/or misbranded VCDs containing dangerous amounts of nitrosamines into the U.S. market.” *See, e.g.*, ELMC ¶¶ 348, 353; PIMC ¶¶ 196, 200, 505; MMMC ¶¶ 306, 310–311. These conclusory allegations are insufficient to establish scienter to support a fraud claim.

Indeed, the Complaints’ allegations concede Defendants’ *lack* of knowledge. The Complaints devote many paragraphs to Defendants’ alleged inappropriate manufacturing practices, yet in the same breath also concede Defendants’ lack of knowledge, asserting that had Defendants adhered to FDA’s guidelines, they “*would have found* the NDMA and NDEA contamination almost immediately.” *See, e.g.*, ELMC ¶ 344; PIMC ¶ 192; MMMC ¶ 302 (emphasis added). This use of the past modal tense (“would have found”) signifies that Defendants *did not in fact* learn of

³⁴ *See* ELMC ¶¶ 496–497; PIMC ¶¶ 397, 419, 425–426; MMMC ¶¶ 5, 305.

the alleged contamination, indicating their lack of knowledge. Nor do the Complaints allege facts establishing an intent to deceive or facts surrounding the alleged fraud to support recklessness in those states applying a recklessness standard. *See* Charts at 22.

Thus, having failed to allege facts supporting the necessary scienter element, the fraud claims asserted in each MC should be dismissed. *Danon v. Vanguard Group, Inc.*, 686 F. App'x 101, 103 (3d Cir. 2017) (stating that “[b]ecause knowledge is a necessary element of [plaintiff’s] claim, failing to plead knowledge adequately was sufficient to warrant dismissal”).

B. The PIMC and MMC Fail to Allege Design Defect and Failure-to-Warn Product Liability Claims.

The Complaints assert products liability claims, alleging that the VCDs (1) were defectively designed and (2) lacked adequate warnings. Though each of these allegations and claims must be evaluated pursuant to each governing state’s law, certain pleading deficiencies cut to the core and render these claims uniformly inadequate under *any* state’s law. Further, some states categorically reject strict liability in the products liability context for design defect and failure-to-warn claims. Dismissing those claims now will greatly streamline these cases.³⁵

³⁵Additionally, to the extent any of Plaintiffs’ product liability claims are premised on the notion that Defendants had a state-law duty to alter their labeling, *see* 21 C.F.R. § 202.1(l)(2) (defining “labeling”), those claims are preempted pursuant to *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). To the extent any of Plaintiffs’ claims

1. The PIMC Inadequately Alleges a Design Defect Claim.

The PIMC asserts a strict liability design defect claim but contains only conclusory allegations that parrot the elements of the claim.³⁶ A product is defectively designed if it is unreasonably dangerous for its intended use, despite being manufactured as intended. Restatement (Second) of Torts, § 402A (1965). A design is deemed unreasonably dangerous if the risk of harm outweighs the benefits of the product. *Id.*; *see also* Restatement (Third) of Torts: Prod. Liab. § 6 (1998) (“A prescription drug . . . is not reasonably safe due to defective design if the foreseeable risks of harm . . . are sufficiently great in relation to its foreseeable therapeutic benefit[.]”). The PIMC does not plead facts establishing these elements.

At the outset, it is unclear how the PIMC asserts a defective design claim at all. Plaintiffs do not allege that Defendants’ *designed* their VCDs to contain nitrosamines. To the contrary, they assert this condition occurred as a result of deficiencies in Defendants’ manufacturing practices that resulted in the VCDs containing an unintended byproduct in the form of nitrosamines. *See, e.g.*, PIMC ¶¶ 10–11, 266–345. Thus, Plaintiffs’ design defect claim fails at the most basic level: There is no plausible allegation of a defective design.

are premised on the notion that Defendants were required under state law to change the design of the VCDs or the process used to make them, those claims are preempted under *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013); *see supra* n.26.

³⁶ *See* PIMC ¶¶ 450–459.

Even if some design defect were at issue, the PIMC contains no factual allegations whatsoever as to the other elements of a defective design claim, and therefore fails to allege a plausible claim under *any* state’s law. The PIMC simply recites the elements and alleges the VCDs were “defectively designed because the design was unsafe for the purposes intended by Defendant,” PIMC ¶ 453, and “foreseeable risks of harm could have been reduced or avoided by adopting a reasonable alternative design, as originally approved by the FDA,” *id.* ¶ 456. It concludes by asserting, without elaboration, that “Defendants did not adopt a design that would have rendered these drugs reasonably safe.” *Id.*

The PIMC does not identify any aspect of the design as defective, nor does it specify any deviation from the “FDA-approved” design. *See Bell v. Boehringer Ingelheim Pharms., Inc.*, No. 17-1153, 2018 WL 928237, at *5 (W.D. Pa. Feb. 15, 2018) (“The complaint does not plead any facts, however, about why this design is defective. [Plaintiff] conclusorily alleged that ‘several alternative safer products’ exist but did not identify those products or explain why they are safer.”). The PIMC does not even attempt to weigh the therapeutic benefits of the VCDs against the purported harms. *See Becker v. Smith & Nephew, Inc.*, No. 14-5452, 2015 WL 268857, at *4 (D.N.J. Jan. 20, 2015) (same failure resulting in dismissal). These allegations are insufficient to support a strict liability design defect claim in the states

where such a claim is legally cognizable.³⁷ *See, e.g., Glick v. Leatt Corp.*, No. 4:17-cv-00291, 2018 WL 9439696, at *2 (S.D. Iowa May 3, 2018), *aff'd sub nom. Glick v. W. Power Sports, Inc.*, 944 F.3d 714 (8th Cir. 2019) (dismissing design defect claim that did nothing more than recite elements as bare “legal conclusions, unsupported by any other facts”); *Forslund v. Stryker Corp.*, No. 09-2134, 2010 WL 3905854, at *2 (D. Minn. Sept. 30, 2010) (same); *Bosch v. Bayer Healthcare Pharm., Inc.*, 13 F. Supp. 3d 730, 743 (W.D. Ky. 2014) (same); *Thornton v. AstraZeneca Pharm. LP*, No. 1:17-cv-652, 2017 WL 2255776, at *4 (N.D. Ga. May 15, 2017) (same).

2. The PIMC and MMC Inadequately Allege Failure-to-Warn Claims.

The PIMC and MMC also inadequately allege failure-to-warn claims based on Defendants’ claimed failure to warn of the dangers associated with the recalled VCDs, under both strict liability and negligence theories.³⁸ Absent from both Complaints is the critical element that Defendants knew or had reason to know that

³⁷ Many states do not recognize strict liability design defect claims at all. *See* Charts at 23–27.

³⁸ *See* PIMC Count 2 ¶¶ 438–449 and MMC Count 5 ¶¶ 437–442 (strict liability claims); PIMC Count 9 ¶¶ 510–519 and MMC Count 1 ¶¶ 394–405 (negligence claims). As to negligence, those claims can further be divided into negligent misrepresentation and negligent omission theories of liability. For convenience, this submission refers to negligent misstatements. As to strict liability, certain states do not recognize strict liability failure-to-warn claims at all. *See* Charts at 28.

the VCDs contained the nitrosamine impurity. A warning is inadequate “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe.” Restatement (Third) of Torts: Prod. Liab. § 2 (1998); *see also* Restatement (Third) of Torts: Prod. Liab. § 6 (1998).

But a defendant can only warn of a risk about which it knows or has reason to know. *See* Restatement (Second) of Torts § 402A cmt. j (1965) (seller must warn “*if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger*”) (emphasis added). In a case like this one, therefore, a plaintiff must allege that the seller knew or should have known of the presence of—and the foreseeable harm which may be caused by—the impurity. Restatement (Third) of Torts § 6 cmt. g (1998); *accord Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1000 (1991) (“majority of jurisdictions” agree that “knowledge or knowability is a component of strict liability for failure to warn”).

The PIMC and MMMC do not allege any facts suggesting that Defendants either knew or should have known about the alleged impurity in their VCDs, that the presence of the impurity was foreseeable, or that the impurity was present in

quantities sufficient to cause harm.³⁹ Thus, failure-to-warn claims are not sustainable on the face of the Complaints.

C. Plaintiffs' Negligence *Per Se* Claims Must be Dismissed.

Each of the Complaints avers negligence *per se*.⁴⁰ These claims are inadequately pleaded or are not cognizable under individual states' laws.

1. The ELMC and MMMC Do Not State Claims for Negligence *Per Se*.

The ELMC and MMMC fail to allege that Plaintiffs are within a class of individuals any statute or regulation was designed to protect—a required element of negligence *per se* in many states. *See* Charts at 29–30. Putting aside that private efforts to enforce the FDCA under the guise of negligence *per se* are preempted, *see infra* Part III.A.1, the ELMC and MMMC are devoid of any allegation that the statutes, regulations, and cGMP they claim were violated were intended to protect Plaintiffs. Accordingly, the negligence *per se* claims should be dismissed as to all states requiring this element, listed in the Charts at 29–30.

2. The Complaints' Negligence *Per Se* Claims are Not Cognizable Under the Law of Multiple States.

A number of states do not recognize negligence *per se* as a separate cause of action, finding a violation of a statute is either deemed simply evidence of

³⁹ *See* PIMC ¶¶ 438–449, 510–519; MMMC ¶¶ 437–442, 394–405.

⁴⁰ *See* PIMC Count 5; ELMC Counts 17 and 18; MMMC Count 2.

negligence, or they impose other state-specific requirements on negligence *per se* claims. The Manufacturing Defendants have identified in the Charts at 31 the states disallowing the Complaints' negligence *per se* claims on state-specific grounds; these claims should be dismissed as to each such state.

D. The Complaints' Negligence Claims Should Be Dismissed.

Negligence is a highly variable cause of action whose requirements vary from state to state, yet Plaintiffs pursue negligence claims in a broad brush manner in each of the Complaints.⁴¹ Those claims fall short under the law of multiple states. Most notably, many states' economic loss rules preclude recovery of damages for negligence unless a plaintiff has pled physical injury or property damage. The ELMC and MMMC do not allege current physical injury or property damage resulting from Defendants' VCDs. Therefore, the negligence claims in those Complaints should be dismissed as to those states listed in the Charts at 32–34.

E. The Complaints Do Not State Cognizable Breach of Implied and Express Warranty Claims.

Each of the Complaints assert claims for breach of express and implied warranties. The implied warranty claims allege lack of merchantability—*i.e.*, fitness for the VCDs' ordinary purposes.⁴² Plaintiffs also allege two types of express

⁴¹ See PIMC Count 4 ¶¶ 460–465; ELMC Counts 15 ¶¶ 567–576 and 16 ¶¶ 577–586; and MMMC Count 1 ¶¶ 394–405.

⁴² See, e.g., ELMC ¶¶ 472–473; PIMC ¶¶ 492; MMMC ¶¶ 326. Although Plaintiffs do not explicitly allege separate claims for breach of any implied warranty of fitness

warranties emanating from Defendants label and non-label representations. First, Plaintiffs allege Defendants breached the “express warranty of sameness” contained within the VCDs’ labels, which Plaintiffs imply guaranteed that the valsartan products would be bioequivalent and therapeutically equivalent to their RLDs and have the same “quality,” safety, efficacy, and strength.⁴³ Second, Plaintiffs also claim that all Defendants breached their express warranties created through their websites or other marketing materials.

1. State Law Privity Requirements Compel Dismissal of Plaintiffs’ Express and Implied Warranty Claims.

Numerous states require privity of contract for breach of express warranty, implied warranty, or both as set forth in the Charts at 35–38.⁴⁴ Because the ELMC and MMMC have failed to allege privity between Plaintiffs and the Manufacturer

for a particular purpose (“FPP”), “if the particular purpose . . . coincides with [the] general functional use, the implied [FPP warranty] merges with the implied warranty of merchantability.” *Cartillar v. Turbine Conversions, Ltd.*, 187 F.3d 858, 861 n.5 (8th Cir. 1999). Moreover, any claim for an FPP warranty fails because manufacturers were unaware of any Plaintiff’s particular purpose in taking a VCD beyond the ordinary purposes for which VCDs were prescribed and used, and the Plaintiffs’ Complaints articulate no such individualized purpose. *See Doe v. Solvay Pharmaceuticals, Inc.*, 350 F. Supp. 2d 257, 265 (D. Me. 2004).

⁴³ E.g., ELMC ¶¶ 363–364, 366–367, 369, 437, 448; PIMC ¶¶ 482–483; MMMC ¶¶ 322–323.

⁴⁴ Consumers lack privity with a manufacturer where they did not purchase the product directly from that manufacturer. *See Avram v. Samsung Electronics Am., Inc.*, Nos. 2:11-6973, 2:12-976, 2013 WL 3654090, at *11 (D.N.J. July 11, 2013).

Defendants, these claims should be dismissed as to the states listed in the Charts at 35–38.⁴⁵

2. The Implied Warranty Claims in the ELMC and MMMC Fail for Lack of Injury or Loss of Functionality.

The ELMC and MMMC do not allege that Plaintiffs have suffered any present physical harm or that they failed to receive the same therapeutic value from their VCDs as the RLDs. Plaintiffs must show how an alleged defect impaired the product's functionality or caused actual injury, not merely that a defect or impurity existed, to state a claim for breach of implied warranty. *See Hoffman v. Nutraceutical Corp.*, No. 12-5803, 2013 WL 2650611, at *4 (D.N.J. June 10, 2013) (dismissing implied warranty claim for lead-containing supplement because plaintiff failed to plead or demonstrate injury); *Hammer v. Vital Pharms., Inc.*, No. 11-4124, 2012 WL 1018842, at *12 (D.N.J. Mar. 26, 2012) (dismissing implied warranty claims where plaintiff merely claimed supplement contained synthetic components); *Bowman v. Ram Med., Inc.* No. 10-cv-4403, 2012 WL 1964452, at *5 (D.N.J. May 31, 2012) (finding that plaintiff's allegation of receiving a counterfeit mesh implant could not alone sustain claims of breach of an implied warranty); *Crozier v. Johnson & Johnson Consumer Cos., Inc.*, 901 F. Supp. 2d 494, 508–509 (D.N.J. 2012)

⁴⁵ At least four of the PIMC states at issue also require privity in the personal injury context. *See* Charts at 35–38.

(dismissing claims where plaintiff did not allege impaired functionality or physical injury).

Because the ELMC and MMMC are devoid of allegations of impaired functionality or actual injury, the Court should dismiss all implied warranty claims.

3. All Express Warranty Claims Fail Under State Law.

The Complaints also fail to allege the requisite elements of a claim for breach of express warranty. To state a claim for breach of express warranty under New Jersey law, a plaintiff must allege three elements: (1) Defendant made an affirmation, promise or description about the product; (2) that became part of the basis of the bargain; and (3) the product ultimately did not conform to the affirmation or description.” *Snyder v. Farnam Co., Inc.*, 792 F. Supp. 2d 712, 721 (D.N.J. 2011). The Complaints are deficient and do not contain these averments.

a. The Complaints Fail to Allege That Any Warranty Formed the Basis for Any Bargain.

Although all of the Complaints allege various purported express warranties, they do not allege what—if anything—any plaintiff saw or read *before* filling a valsartan prescription that constituted a warranty upon which he or she relied.⁴⁶ At a minimum, a breach of express warranty claim requires the alleged warranty to form the basis of the bargain by alleging they “bought a product *based on* a particular

⁴⁶ See, e.g., PIMC ¶¶ 481–490 (never stating Plaintiffs saw, read, or understood the express warranties at issue prior to their purchases).

promise[.]” *Mladenov v. Wegmans Food Markets, Inc.*, 124 F. Supp. 3d 360, 378 (D.N.J. 2015) (emphasis added). This requires Plaintiffs to demonstrate they first “saw” the warranty and “purchased [the products] as a result.” *Id.*; *see also Walters v. Carson*, No. 11-6545, 2012 WL 6595732, at *3 (D.N.J. Dec. 17, 2012) (Kugler, J.). Because the Complaints do not contain any such allegations, their express warranty claims fail and should be dismissed.⁴⁷

b. The Complaints Do Not Identify Specific Language, Sources, and Effective Time Periods to Establish Express Warranties.

New Jersey and other states require a plaintiff to identify (1) the specific language or guarantee of an express warranty and (2) the source of a warranty. *See Arlandson*, 792 F. Supp. 2d at 707; *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 588 Fed. App’x 171, 175 (3d Cir. 2014) (applying New Jersey law); *Fishman v. Gen. Elec. Co.*, No. 2:12-cv-00585, 2013 WL 1845615, at * 5 (D.N.J. Apr. 30, 2013). Many of Plaintiffs’ warranty claims only identify one of the elements, while some identify neither. *See* Charts at 42.⁴⁸ Claims based on the warranties identified as deficient in the Charts at 42 should be dismissed.

⁴⁷ All jurisdictions adopting the UCC contain a “basis of the bargain” requirement. *See* Charts at 39–41.

⁴⁸ Stating an express warranty’s language and source are pleading requirements under *Twombly*, *see Simmons v. Stryker Corp.*, No. 08-3451, 2008 WL 4936982 at *1–2 (D.N.J. Nov. 17, 2008), as opposed to a substantive requirement of state law.

c. Representations About Safety or Efficacy of VCDs Do Not Create Express Warranties.

Because federal law requires the labeling of valsartan products to disclose risks, contraindications, and side effects, their labels cannot create legally enforceable warranties about the safety or efficacy of those drugs. *See Avandia*, 588 Fed. App'x. at 175. Federal courts interpreting the law of several states, “have refused to find the words ‘safe and effective’ to create an express warranty in the absence” of a guarantee that the drug “was free from all harmful side effects or was absolutely harmless.” *Id.* at 176. Here, the PIMC similarly relies on the premise that Defendants guaranteed valsartan was “safe and effective.” *See* PIMC ¶¶ 482–483. Thus, the PIMC’s express warranty allegations should be dismissed.

4. State Law Pre-Suit Notice Requirements Compel Dismissal of the Complaints’ Express and Implied Warranty Claims.

Because the Complaints do not plead pre-litigation notice, the implied and express warranty claims of Plaintiffs from jurisdictions that require such notice must be dismissed. *See* Charts at 43–48.

5. The Complaints’ Magnuson-Moss Warranty Act Claims Fail.

The Magnuson-Moss Warranty Act (“MMWA”) is inapplicable to any alleged express or implied warranty claims concerning the labeling of valsartan products because federal law controls the content of a generic drug’s label. *See* 15 U.S.C. § 2311(d) (stating MMWA does not apply to “any written warranty the making or content of which is otherwise governed by Federal law”); *Dopico v. IMS Trading*

Corp., No. 14-cv-1874, 2018 WL 4489677, at *6 (D.N.J. Sept. 18, 2018) (holding MMWA is inapplicable to labeling of products regulated by the FDA). Even if FDA regulations did not foreclose Plaintiffs’ MMWA claims, they fail for the same reasons that Plaintiffs’ state implied and express warranty claims fail. *See, e.g., Johansson v. Cent. Garden & Pet Co.*, 804 F. Supp. 2d 257, 265 (D.N.J. 2011) (dismissing MMWA claim where underlying state claim was dismissed). They also fail because Plaintiffs do not allege they afforded Defendants “a reasonable opportunity to cure such failure to comply.” 15 U.S.C. § 2310(e). Therefore, all of Plaintiffs’ MMWA claims should be dismissed.

F. The ELMC’s Unjust Enrichment Claims Are Inadequately Pleaded.

The ELMC’s allegations of unjust enrichment consist of nothing more than a recitation of the elements of an unjust enrichment claim. Likewise, they are not directed to any particular Defendants, rendering it impossible to tell which Defendant was supposedly enriched unjustly and by whom. *See D’Addario*, 2020 WL 3546750, at *6 (quoting *Sheeran v. Blyth Shipholding S.A.*, No. 14-5482, 2015 WL 9048979, at *3 (D.N.J. Dec. 16, 2015)) (“‘[G]roup pleading’ does not satisfy Rule 8[] because it does not place Defendants on notice of the claims against each of them[.]”). Though unjust enrichment law varies considerably by state, these bare assertions fail to state the most basic facts underlying such a claim. *See, e.g., Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 544, 555) (“[T]he pleading standard

Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’”).

Beyond these basic pleading deficiencies, certain states require that a plaintiff expressly plead the absence of an adequate remedy at law. *See* Charts at 49. The ELMC contains no such allegations, nor does it plead unjust enrichment in the alternative.

The claims likewise fail because they hinge on the same allegations of wrongful conduct as the ELMC’s eighteen other causes of action. *See, e.g., Bourbia v. S.C. Johnson & Son, Inc.*, 375 F. Supp. 3d 454, 466 (S.D.N.Y. 2019) (although New York allows plaintiffs to plead unjust enrichment in the alternative, where it “is duplicative of other causes of action,” *i.e.*, it “relies on the same conduct that forms the basis of [] other claims[,]” “it should be dismissed”); *Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1342–1343 (S.D. Fla. 2011) (noting that if a plaintiff seeks recovery under unjust enrichment for the exact same wrongful conduct that form the basis of her other claims, the unjust enrichment claim will be dismissed); *Wahlcometroflex, Inc. v. Baldwin*, 991 A.2d 44, 49–50 (Me. 2010) (applying Delaware law and dismissing unjust enrichment claim where it was based on the same factual allegations as plaintiff’s breach of fiduciary duty claim). Not only are

the unjust enrichment claims duplicative, but the other causes of action also aptly demonstrate the plethora of adequate legal remedies available to Plaintiffs. *See, e.g., Shaulis v. Nordstrom, Inc.*, 865 F.3d 1, 16 (1st Cir. 2017) (applying Massachusetts law and dismissing plaintiff’s unjust enrichment claim even though plaintiff’s other legal claims were dismissed, because “[i]t is the availability of a remedy at law, *not the viability of that remedy*, that prohibits a claim for unjust enrichment”) (emphasis supplied); *Indiana ex rel. Zoeller v. Pastrick*, 696 F. Supp. 2d 970, 999 n.7 (N.D. Ind. 2010) (noting that “[u]nder Indiana law, equitable principles such as unjust enrichment will not apply where there exists a remedy at law”) (citation omitted); *Duffy v. Charles Schwab & Co., Inc.*, 123 F. Supp. 2d 802, 814 (D.N.J. 2000) (recognizing that “[r]estitution for unjust enrichment is an equitable remedy, available only when there is no adequate remedy at law”). Therefore, to the extent the ELMC’s unjust enrichment claims are brought under the laws of the states listed in the Charts at 52–56, they must be dismissed.

Moreover, a key requirement of many states’ unjust enrichment laws is that the plaintiff must confer a *direct* benefit upon the defendant—something akin to a privity requirement. *See, e.g., Arlandson v. Hartz Mountain Corp.*, 792 F. Supp. 2d 691, 711 (D.N.J. 2011) (internal quotation marks and citation omitted) (“Since a plaintiff must confer a benefit on the defendant to support an unjust enrichment claim, this element has been interpreted by New Jersey courts as a requirement that

the plaintiff allege a sufficiently direct relationship with the defendant to support the claim”); *In re Packaged Seafood Prod. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1090 (S.D. Cal. 2017) (quoting *Kopel v. Kopel*, 229 So. 3d 812, 818 (Fla. 2017)) (dismissing unjust enrichment claim under Florida law because “the Florida Supreme Court explicitly acknowledged that ‘to prevail on an unjust enrichment claim, the plaintiff must directly confer a benefit to the defendant’”); *see also* Charts at 50–51. The ELMC contains no such allegations of any Plaintiff conferring a direct benefit upon any of the Manufacturer Defendants. To the contrary, the ELMC indicates that the Manufacturer Defendants did not sell the products directly to consumers and that Plaintiffs are three transactions removed from the manufacturers. *See* ELMC ¶ 155. That leaves the ELMC without a viable claim for unjust enrichment under the laws of the states listed in the Charts at 50–51.

G. The MMMC Fails to Allege a Claim for Medical Monitoring.

In the MMMC, Plaintiffs pursue a stand-alone medical monitoring cause of action, despite the vast majority of states either refusing to recognize medical monitoring as an independent cause of action or recognizing medical monitoring only as a measure of recoverable damages. Twenty states do not recognize medical monitoring claims at all. *See* Charts at 57–58. For this reason, medical monitoring claims brought under the laws of the states listed in Charts at 57–58 should be dismissed. Nine states (and Puerto Rico) have not recognized medical monitoring as

an independent cause of action. *See* Charts at 59. For this reason, the medical monitoring claims brought under the law of the states listed in Charts at 59 should be dismissed. Fourteen states permit the recovery of damages for medical monitoring costs but still refuse to recognize medical monitoring as an independent cause of action. *See* Charts at 60. For this reason, the medical monitoring claims brought under the law of the states listed in Charts at 60 should be dismissed.

H. The PIMC’s Claims for Wrongful Death, Survival Actions and Loss of Consortium, and Demand for Punitive Damages, Fail as a Matter of Law

1. The PIMC’s Claims for Wrongful Death, Survival Actions, and Loss of Consortium Should Be Dismissed

The PIMC asserts three derivative claims: (1) wrongful death; (2) survival actions; and (3) loss of consortium. PIMC ¶¶ 580–587, 588–592, 593–600. Because each claim is derivative, it should be dismissed for the same reasons as the PIMC’s underlying claims on which each derivative claim relies. *See Marie v. McGreevey*, 314 F.3d 136, 140 (3d Cir. 2002) (quoting *Giardina v. Bennett*, 545 A.2d 139, 145 (N.J. 1988)) (wrongful death); *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 659–660 (Pa. Super. Ct. 2013) (wrongful death and survival); *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 777–778 (3d Cir. 2018) (loss of consortium).

2. The PIMC Does Not State a Plausible Claim for Punitive Damages.

The PIMC fails to allege any plausible factual basis supporting its claim for punitive damages, even under the most lenient standard among those states that

might consider such damages.⁴⁹ An action for punitive damages, like any other, must allege a claim for relief that is plausible on its face. *See, e.g., Shukh v. Seagate Tech., LLC*, 873 F. Supp. 2d 1087, 1091 (D. Minn. 2012) (citing *Twombly* and *Iqbal*); *Kelley v. Corrections Corp. of Am.*, 750 F. Supp. 2d 1132, 1147 (E.D. Cal. 2010) (citing *Twombly* and *Iqbal*).

Asserting a claim for punitive damages requires, *at a minimum*, that the PIMC present facts which, if accepted as true, demonstrate gross negligence on the part of Defendants, and only a minority of States permit punitive damages for gross negligence.⁵⁰ *See* Charts at 61–67. In New Jersey, for example, punitive damages require clear and convincing evidence that the defendant’s acts or omissions “were actuated by actual malice or accompanied by a wanton and willful disregard of persons,” and “may not be satisfied by proof of any degree of negligence including gross negligence.” N.J.S.A. § 2A:15–5.12(a). Those states applying a gross negligence standard define it differently, but all require conduct a degree of

⁴⁹ A plaintiff’s ability to assert a claim for punitive damages and the standard to plead such a punitive damages claim where available are questions of law that vary by state. Defendants reserve their right to contest punitive damages as to individual plaintiffs on jurisdiction-specific grounds.

⁵⁰ Though many states impose a higher standard, the minimum standard of any state for punitive damages requires that Plaintiffs plead facts sufficient to establish gross negligence. *See* Charts at 61–67. The statutory standard for a punitive damages claim is significantly higher in most states, and some do not permit punitive damages at all. *See id.*

magnitude beyond ordinary negligence. *See, e.g., Mobil Oil Corporation v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998) (finding gross negligence to support punitive damages requires “an extreme degree of risk” “actual, subjective awareness of the risk involved,” and “conscious indifference to the rights, safety, or welfare of others”); *Kinney v. Butcher*, 131 S.W.3d 357, 359 (Ky. Ct. App. 2004) (defining gross negligence to award punitive damages as a “wanton or reckless disregard for the safety of others”); *see also* Fla. Stat. § 768.72(2)(b) (defining “gross negligence” for punitive damages as conduct “so reckless or wanting in care that it constitutes a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct”).

The PIMC’s punitive damages claim, even viewed liberally, does not plead facts asserting grossly negligent conduct. The PIMC alleges Defendants failed to conduct proper quality control, testing, and post-market surveillance, purportedly resulting in VCDs containing “unreasonably dangerous and carcinogenic substances” being distributed without disclosure of their alleged dangerousness. PIMC ¶¶ 602–608, 609–611. Its allegations are merely a redux of the PIMC’s earlier claims with no plausible factual allegations of gross negligence, much less conduct capable of satisfying any higher punitive damages standard. The PIMC does not allege that Defendants engaged in any extreme departure from the ordinary standard of conduct. Instead, the PMIC contains conclusory statements as to Defendants’

supposed knowledge of nitrosamine contamination, but supplies no allegations of fact in support. *See* PIMC ¶¶ 11, 14, 168. The PIMC asks the Court to impute knowledge or intent to Defendants based on a series of unrelated factual allegations pertaining to a single API manufacturing site (*see id.* ¶¶ 197–198), but these statements, even if accepted as true, connect only tangentially to the VCD manufacturing process at issue in this litigation. The same goes for the PIMC’s allegations regarding Ranbaxy, a prior manufacturer of Diovan and non-party to this litigation (*see id.* ¶¶ 252–262), and regarding purported issues with the Defendants’ manufacturing practices either unrelated to the VCD manufacturing process or occurring after the recalls had been initiated (*see id.* ¶¶ 271–285, 289–300, 311–330, 334–344).

Put simply, the PIMC’s conclusory general allegations lack sufficient facts to cross the threshold of gross negligence and to state a claim for punitive damages under even the most permissive standard. *See id.* ¶¶ 413–426. Without such factual allegations, the PIMC’s claims cannot clear the high bar to plead punitive damages under the laws of any state, and the claims should therefore be dismissed.

VI. THE COMPLAINTS FAIL TO STATE CLAIMS FOR RELIEF AGAINST FDA LIAISONS.

In addition to joining all arguments for dismissal made by the Manufacturer Defendants, the FDA Liaison Defendants seek dismissal pursuant to Rule 12(b)(6) for Plaintiffs’ failure to state cognizable claims against them. APUSA, Hetero USA,

and Princeton are U.S. agents for foreign manufacturers' production of VCDs under 21 C.F.R. § 207.69(b),⁵¹ which effectively makes them liaisons between FDA and the respective foreign manufacturers.

A U.S. agent possesses limited responsibilities to serve as a liaison to FDA on behalf of a foreign establishment.⁵² Defendants are unaware of any case law holding a U.S. agent liable for claims arising from a foreign establishment's manufacturing or sale of medications. Rather, in *Moore*, the court dismissed claims against a foreign vaccine manufacturer's U.S. agent because it "did not manufacture, distribute, promote, sell, administer, or provide the package warnings or inserts." *Moore v. Medeva Pharms., Inc.*, No. 01-311-M, 2004 WL 57084, at *2 (D.N.H. Jan. 13, 2004). The regulations "obligated [the U.S. agent] only to act as an intermediary between the manufacturer and the FDA; the regulations . . . do not purport to impose any further obligations on a United States agent of a foreign drug manufacturer." *Id.* at *3.

⁵¹ 21 C.F.R. § 207.40(c) was the prior U.S. agent provision but it was replaced by 21 C.F.R. § 207.69(b), effective Nov. 29, 2016.

⁵² 21 C.F.R. § 207.69(b) charges a U.S. agent with: (1) routing and responding to FDA communications; (2) responding to questions concerning drugs imported or offered for import to the U.S.; (3) assisting in scheduling FDA inspections; and (4) receiving information/documents from FDA for the foreign establishment.

The Complaints' allegations that Hetero USA and Princeton are potentially liable for engaging in the manufacturing, sale, and distribution of VCDs are conclusory assertions that "are not entitled to the assumption of truth." *Santiago v. Warminster Tp.*, 629 F.3d 121, 131 (3d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 680). Likewise, the allegations that APUSA designed, manufactured and tested the VCDs are merely catch-all assertions. *See id.* The Complaints fail to plead any specific facts that Hetero USA or Princeton designed, manufactured, distributed, or sold the VCDs at issue. Similarly, the Complaints lack factual support to indicate APUSA was responsible for manufacturing, testing, or designing the VCDs at issue. Accordingly, the Court should dismiss all claims against Hetero USA and Princeton, and all claims alleging APUSA designed or manufactured the VCDs.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Manufacturing Defendants respectfully request the Complaints be dismissed.

Dated: July 17, 2020

Respectfully submitted,

By: /s/ Seth A. Goldberg
Seth A. Goldberg, Esq.
*Lead Counsel and Liaison Counsel
for Defendants*

DUANE MORRIS LLP

Seth A. Goldberg, *Lead Counsel and
Liaison Counsel for Defendants*
Barbara A. Schwartz
Coleen W. Hill (DE #6287)
Nathan B. Reeder
30 South 17th Street
Philadelphia, Pennsylvania 19103
Tel.: (215) 979-1000
Fax: (215) 979-1020
SAGoldberg@duanemorris.com
BASchwartz@duanemorris.com
NBReeder@duanemorris.com

*Attorneys for Zhejiang Huahai
Pharmaceutical Co, Ltd., Prinston
Pharmaceutical Inc., and Solco
Healthcare US, LLC*

PIETRAGALLO GORDON ALFANO
BOSICK & RASPANTI, LLP

Clem C. Trischler, *Lead Counsel for
Defendants*
Jason M. Reefer
38th Floor, One Oxford Centre
Pittsburgh, Pennsylvania 15219
Tel: (412) 263-2000
Fax: (412) 263-2001
CCT@PIETRAGALLO.com

Attorneys for Mylan Laboratories,

Ltd. and Mylan Pharmaceuticals, Inc.

GREENBERG TRAURIG

Lori G. Cohen, *Lead Counsel for
Defendants*

Victoria D. Lockard

Steven M. Harkins

Terminus 200

3333 Piedmont Rd., NE,

Suite 2500

Atlanta, Georgia 30305

Tel: (678) 553-2385

Fax: (678) 553-2386

cohenl@gtlaw.com

lockardv@gtlaw.com

harkinss@gtlaw.com

Gregory E. Ostfeld

77 West Wacker Drive,

Suite 3100

Chicago, Illinois 60601

Tel: (312) 476-5056

ostfeldg@gtlaw.com

Brian H. Rubenstein

1717 Arch Street

Suite 400

Philadelphia, Pennsylvania

Tel: (215) 988-7864

Fax: (214) 689-4419

rubensteinb@gtlaw.com

*Attorneys for Teva Pharmaceuticals
USA, Inc., Teva Pharmaceutical
Industries Ltd., Actavis LLC, and
Actavis Pharma, Inc.*

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**CERTIFICATION OF SETH A.
GOLDBERG, ESQ.**

SETH A. GOLDBERG, ESQ., being of full age, certifies as follows:

1. I am a Partner at Duane Morris LLP, attorneys for Defendants Zhejiang Huahai Pharmaceutical Co, Ltd., Princeton Pharmaceutical Inc., and Solco Healthcare US, LLC. I make this Certification based on personal knowledge and in support of the Manufacturer Defendants' Motion to Dismiss.
2. Attached hereto is a true and accurate copy of the Compendium of Charts drafted by counsel for Defendants, which includes a table of contents listing all charts included.

Respectfully submitted,

/s/ Seth A. Goldberg

Seth A. Goldberg
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103-4196
Tel.: (215) 979-1000
Fax: (215) 979-1020
SAGoldberg@duanemorris.com

*Lead Counsel for Defendants and
Attorney for Zhejiang Huahai
Pharmaceutical Co, Ltd., Princeton
Pharmaceutical Inc., and Solco
Healthcare US, LLC*

Dated: July 17, 2020

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**COMPENDIUM OF CHARTS REFERENCED IN MANUFACTURER
DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO DISMISS THE COMPLAINTS**

TABLE OF CONTENTS

Defendants Named In PIMC By Supply Chain Role	1
Defendants Named In ELMC By Supply Chain Role	2
Defendants Named In MMMC By Supply Chain Role.....	3
The Claims Asserted In The PIMC.....	4
The Claims Asserted In The ELMC	5
The Claims Asserted In The MMMC	6
State Law Claims Asserted In The PIMC That Are Preempted	7
State Law Claims Asserted In The ELMC That Are Preempted.....	8
State Law Claims Asserted In The MMMC That Are Preempted	9
ELMC Defendants As To Whom No Class Representative Alleges Injury.....	10
MMMC Defendants As To Whom No Class Representative Alleges Injury	11
Jurisdictions For Which The ELMC Class Representatives Have No Standing	12
Jurisdictions For Which The MMMC Class Representatives Have No Standing	13
ELMC Defendants Over Which This Court Lacks Personal Jurisdiction	14
MMMC Defendants Over Which This Court Lacks Personal Jurisdiction.....	15
State Law Claims Subsumed By Product Liability Acts	16
States Requiring Actual Knowledge Of Falsity For Fraud.....	20
States With A Recklessness Alternative To Fraud	22
States Adopting The Second Or Third Restatement For Design Defect Claims	23

States That Do Not Recognize Strict Liability-Failure To Warn	28
States For Which Class Representatives Have Not Alleged The Protected Class Required For Negligence <i>Per Se</i>	29
States That Limit Or Do Not Recognize Negligence <i>Per Se</i>	31
States Where The Economic Loss Rule Precludes Negligence.....	32
States Requiring Privity For Implied Warranty.....	35
States Requiring Privity For Express Warranty.....	37
States Requiring “Basis Of The Bargain” For Express Warranty	39
Warranty Allegations That Fail To Allege Specific Language, Guarantee, Or Source	42
States Requiring Pre-Suit Notice For Implied Warranty	43
States Requiring Pre-Suit Notice For Express Warranty.....	46
States Requiring Absence Of An Adequate Remedy At Law For Unjust Enrichment.....	49
States Requiring A Direct Benefit Be Conferred On Defendant For Unjust Enrichment.....	50
States Precluding Unjust Enrichment Where There Is An Adequate Remedy At Law	52
States Where Medical Monitoring Is Not Recognized As An Independent Cause Of Action	57
States That Have Not Addressed Whether Medical Monitoring May Be An Independent Cause Of Action.....	59
States Precluding Medical Monitoring Where It Is Only A Measure Of Damages.....	60
State Punitive Damages Standards.....	61

DEFENDANTS NAMED IN PIMC BY SUPPLY CHAIN ROLE

Supply Chain Role	Defendants
API Manufacturers	Aurobindo Pharma, Ltd.; Hetero Drugs, Limited; Hetero Labs, Ltd.; Mylan Laboratories Ltd.; Zhejiang Huahai Pharmaceutical Co., Ltd.
Finished Dose Manufacturers¹	Arrow Pharm Malta Ltd.; Aurolife Pharma, LLC; Hetero Labs, Ltd.; Mylan Pharmaceuticals Inc.; Teva Pharmaceutical Industries Ltd.; Torrent Pharmaceuticals Ltd.; Zhejiang Huahai Pharmaceutical Co., Ltd.
Distributors²	Actavis LLC; Actavis Pharma, Inc.; Aurobindo Pharma USA, Inc.; Camber Pharmaceuticals, Inc.; Huahai US Inc.; Solco Healthcare US, LLC; Teva Pharmaceuticals USA, Inc.; Torrent Pharma, Inc.
Wholesalers	AmerisourceBergen Corporation; Cardinal Health, Inc.; McKesson Corporation
Repackagers³	AvKARE, Inc.; H.J. Harkins Company, Inc. dba Pharma Pac.; Major Pharmaceuticals, Inc.; Preferred Pharmaceuticals, Inc.; RemedyRepack, Inc.
Pharmacies⁴	Albertson's LLC; CVS Pharmacy, Inc. (incorrectly named as CVS Health Corporation); Express Scripts, Inc.; Humana Pharmacy, Inc; The Kroger, Co.; OptumRx; Rite-Aid Corporation; Walgreens Boots Alliance, Inc.; Walmart Inc.

¹ Defendants Aurobindo Pharma USA, Inc., Hetero USA, Inc., and Princeton Pharmaceutical Inc., named in all three Complaints, serve as FDA liaisons for certain Manufacturer Defendants.

² The Distributor Aceteris, LLC has been dismissed by stipulation.

³ The following Repackagers have been dismissed from all three Complaints by stipulation: A-S Medication Solutions, LLC; Bryant Ranch Prepack, Inc.; The Harvard Drug Group, LLC; Northwind Pharmaceuticals; and NuCare Pharmaceuticals, Inc.

⁴ The following Defendants named as Pharmacies have been dismissed from all three Complaints by stipulation: Cigna Corporation; Express Scripts Holding Company; Humana, Inc.; Optum Inc.; and UnitedHealth Group.

DEFENDANTS NAMED IN ELMC BY SUPPLY CHAIN ROLE

Supply Chain Role	Defendants
API Manufacturers	Aurobindo Pharma, Ltd.; Hetero Drugs, Limited; Hetero Labs, Ltd.; Mylan Laboratories Ltd.; Zhejiang Huahai Pharmaceutical Co., Ltd.
Finished Dose Manufacturers	Arrow Pharm Malta Ltd.; Aurolife Pharma, LLC; Hetero Labs, Ltd.; Mylan Pharmaceuticals Inc.; Teva Pharmaceutical Industries Ltd.; Torrent Pharmaceuticals Ltd.; Zhejiang Huahai Pharmaceutical Co., Ltd.
Distributors	Actavis Pharma, Inc.; Actavis, LLC; Aurobindo Pharma USA, Inc.; Camber Pharmaceuticals, Inc.; Huahai US Inc.; Solco Healthcare US, LLC; Teva Pharmaceuticals USA, Inc.; Torrent Pharma, Inc.
Wholesalers	AmerisourceBergen Corporation; Cardinal Health, Inc.; McKesson Corporation
Repackagers	AvKARE, Inc.; H.J. Harkins Company, Inc. dba Pharma Pac.; Preferred Pharmaceuticals, Inc.; RemedyRepack, Inc.
Pharmacies	Albertson's LLC; CVS Pharmacy, Inc. (incorrectly named as CVS Health Corporation); Express Scripts, Inc.; Humana Pharmacy, Inc.; The Kroger, Co.; OptumRx; Rite-Aid Corporation; Walgreens Boots Alliance, Inc.; Walmart Inc.

DEFENDANTS NAMED IN MMMC BY SUPPLY CHAIN ROLE

Supply Chain Role	Defendants
API Manufacturers	Aurobindo Pharma, Ltd.; Hetero Drugs, Limited; Hetero Labs, Ltd.; Mylan Laboratories Ltd.; Zhejiang Huahai Pharmaceutical Co., Ltd.
Finished Dose Manufacturers	Aurolife Pharma, LLC; Hetero Labs, Ltd.; Mylan Pharmaceuticals Inc.; Teva Pharmaceutical Industries Ltd.; Torrent Pharmaceuticals Ltd.; Zhejiang Huahai Pharmaceutical Co., Ltd.
Distributors	Actavis LLC; Actavis Pharma, Inc.; Arrow Pharm Malta Ltd.; Aurobindo Pharma USA, Inc.; Huahai US Inc.; Camber Pharmaceuticals, Inc.; Solco Healthcare US, LLC
Wholesalers	AmerisourceBergen Corporation; Cardinal Health, Inc.; McKesson Corporation
Repackagers	AvKARE, Inc.; A-S Medication Solutions, LLC; H.J. Harkins Company, Inc. dba Pharma Pac.; Major Pharmaceuticals, Inc.; Preferred Pharmaceuticals, Inc.; RemedyRepack, Inc.
Pharmacies	Albertson's LLC; CVS Pharmacy, Inc. (incorrectly named as CVS Health Corporation); Express Scripts, Inc.; Humana Pharmacy, Inc.; The Kroger, Co.; OptumRx; Rite-Aid Corporation; Walgreens Boots Alliance, Inc.; Walmart Inc.

THE CLAIMS ASSERTED IN THE PIMC

Claims	Allegation No.
Claim I: Strict Liability – Manufacturing Defect	426-49
Claim II: Strict Liability – Failure to Warn	438-49
Claim III: Strict Liability – Design Defect	450-59
Claim IV: Negligence	460-65
Claim V: Negligence <i>Per Se</i>	466-80
Claim VI: Breach of Express Warranty	481-90
Claim VII: Breach of Implied Warranty	491-96
Claim VIII: Fraud	497-509
Claim IX: Negligent Misrepresentation	510-19
Claim X: Breach of Consumer Protection Statutes	520-79
Claim XI: Wrongful Death	580-87
Claim XII: Survival Actions	588-92
Claim XIII: Loss of Consortium	593-600
Claim XIV: Punitive Damages	601-14

THE CLAIMS ASSERTED IN THE ELMC

Claims	Allegation No.
Claims I and II: Breach of Express Warranties	435-54
Claims III and IV: Breach of Implied Warranties of Merchantability and Fitness	466-82
Claims V and VI: Magnuson-Moss Warranty Act	483-90
Claims VII and VIII: Fraud (Affirmative Misrepresentation, Omission, and Concealment)	491-516
Claims IX and X: Negligent Misrepresentation and Omission	517-42
Claims XI and XII: Violation of State Consumer Protection Laws	543-54
Claims XIII and XIV: Unjust Enrichment	555-66
Claims XV and XVI: Negligence	567-86
Claims XVII and XVIII: Negligence <i>Per Se</i>	587-602

THE CLAIMS ASSERTED IN THE MMMC

Claims	Allegation No.
Claim I: Negligence	394-405
Claim II: Negligence <i>Per Se</i>	406-13
Claim III: Medical Monitoring	414-29
Claim IV: Products Liability- Manufacturing Defect	430-36
Claim V: Failure to Warn	437-42
Claim VI: Violation of Magnuson-Moss Warranty Act	443-56
Class VII: Breach of Implied Warranty of Merchantability	457-67
Claim VIII: Breach of Express Warranties	468-76
Claim IX: Fraud/Fraudulent Concealment	477-90

**STATE LAW CLAIMS ASSERTED IN THE PIMC THAT ARE
PREEMPTED**

Preempted Claims	Allegations Demonstrating the Claims Seek to Enforce the FDCA
Claim I: Strict Liability – Manufacturing Defect	443
Claim III: Strict Liability – Design Defect	450-59
Claim V: Negligence <i>Per Se</i>	466-80, 467
Count VI: Breach of Express Warranty	481-90
Claim VIII: Fraud	497-509
Claim IX: Negligent Misrepresentation	510-19
Claim X: Breach of Consumer Protection Statutes	520-79

**STATE LAW CLAIMS ASSERTED IN THE ELMC THAT ARE
PREEMPTED**

Preempted Claims	Allegations Demonstrating the Claims Seek to Enforce the FDCA
Claims I and II: Breach of Express Warranty	171, 181, 435-45, 446-54, 439-440
Claims VII and VIII: Fraud (Affirmative Misrepresentation, Omission, and Concealment)	491-503, 504-516, 493-94
Claims IX and X: Negligent Misrepresentation and Omission	517-29, 530-42
Claims XI and XII: Violation of State Consumer Protection Laws	543-48, 549-54
Claims XVII and XVIII: Negligence <i>Per Se</i>	587-94, 595-602

**STATE LAW CLAIMS ASSERTED IN THE MMMC THAT ARE
PREEMPTED**

Preempted Claims	Allegations Demonstrating the Claims Seek to Enforce the FDCA
Claim II: Negligence <i>Per Se</i>	406-413, 408
Claim V: Failure to Warn	438
Claim VIII: Express Warranty	468-476
Claim IX: Fraud/ Fraudulent Concealment	477-490

**ELMC DEFENDANTS AS TO WHOM NO CLASS REPRESENTATIVE
ALLEGES INJURY**

Defendants
A-S Medical Solutions, LLC Albertson's LLC AmerisourceBergen Corporation AvKARE, Inc. Bryant Ranch Prepack, Inc. Cardinal Health CVS Pharmacy, Inc. Express Scripts, Inc. H J Harkins Co., Inc. Humana Pharmacy, Inc. The Kroger Co. Major Pharmaceuticals, Inc. McKesson Corporation Northwind Pharmaceuticals OptumRx Preferred Pharmaceuticals Remedy Repack, Inc. Rite-Aid Corporation Walgreens Boots Alliance Walmart Inc.

**MMMC DEFENDANTS AS TO WHOM NO CLASS REPRESENTATIVE
ALLEGES INJURY**

Defendants
Actavis Pharma, Inc. Arrow Pharm Malta Ltd. A-S Medical Solutions, LLC Albertson's LLC AmerisourceBergen Corporation AvKARE, Inc. Bryant Ranch Prepack, Inc. Cardinal Health Express Scripts, Inc. The Harvard Drug Group, LLC H J Harkins Co., Inc. Humana Pharmacy, Inc. The Kroger Co. Major Pharmaceuticals, Inc. McKesson Corporation Northwind Pharmaceuticals NuCare Pharmaceuticals, Inc. OptumRx Preferred Pharmaceuticals Remedy Repack, Inc. Rite-Aid Corporation Teva Pharmaceutical USA, Inc. Torrent Pharma, Inc. Torrent Pharmaceuticals Ltd. Walgreens Boots Alliance

**JURISDICTIONS FOR WHICH THE ELMC CLASS REPRESENTATIVES
HAVE NO STANDING**

Jurisdictions
Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming

**JURISDICTIONS FOR WHICH THE MMMC CLASS
REPRESENTATIVES HAVE NO STANDING**

Jurisdictions
Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming

ELMC DEFENDANTS OVER WHICH THIS COURT LACKS PERSONAL JURISDICTION⁵

Non-Resident Defendants Not Alleged to Have Supplied Valsartan to Any New Jersey Class Representative

Albertson's LLC
AmerisourceBergen Corporation
Aurobindo Pharma Ltd.
AvKARE, Inc.
Bryant Ranch Pre-pack Inc.
Cardinal Health Inc.
CVS Health Corporation
Express Scripts Inc.
Express Scripts Holding Company
The Harvard Drug Group LLC
H J Harkins Co. Inc. d/b/a/ Pharma Pac
Humana Pharmacy Inc.
The Kroger Co.
McKesson Corporation
Mylan Pharmaceuticals Inc.
NuCare Pharmaceuticals Inc.
Rite-Aid Corporation
Teva Pharmaceutical Industries Ltd.
Walmart Inc.

⁵ All Defendants reserve the right to challenge personal jurisdiction.

**MMMC DEFENDANTS OVER WHICH THIS COURT LACKS
PERSONAL JURISDICTION**

**Non-Resident Defendants Not Alleged to Have Supplied Valsartan to Any
New Jersey Class Representative**

Albertson's LLC
AvKARE, Inc.
Bryant Ranch Pre-pack Inc.
Express Scripts Inc.
Express Scripts Holding Company
H J Harkins Co. Inc. d/b/a/ Pharma Pac
Humana Pharmacy Inc.
The Kroger Co.
Mylan Pharmaceuticals Inc.
NuCare Pharmaceuticals Inc.
Rite-Aid Corporation
Teva Pharmaceutical Industries Ltd.
Walmart Inc.

STATE LAW CLAIMS SUBSUMED BY PRODUCT LIABILITY ACTS

State	Authority	PIMC Claims Subsumed	ELMC Claims Subsumed	MMC Claims Subsumed
Connecticut	Conn. Gen. Stat. § 52-572m-q (state product liability act); Conn. Gen. Stat. Ann. § 52-572n(a) (stating the product liability is an exclusive remedy); <i>Winslow v. Lewis-Shepard, Inc.</i> , 562 A.2d 517, 521 (Conn. 1989) (finding subsumption of claims).	All	All	All
Indiana	Ind. Code § 34-20-1-1 (product liability act); <i>Hathaway v. Cintas Corp. Serv.</i> , 903 F. Supp. 2d 669, 673 (N.D. Ind. 2012) (express warranty and implied warranty claims subsumed); <i>Henderson v. Freightliner, LLC</i> , No. 1:02-cv-01301, 2005 WL 775929, at *3 (S.D. Ind. Mar. 24, 2005) (finding multiple claims subsumed); <i>Doerner v. Swisher Int'l, Inc.</i> , 272 F.3d 928, 932 (7th Cir. 2001) (loss of consortium claim brought under IPLA).	All	All	All
Kansas	Kan. Stat. Ann. § 60-3302 <i>et seq.</i> (product liability act); <i>Patton v. Hutchinson Wil-Rich Mfg. Co.</i> , 861	All Except Claim X	All Except Claims XI and XII	All

State	Authority	PIMC Claims Subsumed	ELMC Claims Subsumed	MMMC Claims Subsumed
	P.2d 1299, 1311 (Kan. 1993) (discussing subsumption doctrine of Kansas Product Liability Act).			
Louisiana	La. Stat. § 9:2800.51, <i>et seq.</i> (product liability act); <i>id.</i> at § 9:2800.52 (stating that the product liability act provides the exclusive theories under which a claim can be brought); <i>id.</i> at § 9:2800.54(B)(1-4) (limiting LPLA cause of action to four theories); <i>Jefferson v. Lead Indus. Ass'n, Inc.</i> , 106 F.3d 1248, 1251 (5th Cir. 1997) (finding subsumption of claims); <i>see also Stroder v. Yamaha Motor Corp., U.S.A.</i> , No. 04-cv-3040, 2005 WL 2037419, at *2 (E.D. La. Aug. 4, 2005) (same).	All	All	All
Mississippi	Miss. Code § 11-1-63 (product liability act); <i>Estes v. Lanx, Inc.</i> , 1:14-cv-052, 2015 WL 9462964, at *5 (N.D. Miss. Dec. 23, 2015) (finding MPLA was amended to signal the Mississippi Legislature's intent for all claims brought	All Except Claim VIII	All Except Claims VII and VIII	All Except Claim IX

State	Authority	PIMC Claims Subsumed	ELMC Claims Subsumed	MMMC Claims Subsumed
	for damage caused by a product to be analyzed under the MPLA); <i>Lawson v. Honeywell Int'l, Inc.</i> , 75 So. 3d 1024, 1027 (Miss. 2011) (finding strict liability governed by MPLA); <i>McSwain v. Sunrise Med., Inc.</i> , 689 F. Supp. 2d 835, 848 (S.D. Miss. 2010) (finding MPLA subsumed multiple claims).			
North Carolina	N.C. Gen. Stat. § 99B-1.1 (abolishing strict liability).	Claims I, II, and III Only	None	None
Ohio	Ohio Rev. Code § 2307.71 (product liability act); <i>Kodger v. Zimmer Biomet Holdings, Inc.</i> , No. 1:17-cv-1350, 2017 WL 4348997, at *5 (N.D. Ohio Sept. 29, 2017) (finding sweeping abrogation) (citing Ohio Rev. Code Ann. § 2307.71(B)); <i>see also Johnson v. Eli Lilly & Co.</i> , No. 1:14-cv-453, 2015 WL 1120009, at *2 (S.D. Ohio Mar. 12, 2015) (finding subsumption of multiple claims).	All Except Claim VIII	All Except Claim VII and VIII	All Except Claim IX

State	Authority	PIMC Claims Subsumed	ELMC Claims Subsumed	MMMC Claims Subsumed
Tennessee	Tenn. Code Ann. § 29–28–102(6) (product liability act); <i>Smith v. Merial Ltd.</i> , 2:10-cv-439, 2011 WL 2119100, at *5 (D.N.J. May 26, 2011) (finding the Tennessee Product Liability Act “is at least as broad, if not broader” than the NJPLA); <i>Adkins v. Nestle Purina PetCare Co.</i> , 973 F. Supp. 2d 905, 918 (N.D. Ill. 2013) (applying Tennessee law) (dismissing claims not brought under the Tennessee Product Liability Act).	All	All	All
Washington	Wash. Rev. Code § 7.72.010, <i>et seq.</i> (product liability act); <i>Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.</i> , 858 P.2d 1054, 1066 (Wash. 1993) (en banc) (finding Washington Product Liability Act created single cause of action).	All Except Claim X	All Except Claims XI and XII	All

**STATES REQUIRING ACTUAL KNOWLEDGE OF FALSITY FOR
FRAUD**

State	Authority
California	<i>Graham v. Bank of Am., N.A.</i> , 172 Cal. Rptr. 3d 218, 228 (Cal. Ct. App. 2014)
Colorado	<i>Kinsey v. Preeson</i> , 746 P.2d 542, 550 (Colo. 1987)
D.C.	<i>Remeikis v. Boss & Phelps, Inc.</i> , 419 A.2d 986, 988 (D.C. 1980)
Florida	<i>Butler v. Yusem</i> , 44 So. 3d 102, 105 (Fla. 2010)
Georgia	<i>Greenwald v. Odom</i> , 723 S.E.2d 305 (Ga. Ct. App. 2012)
Hawaii	<i>Peace Software, Inc. v. Hawaiian Elec. Co., Inc.</i> , No. 1:09-cv-00408, 2009 WL 3923350, at *4 (D. Haw. Nov. 17, 2009)
Iowa	<i>Dier v. Peters</i> , 815 N.W.2d 1, 7 (Iowa 2012)
Idaho	<i>Country Cove Dev., Inc. v. May</i> , 150 P.3d 288, 293 (Idaho 2006)
Illinois	<i>Avon Hardware Co. v. Ace Hardware Corp.</i> , 998 N.E.2d 1281, 1287 (Ill. Ct. App. 2013)
Louisiana	<i>Sys. Eng'g & Sec. Inc. v. Science & Eng'g Ass'ns, Inc.</i> , 962 So.2d 1089, 1091 (La. Ct. App. 2007).
New Jersey	<i>Gennari v. Weichert Co. Realtors</i> , 691 A.2d 350, 367 (N.J. 1997)
New York	<i>Tuosto v. Philip Morris USA Inc.</i> , 672 F. Supp. 2d 350 (S.D.N.Y. 2009)
North Carolina	<i>Libby Hill Seafood Rests., Inc. v. Owens</i> , 3030 S.E.2d 565, 568 (N.C. Ct. App. 1983)
Massachusetts	<i>Balles v. Babcock Power Inc.</i> , 70 N.E.3d 905, 913 (Mass. 2017)
Oklahoma	<i>Key Fin., Inc. v. Koon</i> , 371 P.3d 1133, 1137 (Okla. Civ. App. 2015)
Pennsylvania	<i>Ross v. Foremost Ins. Co.</i> , 998 A.2d 648, 654 (Pa. Super. Ct. 2010)
Puerto Rico	<i>Valle-Ortiz v. R.J. Reynolds Tobacco Co.</i> , 385 F. Supp. 2d 126, 133 (D.P.R. 2005)
Rhode Island	<i>Guilbeault v. R.J. Reynolds Tobacco Co.</i> , 84 F. Supp. 2d 263, 268 (D.R.I. 2000)

State	Authority
Virginia	<i>Benton v. Phillips Edison & Co.</i> , No. 3:17-cv-630, 2017 WL 6273361, at *5 (E.D. Va. Dec. 8, 2017)
Vermont	<i>Felis v. Downs Rachlin Martin PLLC</i> , 133 A.3d 836, 842 (Vt. 2015)
Washington	<i>Adams v. King Cnty.</i> , 192 P.3d 891, 902 (Wash. 2008)

STATES WITH A RECKLESSNESS ALTERNATIVE TO FRAUD

States	Authority
Delaware	<i>Stephenson v. Capano Dev., Inc.</i> , 462 A.2d 1069, 1074 (Del. 1983)
Indiana	<i>Rice v. Strunk</i> , 670 N.E.2d 1280 (Ind. 1996).
Kansas	<i>Stechschulte v. Jennings</i> , 297 Kan. 2, 19 (Kan. 2013)
Kentucky	<i>Prather v. Abbott Labs.</i> , 960 F. Supp. 2d 700, 715 (W.D. Ky. 2013)
Maryland	<i>Thomas v. Nadel</i> , 48 A.3d 276, 282 (Md. 2012)
Maine	<i>Barr v. Dyke</i> , 49 A.3d 1280, 1286-87 (Me. 2012)
Michigan	<i>Lucas v. Awaad</i> , 830 N.W.2d 141, 152 (Mich. Ct. App. 2013)
Nebraska	<i>Freeman v. Hoffmann-La Roche, Inc.</i> , 618 N.W.2d 827, 844-45 (Neb. 2000)
New Hampshire	<i>Town of Hooksett School Dist. v. W.R. Grace Co.</i> , 617 F. Supp. 126, 133 (D.N.H. 1984)
New Mexico	<i>Array Techs., Inc. v. Mitchell</i> , 305 F. Supp. 3d 1256, 1276 (D. N. M. 2018)
North Carolina	<i>Libby Hill Seafood Rests., Inc. v. Owens</i> , 3030 S.E.2d 565, 568 (N.C. Ct. App. 1983)
Ohio	<i>Schmitz, et al. v. Nat'l Collegiate Athletic Assn</i> , 67 N.E.3d 852 (Ohio App. Ct. 2016)
South Carolina	<i>Turner v. Milliman</i> , 708 S.E.2d 766 (S.C. 2011)
South Dakota	<i>Stabler v. First State Bank of Roscoe</i> , 865 N.W.2d 466, 477 (S.D. 2015)
Texas	<i>JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.</i> , 546 S.W.3d 648, 653 (Tex. 2018)
Utah	<i>Giusti v. Sterling Wentworth Corp.</i> , 201 P.3d 966, 977 n. 38 (Utah 2009)
Wisconsin	<i>Tietsworth v. Harley-Davidson, Inc.</i> , 677 N.W.2d 233, 252 n. 38 (Wisc. 2004)

**STATES ADOPTING THE SECOND OR THIRD RESTATEMENT FOR
DESIGN DEFECT CLAIMS**

State	Restatement (Second)	Restatement (Third)
Alaska	<i>Shanks v. Upjohn Co.</i> , 835 P.2d 1189 (Alaska 1992) (expressly rejected adherence to comment k of Restatement Second, §402 while admitting its precepts underlie two-prong design defect test)	
Arizona	<i>Golonka v. General Motors Corp.</i> , 204 Ariz. 575, 65 P.3d 956, (Ariz. Ct. App. 2003)	
California		<i>Trejo v. Johnson & Johnson</i> , 13 Cal. App. 5th 110, 220 Cal. Rptr. 3d 127 (Cal. Ct. App. 2017)
Colorado	<i>Barton v. Adams Rental, Inc.</i> , 938 P.2d 532 (Colo. 1997)	
Connecticut	<i>Potter v. Chicago Pneumatic Tool Co.</i> , 241 Conn. 199, 694 A.2d 1319, (1997)	
Dist. of Columbia	<i>Warner Fruehauf Trailer Co., Inc v. Boston</i> , 654 A.2d 1272 (D.C. 1995)	
Florida	<i>Aubin v. Union Carbide Corp.</i> , 177 So. 3d 489 (Fla. 2015)	
Indiana	<i>Montgomery Ward Co. v. Gregg</i> , 554 N.E.2d 1145 (Ind. Ct. App. 1990) (adopted Restatement (Second) and	

State	Restatement (Second)	Restatement (Third)
	codified product liability actions to allow negligence)	
Iowa		<i>Wright v. Brooke Group Ltd.</i> , 652 N.W.2d 159 (Iowa 2002)
Kansas	<i>Jenkins v. Amchem Products, Inc.</i> , 886 P.2d 869, 256 Kan. 602 (1994)	
Maryland	<i>Nissan Motor Co. Ltd. v. Nave</i> , 129 Md. App. 90, 740 A.2d 102 (Md. Spec. Ct. App. 1999)	
Massachusetts		<i>Evans v. Lorillard Tobacco Co.</i> , 465 Mass. 411, 990 N.E.2d 997, (Mass. 2013)
Missouri	<i>Thompson v. Brown & Williamson Tobacco Corp.</i> , 207 S.W.3d 76 (Mo. Ct. App. 2006) (Adopts Restatement (Second) and statutory scheme which permits negligent design defect actions)	
Montana	<i>Streich v. Hilton-Davis, a Div. of Sterling Drug, Inc.</i> , 214 Mont. 44, 692 P.2d 440 (1984)	
Nebraska	<i>Rahmig v. Mosley Machinery Co.</i> , 226 Neb. 423, 412 N.W.2d 56 (1987) (Adopts Restatement (Second) test for strict liability design defect	

State	Restatement (Second)	Restatement (Third)
	while permitting negligent design actions)	
Nevada	<i>Allison v. Merck and Co., Inc.</i> , 110, 878 P.2d 948, Nev. 762 (1994)	
New Hampshire	<i>Chellman v. Saab-Scania AB</i> , 138 N.H. 73, 637 A.2d 148, (N.H. 1993)	
New York		<i>Scarangella v. Thomas Built Buses, Inc.</i> , 695 N.Y.S.2d 570, 717 N.E.2d 679, (N.Y. Sup. Ct. App. Div. 1999) (Strict liability is imposed in design defects, with reliance on Restatement (Third) §, comment f.)
Ohio	<i>Leichtamer v. American Motors Corp.</i> , 67 Ohio St. 2d 456, 424 N.E.2d 568, (Ohio 1981) (Product liability lies in negligence and strict liability per Restatement (Second))	
Oklahoma	<i>Stewart v. Scott-Kitz Miller Co.</i> , 1981 OK CIV APP 3, 626 P.2d 329 (Ok. Civ. App. 1981) (stating the state is committed to the strict liability concept promulgated un Restatement (Second) of Torts.)	
Oregon	<i>Hoyt v. Vitek, Inc.</i> , 134 Or. App. 271, 894 P.2d 1225, (Ore. Ct. App. 1995)	

State	Restatement (Second)	Restatement (Third)
	O.R.S. § 30.920	
Pennsylvania		<i>Lance v. Wyeth</i> , 624 Pa. 231, 85 A.3d 434, (2014)
Puerto Rico	<i>Rivera et al. v. Superior Pkg., Inc. et al.</i> , No. RE-89-593, 1992 WL 754830, n.6 (P.R. Dec. 9, 1992)	
Rhode Island		<i>Buonanno v. Colmar Belting Co.</i> , 733 A.2d 712 (R.I. 1999)
South Carolina	<i>Bragg v. Hi-Ranger, Inc.</i> , 319 S.C. 531, 462 S.E.2d 321 (S. C. Ct. App. 1995) (noting that the General Assembly signaled its agreement by adopting the Restatement (Second))	
South Dakota	<i>Burley v. Kytect Innovative Sports Equipment, Inc.</i> , 2007 S.D. 82, ¶ 27, 737 N.W.2d 397 (S.D. 2007)	
Tennessee	<i>Ray by Holman v. BIC Corp.</i> , 925 S.W.2d 527 (Tenn. 1996)	
Texas		<i>Hernandez v. Tokai Corp.</i> , 2 S.W.3d 251 (Tex. 1999) Tex. Civ. Prac. & Rem. Code Ann. § 82.005 § 82.005
Utah	<i>Grundberg v. Upjohn Co.</i> , 813 P.2d 89 (Utah 1991)	
Vermont	<i>Farnham v. Bombardier, Inc.</i> , 161 Vt. 619, 640 A.2d 47 (Vt. 1994)	

State	Restatement (Second)	Restatement (Third)
Washington	<i>Falk v. Keene Corp.</i> , 113 Wash. 2d 645, 782 P.2d 974, (Wash. 1989)	
Wisconsin	<i>Godoy ex rel. Gramling v. E.I. du Pont Nemours and Co.</i> , 329 Wis. 2d 91, 768 N.W.2d 674 (Wis. 2009) (The Restatement (Second) remains the touchstone for product defect litigation)	

**STATES THAT DO NOT RECOGNIZE STRICT LIABILITY-FAILURE
TO WARN**

State	Authority
Delaware	<i>Javens v. G.E. Healthcare Inc.</i> , No. 1:18-cv-1030, 2020 WL 2783581, at *2 (D. Del. May 29, 2020) (citing Pennsylvania, Delaware and Massachusetts law)
Massachusetts	<i>Javens v. G.E. Healthcare Inc.</i> , No. 1:18cv-1030, 2020 WL 2783581, at *2 (D. Del. May 29, 2020) (citing Pennsylvania, Delaware and Massachusetts law)
North Carolina	N.C. Gen. Stat. § 99B-1.1
Pennsylvania	<i>Javens v. G.E. Healthcare Inc.</i> , No. 1:18-cv-1030 (RGA) (SRA), 2020 WL 2783581, at *2 (D. Del. May 29, 2020) (citing Pennsylvania, Delaware, and Massachusetts law); <i>see also Rosenberg v. C.R. Bard, Inc.</i> , 287 F.Supp.3d 572, 579 (E.D. Pa. 2019); <i>Hahn v. Richter</i> , 628 A.2d 860, 871 (Pa. Super. Ct. 1993), <i>aff'd</i> , 673 A.2d 888 (Pa. 1996) (noting that Pennsylvania, for policy reasons, does not recognize strict liability for prescription drug manufacturers); <i>see also Mills v. Ethicon, Inc.</i> , 406 F. Supp. 3d 363, 377-380 (D.N.J. 2019) (citing, <i>inter alia</i> , Hahn and concluding that “Pennsylvania law bars [plaintiff’s] strict liability design defect and failure-to-warn claims”)
Virginia	<i>Torkie-Tork v. Wyeth</i> , 757 F. Supp. 2d 567, 572 n.11 (E.D. Va. 2010)

**STATES FOR WHICH CLASS REPRESENTATIVES HAVE NOT
ALLEGED THE PROTECTED CLASS REQUIRED FOR NEGLIGENCE
PER SE**

State	Authority
Alabama	<i>Fox v. Bartholf</i> , 374 So. 2d 294, 295 (Ala. 1979)
Colorado	<i>Smit v. Anderson</i> , 72 P.3d 369, 375 (Colo. App. 2002)
Connecticut	<i>Gore v. People's Sav. Bank</i> , 665 A.2d 1341, 1345 (Conn. 1995)
Florida	<i>Liese v. Indian River Cnty. Hosp. Dist.</i> , 701 F.3d 334, 353 (11th Cir. 2012) (applying Florida law)
Georgia	<i>McLain v. Mariner Health Care, Inc.</i> , 631 S.E.2d 435 (Ga. Ct. App. 2006)
Illinois	<i>Bier v. Leanna Lakeside Prop. Ass'n</i> , 711 N.E.2d 773, 783 (Ill. App. Ct. 1999)
Maryland	<i>Hart v. A.C.E. Taxi</i> , 442 F. Supp. 2d 268, 270 (D. Md. 2006)
Michigan	<i>Mercantile Bank of Mich. v. CLMIA, LLC</i> , No. 316777, 2015 WL 630259, at *9 (Mich. Ct. App. Feb. 12, 2015)
Minnesota	<i>Vind v. McGuire</i> , No. A13-0591, 2013 WL 6152312, at *4 (Minn. Ct. App. Nov. 25, 2013)
Mississippi	<i>Faul v. Perlman</i> , 104 So. 3d 148, 156 (Miss. Ct. App. 2012)
Montana	<i>Maier v. Wilson</i> , 409 P.3d 878, 883 (Mont. 2017)
North Carolina	<i>Parker v. Colson</i> , 831 S.E.2d 102, 106 (N.C. Ct. App. 2019)
New Mexico	<i>Cobb v. Gammon</i> , 389 P.3d 1058, 1073 (N.M. 2017)
Nevada	<i>Brochu v. Foote Enters., Inc.</i> , 381 P.3d 596, 2012 WL 5991571, at *3 (Nev. Nov. 29 2012) (table)
New York	<i>Dance v. Town of Southampton</i> , 95 A.D.2d 442, 445 (NY App. Div. 1983)
Oklahoma	<i>Been v. MK Enter., Inc.</i> , 256 P.3d 1040, 1044 (Okla. Civ. App. 2011)
Oregon	<i>Buoy v. Soo Hee Kim</i> , 221 P.3d 771, 779 (Or. Ct. App. 2009)
Pennsylvania	<i>Kote v. Bank of NY Mellon</i> , 169 A.3d 1103, 1113 (Pa. Super. Ct. 2017)

State	Authority
Tennessee	<i>Harden v. Danek Med., Inc.</i> , 985 S.W.2d 449, 452 (Tenn. Ct. App. 1998)
Texas	<i>Ybarra v. Ameripro Funding, Inc.</i> , No. 1:17-cv-00224, 2018 WL 2976126, at *9 (Tex. Ct. App. June 14, 2018), <i>review denied</i> (Nov. 9, 2018)
Utah	<i>Colosimo v. Gateway Cmty. Church</i> , 424 P.3d 866, 882 (Utah 2018)
Virginia	<i>Doe by Watson v. Russell Cnty. Sch. Bd.</i> , 292 F. Supp. 3d 690, 707 (W.D. Va. 2018)
Wisconsin	<i>Marvin v. Zydus Pharms. (USA) Inc.</i> , 203 F. Supp. 3d 985, 989 (W.D. Wis. 2016)

STATES THAT LIMIT OR DO NOT RECOGNIZE NEGLIGENCE *PER SE*

State	Authority
Arkansas	<i>Young v. Dodson</i> , 388 S.W.2d 94, 98 (Ark. 1965)
Arizona	<i>Craten v. Foster Poultry Farms Inc.</i> , 305 F. Supp. 3d 1051, 1054 n.2 (D. Ariz. 2018)
California	Cal. Evid. Code, § 669(a); <i>see also Ramirez v. Nelson</i> , 188 P.3d 659, 735–36 (Cal. 2008)
Kentucky	<i>St. Luke Hosp., Inc. v. Straub</i> , 354 S.W.3d 529, 534 (Ky. 2011) (noting that Kentucky, which has codified negligence <i>per se</i> , <i>see</i> KRS 446.070, “applies [only] to [violations of] Kentucky statutes[,]” and, therefore, “[violations of federal laws and regulations . . . do not create a cause of action under KRS 446.070”)
Louisiana	<i>Ducote v. Boleware</i> , 216 So.3d 934, 944 (La. Ct. App. 2016)
Massachusetts	<i>Lev v. Beverly Enters.-Mass., Inc.</i> , 929 N.E.2d 303, 313 (Mass. 2010)
Maine	<i>Binette v. Dyer Library Ass’n</i> , 688 A.2d 898, 904 (Me. 1996)
Nebraska	<i>Krehnke v. Farmers Union Co-op. Ass’n</i> , 260 N.W.2d 601, 608 (Neb. 1977)
Rhode Island	<i>Kurczy v. St. Joseph Veterans Ass’n, Inc.</i> , 820 A.2d 929, 947 (R.I. 2003)
South Carolina	<i>Salley v. Heartland-Charleston of Hanahan, SC, LLC</i> , No. 2:10-cv-00791, 2011 WL 2728051, at *3 (D.S.C. July 12, 2011) (noting that “[a] statute must permit a private cause of action in order for plaintiffs to maintain a civil suit” sounding in negligence <i>per se</i>)
Texas	<i>Sweezy v. C.R. Bard Inc.</i> , No. 3:19-cv-2172, 2020 WL 1237394, at *1 (N.D. Tex. Mar. 12, 2020) (“Texas courts . . . refuse to recognize a cause of action for negligence <i>per se</i> based on violations of the [FDCA] and FDA regulations.”) (quoting <i>Monk v. Wyeth Pharm., Inc.</i> , No. 5:16-cv-1273, 2017 WL 2063008, at *8 (W.D. Tex. May 11, 2017))

**STATES WHERE THE ECONOMIC LOSS RULE PRECLUDES
NEGLIGENCE**

State	Authority
Alabama	<i>Lloyd Word Coal Co. v. Clark Equip. Co.</i> , 543 So.2d 671, 674 (Ala. 1989)
Alaska	<i>Northern Power & Eng'g Corp. v. Caterpillar Tractor Co.</i> , 623 P.2d 324, 329 (Alaska 1981)
Arizona	<i>Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.</i> , 694 P.2d 198, 206 (Ariz. 1984), <i>abrogated on other grounds by Phelps v. Firebird Raceway, Inc.</i> , 111 P.3d 1003, 1006, 1013 (Ariz. 2005)
California	<i>Jimenez v. Superior Court</i> , 58 P.3d 450, 465 (Cal. 2002)
Colorado	<i>Jardel Enters. Inc. v. Triconsultants, Inc.</i> , 770 P.2d 1301, 1303 (Colo. App. 1998)
Delaware	<i>Danforth v. Acorn Structures, Inc.</i> , 608 A.2d 1194, 1195 (Del. 1999)
Florida	<i>Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos.</i> , 110 So. 3d 399, 407 (Fla. 2013) (economic loss doctrine applies, but only in the products liability context)
Georgia	Ga. Code Ann. § 51-1-11; <i>Busbee v. Chrysler Corp.</i> , 524 S.E.2d 539, 541 (Ga. Ct. App. 1999)
Hawaii	<i>State by Bronster v. U.S. Steel Corp.</i> , 919 P.2d 294, 302 (Haw. 1996)
Idaho	<i>Duffin v. Idaho Crop Improvement Ass'n</i> , 895 P.2d 1195, 1200-01 (Idaho 1995)
Illinois	<i>Moorman Mfg. Co. v. Nat'l Tank Co.</i> , 435 N.E.2d 443, 448-50 (Ill. 1982)
Indiana	<i>Indianapolis-Marion Cnty. Pub. Lib. v. Charlier Clark & Linard, P.C.</i> , 929 N.E.2d 722, 729 (Ind. 2010)
Iowa	<i>Am. Fire & Cas. Co. v. Ford Motor Co.</i> , 588 N.W.2d 437, 439 (Iowa 1999)
Kansas	<i>Koss Constr. v. Caterpillar, Inc.</i> , 960 P.2d 255, 260 (Kan. Ct. App. 1998); <i>Jordan v. Case Corp.</i> , 993 P.2d 650, 651-52 (Kan. Ct. App. 1999)
Kentucky	<i>Giddings & Lewis, Inc. v. Indus. Risk Insurers</i> , 348 S.W.3d 729, 733 (Ky. 2011)
Maine	<i>Oceanside at Pine Point Condos. Owners Ass'n v. Peachtree Doors, Inc.</i> , 659 A.2d 267, 270 (Me. 1995)

State	Authority
Maryland	<i>A.J. Decoster v. Westinghouse Elec. Corp.</i> , 634 A.2d 1330, 1333 (Md. Ct. App. 1994)
Massachusetts	<i>Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.</i> , 533 N.E.2d 1350, 1353 (Mass. 1989)
Minnesota	Minn. Stat. § 604.10(c) (“The economic loss recoverable in tort under this section does not include economic loss due to damage to the goods themselves.”)
Mississippi	<i>State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.</i> , 736 So.2d 384, 386-87 (Miss. Ct. App. 1999)
Missouri	<i>Clevenger & Wright, Co. v. A.O. Smith Harvestore Prods., Inc.</i> , 625 S.W.2d 906, 909 (Mo. Ct. App. 1981)
Nebraska	<i>Dobrovolny v. Ford Motor Co.</i> , 281 Neb. 86, 93, 793 N.W.2d 445, 450 (Neb. 2011)
Nevada	<i>Terracon Consultants West, Inc. v. Mandalay Resort Grp.</i> , 206 P.3d 81, 86 (Nev. 2009)
New Hampshire	<i>Lockheed Martin Corp. v. RFI Supply, Inc.</i> , 440 F.3d 549, 545-55 (1st Cir. 2006) (applying New Hampshire law)
New Mexico	<i>Farmers Alliance Mut. Ins. Co. v. Naylor</i> , 452 F. Supp. 2d 1167, 1171 (D.N.M. 2006)
New York	<i>EED Holdings v. Palmer Johnson Acquisition Corp.</i> , 387 F. Supp. 2d 265, 277 (S.D.N.Y. 2004)
North Carolina	<i>Moore v. Coachmen Indus. Inc.</i> , 499 S.E.2d 772, 780 (N.C. Ct. App. 1998)
North Dakota	<i>Steiner v. Ford Motor Co.</i> , 606 N.W.2d 881, 884 (N.D. 2000)
Oklahoma	<i>United Golf, LLC v. Westlake Chem. Corp.</i> , No. 4:05-cv-0495, 2006 WL 2807342, at *3 (N.D. Okla. 2006)
Oregon	<i>Harris v. Suniga</i> , 149 P.3d 224, 227 (Or. Ct. App. 2006), <i>aff’d</i> 180 P.3d 12 (Or. 2008)
Pennsylvania	<i>Sovereign Bank v. BJ's Wholesale Club, Inc.</i> , 533 F.3d 162, 175 (3d Cir. 2008)
Rhode Island	<i>Daniele Int'l, Inc. v. Sabra Dipping Co., LLC</i> , No. 1:17-cv-499, 2018 WL 2744976, at *2 (D.R.I. June 7, 2018)
South Carolina	<i>Kennedy v. Columbia Lumber & Mfg. Co.</i> , 384 S.E.2d 730, 734 (S.C. 1989)
South Dakota	<i>Diamond Surface, Inc. v. State Cement Plant Comm'n</i> , 583 N.W.2d 155, 160 (S.D. 1998)

State	Authority
Tennessee	<i>Acuity v. McGhee Eng'g, Inc.</i> , 297 S.W.3d 718, 734 (Tenn. Ct. App. 2008)
Texas	<i>LAN/STV v. Martin K. Eby Const. Co.</i> , 435 S.W.3d 234, 235–36 (Tex. 2014)
Utah	<i>Reighard v. Yates</i> , 285 P.3d 1168, 1176 (Utah 2012)
Vermont	<i>Gus' Catering, Inc. v. Menusoft Sys.</i> , 762 A.2d 804, 807 (Vt. 2000)
Virginia	<i>Beard Plumbing & Heating, Inc. v. Thompson Plastics, Inc.</i> , 152 F.3d 313, 316 (4th Cir. 1998)
Wisconsin	<i>Grams v. Milk Prod., Inc.</i> , 699 N.W.2d 167, 171 (Wis. 2005)
Wyoming	<i>Cont'l Ins. v. Page Eng'g Co.</i> , 783 P.2d 641, 647 (Wyo. 1989)

STATES REQUIRING PRIVACY FOR IMPLIED WARRANTY⁶

State	Authority
Alabama	<i>Rampey v. Novartis Consumer Health, Inc.</i> , 867 So.2d 1079, 1089 (Ala. 2003)
Arizona	<i>Flory v. Silvercrest Indus., Inc.</i> , 633 P.2d 383, 388 (Ariz. 1981)
Connecticut	<i>Hamon v. Digliani</i> , 148 Conn. 710, 712, 174 A.2d 294 (Conn. 1961)
Florida	<i>Mesa v. BMW of No. Am., LLC</i> , 904 So.2d 450, 458 (Fla. Dist. Ct. App. 2005) (economic loss); <i>T.W.M. v. Am. Med. Sys., Inc.</i> , 886 F. Supp. 842, 844 (N.D. Fla. 1995) (personal injury) (citing <i>Kramer v. Piper Aircraft Corp.</i> , 520 So.2d 37 (Fla. 1988))
Georgia	<i>Edwards v. Wisc. Pharmacal Co., LLC</i> , 987 F. Supp. 2d 1340, 1346 (N.D. Ga. 2013) (finding privacy required for implied and express warranty claims in context of personal injury case) (citing <i>Bryant v. Hoffmann—La Roche, Inc.</i> , 585 S.E.2d 723, 731 (Ga. Ct. App. 2003)); <i>Lamb v. Georgia-Pacific Corp.</i> , 392 S.E.2d 307, 309 (Ga. Ct. App. 1990) (economic loss)
Idaho	<i>Am. West Enter. v. CNH, LLC</i> , 316 P.3d 662, 666 (Idaho 2013)
Illinois	<i>Manley v. Hain Celestial Grp., Inc.</i> , 417 F. Supp. 3d 1114, 1121 (N.D. Ill. 2019) (citing <i>Szajna v. General Motors Corp.</i> , 503 N.E.2d 760 (Ill. 1986)); <i>Jensen v. Bayer AG</i> , 862 N.E.2d 1091, 1099-1100 (Ill. App. Ct. 2007) (finding privacy needed for breach of implied warranty in case where medical monitoring claim asserted)
Iowa	<i>Tomka v. Hoechst Celanese Corp.</i> , 528 N.W.2d 103, 108 (Iowa 1995)
Kansas	<i>Kice Indus., Inc. v. AWC Coatings, Inc.</i> , 255 F. Supp. 2d 1255, 1258 (D. Kan. 2003) (citing <i>Prof'l Lens Plan, Inc. v. Polaris Leasing</i> , 675 P.2d 887 (Kan. 1984))

⁶ While most jurisdictions requiring privacy have relaxed those requirements for cases involving personal injury, as noted in this chart, Florida, Georgia, Kentucky, and Wisconsin still require privacy for personal injury implied warranty claims.

State	Authority
Kentucky	<i>Simpson v. Champion Petfoods USA, Inc.</i> , 397 F. Supp. 3d 952, 970 (E.D. Ky. 2019) (economic loss); <i>Compex Int'l Co., Ltd. v. Taylor</i> , 209 S.W.3d 462, 465 (Ky. 2006) (personal injury)
Michigan	<i>Pidcock v. Ewing</i> , 371 F. Supp. 2d 870, 878 (E.D. Mich. 2005)
Nevada	<i>Regent at Town Ctr. Homeowners' Ass'n v. Oxbow Constr., LLC</i> , 419 P.3d 702, 2018 WL 2431690, at *4 (Nev. May 24, 2018) (table opinion); <i>Long v. Flanigan Warehouse Co. & Inland Ladder Co.</i> , 382 P.2d 399, 402 (Nev. 1963)
New York	<i>Cummings v. FCA US LLC</i> , 401 F. Supp. 3d 288, 309 (N.D.N.Y. 2019); <i>Lexow & Jenkins, P.C. v. Hertz Commercial Leasing Corp.</i> , 122 A.D.2d 25, 26 (N.Y. 2d Dep't 1986)
North Carolina	<i>Energy Investors Fund, L.P., Inc. v. Metric Constructors, Inc.</i> , 525 S.E.2d 441, 446 (N.C. 2000) <i>Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.</i> , 623 S.E.2d 334, 339 (N.C. Ct. App. 2006)
Ohio	<i>McKinney v. Bayer Corp.</i> , 744 F. Supp. 2d 733, 757-58 (N.D. Ohio 2010) (citing <i>Curl v. Volkswagen of Am., Inc.</i> , 871 N.E.2d 1141, 1147 (Ohio 2007))
Oregon	<i>Davis v. Homasote Co.</i> , 574 P.2d 1116, 1117 (Or. 1977)
Tennessee	<i>Messer Greisheim Indus. v. Cryotech of Kingsport, Inc.</i> , 131 S.W.3d 457, 463 (Tenn. Ct. App. 2003)
Utah	<i>Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims, LC</i> , 221 P.3d 234, 252 (Utah 2009)
Vermont	<i>Mainline Tractor & Equip. Co., Inc. v. Nutrite Corp.</i> , 937 F. Supp. 1095, 1108 (D. Vt. 1996)
Virginia	<i>Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.</i> , 491 S.E.2d 731, 734 (Va. 1997)
Washington	<i>Baughn v. Honda Motor Co., Ltd.</i> , 727 P.2d 655, 669 (Wash. 1986).
Wisconsin	<i>Twin Disc, Inc. v. Big Bud Tractor, Inc.</i> , 582 F. Supp. 208, 215 (E.D. Wisc. 1984) (economic loss); <i>Staudt v. Artifex Ltd.</i> , 16 F. Supp. 2d 1023 (E.D. Wis. 1998)

STATES REQUIRING PRIVACY FOR EXPRESS WARRANTY⁷

State	Authority
Connecticut	<i>Fraiser v. Stanley Black & Decker, Inc.</i> , 109 F. Supp. 3d 498, 506 (D. Conn. 2015).
Florida	<i>T.W.M. v. American Med. Sys., Inc.</i> , 886 F. Supp. 842, 844 (N.D. Fla. 1995) (personal injury); <i>Weiss v. Johansen</i> , 898 So.2d 1009 (Fla. Dist. Ct. App. 2005) (economic loss)
Georgia	<i>Edwards v. Wis. Pharmacal Co., LLC</i> , 987 F. Supp. 2d 1340, 1346 (N.D. Ga. 2013) (finding privacy required for implied and express warranty claims in context of personal injury case) (citing <i>Bryant v. Hoffmann—La Roche, Inc.</i> , 585 S.E.2d 723, 731 (Ga. Ct. App. 2003)); <i>Lamb v. Georgia-Pacific Corp.</i> , 392 S.E.2d 307, 309 (Ga. Ct. App. 1990) (economic loss)
Illinois	<i>Manley v. Hain Celestial Grp., Inc.</i> , 417 F. Supp. 3d 1114, 1125 (N.D. Ill. 2019) (citing <i>Collins Co. Ltd. v. Carboline Co.</i> , 532 N.E.2d 834 (Ill. 1988)).
Indiana	<i>Atkinson v. P&G-Clairol, Inc.</i> , 813 F. Supp. 2d 1021, 1026 (N.D. Ind. 2011)
Iowa	<i>Tomka v. Hoechst Celanese Corp.</i> , 528 N.W.2d 103, 108 (Iowa 1995)
Kentucky	<i>Simpson v. Champion Petfoods USA, Inc.</i> , 397 F. Supp. 3d 952, 970 (E.D. Ky. 2019) (economic loss); <i>Compex Int'l Co., Ltd. v. Taylor</i> , 209 S.W.3d 462, 465 (Ky. 2006) (personal injury)
Maryland	<i>Copiers Typewriters Calculators, Inc. v. Toshiba Corp.</i> , 576 F. Supp. 312, 323 (D. Md. 1983) (citing <i>Blankenship v. Morrison Machine Co.</i> , 257 A.2d 430 (Md. 1969)).
Nevada	<i>Regent at Town Ctr. Homeowners' Ass'n v. Oxbow Constr., LLC</i> , 419 P.3d 702 (Nev. May 24, 2018) (table opinion)
Virginia	<i>Genito Glenn L.P. v. Nat'l. Housing Bldg. Corp.</i> , 50 Va. Cir. 71, 1999 WL 33722382, *5 (Va. Cir. Ct. 1999)

⁷ While most jurisdictions requiring privacy have relaxed those requirements for cases involving personal injury, as noted in this chart, Florida, Georgia, Kentucky, and Wisconsin still require privacy for personal injury express warranty claims.

State	Authority
Wisconsin	<i>Twin Disc. Inc. v. Big Bud Tractor, Inc.</i> , 582 F. Supp. 208, 215 (E.D. Wis. 1984) (economic loss); <i>Staudt v. Artifex Ltd.</i> , 16 F.Supp.2d 1023 (E.D. Wis. 1998)

STATES REQUIRING “BASIS OF THE BARGAIN” FOR EXPRESS WARRANTY

State	Authority
Alabama	Ala. Code § 7-2-313(1)(a)
Alaska	Alaska Stat. § 45.02.313
Arizona	Az. Rev. Stat. Ann. § 47-2313(1)
Arkansas	Ark. Code Ann. § 4-2-313(1)(a)
California	Cal. Com. Code § 2313(1)(a)
Colorado	Colo. Rev. Stat. § 4-2-313(1)(a)
Connecticut	Conn. Gen. Stat. § 42a-2-313(1)
Delaware	Del. Code tit. 6, § 2-313(1)(a)
District of Columbia	D.C. Code § 28:2-313(1)(a)
Florida	Fla. Stat. § 672.313(1)(a)
Georgia	Ga. Code Ann. § 11-2-313(1)(a)
Hawaii	Haw. Rev. Stat. § 490:2-313
Idaho	Idaho Code § 28-2-313
Illinois	810 Ill. Comp. Stat. § 5/2-313(a)
Indiana	Ind. Code § 26-1-2-313(1)(a)
Iowa	Iowa Code Ann. § 554.2313(1)(a)
Kansas	Kan. Stat. Ann. § 84-2-313(1)(a)
Kentucky	Ky. Rev. Stat. Ann. § 355.2-313
Maine	Me. Stat. tit. 11, § 2-313(1)(a)

State	Authority
Maryland	Md. Code Ann., Com. Law § 2-313 (1)
Massachusetts	Mass. Gen. ch. 106 § 2-313
Michigan	Mich. Comp. Laws § 440.2313(1)(a)
Minnesota	Minn. Stat. § 336.2-313(1)(a)
Mississippi	Miss. Code Ann. § 75-2-313(1)(a)
Missouri	Mo. Rev. Stat. § 400.2-313(1)
Montana	Mont. Code Ann. § 30-2-313
Nebraska	Neb. Rev. Stat. § 2-313
Nevada	Nev. Rev. Stat. § 104.2313
New Hampshire	N.H. Rev. Stat. Ann. § 382-A:2-313
New Jersey	N.J. Stat. Ann. § 12A:2-313(1)(a)
New Mexico	N.M. Stat. Ann. § 55-2-313(1)(a)
New York	N.Y. U.C.C. Law § 2-313(1)(a)
North Carolina	N.C. Gen. Stat. § 25-2-313(1)(a)
North Dakota	N.D. Cent. Code § 41-02.1-19
Ohio	Ohio Rev. Code Ann. § 1302.26(A)(1)
Oklahoma	Okla. Stat. tit. 12A, § 2-313
Oregon	Or. Rev. Stat. § 72.3130
Pennsylvania	13 Pa. Cons. Stat. § 2313(1)
Rhode Island	R.I. Stat. § 6A-2-313(1)
South Carolina	S.C. Code Ann. § 36-2-313

State	Authority
South Dakota	S.D. Codified Laws § 57A-2-313
Tennessee	Tenn. Code Ann. § 47-2-313(1)(a)
Texas	Tex. Bus. & Com. Code Ann. § 2.313(a)(1)
Utah	Utah Code Ann. § 70A-2-313
Vermont	Vt. Stat. Ann. tit. 9A, § 2-313
Virginia	Va. Code Ann. § 8.2-313
Washington	Wash. Rev. Code § 62A.2-313
West Virginia	W. Va. Code, § 46-2-313
Wisconsin	Wis. Stat. § 402.313(1)(a)
Wyoming	Wyo. Stat. Ann. § 34.1-2-313

**WARRANTY ALLEGATIONS THAT FAIL TO ALLEGE SPECIFIC
LANGUAGE, GUARANTEE, OR SOURCE**

Deficiency	PIMC Allegation No.	ELMC Allegation No.	MMMC Allegation No.
No Specific Warranty Language/ Guarantee	348, 349, 350, 358, 366, 370, 373, 375, 482, 483, 484	8, 11-34, 210, 363, 364, 365, 378, 386, 391, 394, 396, 418, 437, 438, 439, 448, 449	3, 164, 317, 320, 321, 322, 335, 343, 348, 350, 352, 385, 469, 470
No Specific Source	348, 349, 350, 482	8, 11-34, 210, 363, 364, 365, 418, 437, 438, 439, 448, 449	3, 164, 317, 320, 321, 322, 385, 469, 470

STATES REQUIRING PRE-SUIT NOTICE FOR IMPLIED WARRANTY⁸

State	Authority
Alabama	<i>Rampey v. Novartis Consumer Health, Inc.</i> , 867 So. 2d 1079, 1086, 1093 (Ala. 2003)
Arkansas	<i>Hartness v. Nuckles</i> , 475 S.W. 3d 558, 561 (Ark. 2015)
California	<i>Donohue v. Apple, Inc.</i> , 871 F. Supp. 2d 913, 929 (N.D. Cal. 2012)
Colorado	<i>Fiberglass Component Prod., Inc. v. Reichold Chems., Inc.</i> , 983 F. Supp. 948, 953 (D. Colo. 1997)
Connecticut	<i>Zeigler v. Sony Corp of Am.</i> , 849 A.2d 19, 402–03 (Conn. Super. Ct. 2004)
Delaware	<i>Dilenno v. Libbey Glass Div., Owens-Illinois, Inc.</i> , 668 F. Supp. 373, 377 (D. Del. 1987)
Georgia	<i>Economy Forms Corp. v. Kandy, Inc.</i> , 391 F. Supp. 944, 950 (N.D. Ga. 1974)
Indiana	<i>Lemon v. Anonymous Physician</i> , No. 1:04CV2083, 2005 WL 2218359, at *2 (S.D. Ind. Sept. 12, 2005) (citing <i>McClure Oil Corp. v. Murray Equip., Inc.</i> , 515 N.E.2d 546, 554 (Ind. Ct. App. 1987))
Iowa	<i>Randa v. U.S. Homes, Inc.</i> , 325 N.W. 2d 905, 909 (Iowa Ct. App. 1982)
Kansas	<i>Unified School Dist. No. 500 v. U.S. Gypsum Co.</i> , 788 F. Supp. 1173, 1176 (D. Kan. 1992)
Maryland	<i>Doll v. Ford Motor Co.</i> , 814 F. Supp. 2d 526, 542 (D. Md. 2011)
Massachusetts	<i>Jacobs v. Yamaha Motor Corp., U.S.A.</i> , 649 N.E. 2d 758, 763 (Mass. 1995)
Michigan	<i>Danielkiewicz v. Whirlpool Corp.</i> , 426 F. Supp. 3d 426, 433 (E.D. Mich. 2019)
Minnesota	<i>Podpeskar v. Makita U.S.A. Inc.</i> , 247 F. Supp. 3d 1001, 1006 (D. Minn. 2017)
Missouri	<i>Renaissance Leasing, LLC v. Vermeer Mfg. Co.</i> , 322 S.W.3d 112, 122 (Mo. 2010)

⁸ The following states do not require implied warranty pre-suit notice for personal injury claims: Alabama, Illinois, South Carolina, Tennessee, and West Virginia.

State	Authority
Mississippi	<i>Steel Dynamics Columbus, LLC v. Altech Env't USA Corp.</i> , 273 F. Supp. 3d 627, 644 (N.D. Miss. 2017)
Montana	<i>Fire Supply & Serv. v. Chico Hot Springs</i> , 196 Mont. 435, 639 P.2d 1160, 1164 (Mont. 1982)
Nevada	<i>Banh v. Am. Honda Motor Co., Inc.</i> , No. 2:19-cv-05984, 2019 WL 8683361, at *11 (C.D. Cal. Dec. 17, 2019) (applying Nevada law)
New Hampshire	<i>Dudley v. Bus. Express, Inc.</i> , 882 F. Supp. 199, 211 (D. N.H. 1994)
New Mexico	<i>Baranco v. Ford Motor Co.</i> , 294 F. Supp. 3d 950, 971–72 (N.D. Cal. 2018) (applying New Mexico law)
New Jersey	<i>Hammer v. Vital Pharms. Inc.</i> , No. 11-4124, 2012 WL 1018842, at *10–11 (D.N.J. Mar. 26, 2012) (citing, <i>inter alia</i> , <i>C.F. Seabrook Co. v. Beck</i> , 174 N.J. Super. 577, 593 (N.J. App. Div. 1980))
North Carolina	<i>Sani-Pure Food Lab'ys, LLC v. bioMerieux, Inc.</i> , No. 13-cv-6643, 2014 WL 6386803, at *6 (D.N.J. Nov. 13, 2014) (applying North Carolina Law)
North Dakota	<i>Indus. Fiberglass v. Jandt</i> , 361 N.W.2d 595, 597–98 (N.D. 1985)
Ohio	<i>Radford v. Daimler Chrysler Corp.</i> , 168 F. Supp. 2d 751, 754 (D.N.J. 2001) (applying Ohio law)
Oregon	<i>Redfield v. Mead, Johnson & Co.</i> , 266 Or. 273, 284–85 (Or. 1973)
Pennsylvania	<i>Am. Fed'n of State Cnty. & Mun. Emps. v. Ortho-McNeil-Janssen Pharms., Inc.</i> , No. 2:08-5904, 2010 WL 891150, at *6 (E.D. Pa. Mar. 11, 2010)
Rhode Island	<i>Hydronic Enters. v. Danal Jewelry Co.</i> , 1986 WL 213409 (R.I. Super. Dec. 22, 1986)
South Carolina	<i>Terrill v. Electrolux Home Prods., Inc.</i> , 753 F. Supp. 2d 1272, 1287 (S.D. Ga. 2010) (citing <i>Seaside Resorts, Inc. v. Club Car, Inc.</i> , 416 S.E. 2d 655, 663–64 (S.C. Ct. App. 1992))
Tennessee	<i>Bunn v. Navistar, Inc.</i> , 797 F. App'x 247, 253 (6th Cir. 2020) (applying Tennessee law)
Texas	<i>Martin v. Home Depot U.S.A., Inc.</i> , 369 F. Supp. 2d 887, 893 (W.D. Tex. 2005)

State	Authority
Utah	<i>Callegari v. Blendtec, Inc.</i> , No. 2:18-CV-308, 2018 WL 5808805, at *6 (D. Utah Nov. 6, 2018)
Vermont	<i>Ehlers v. Ben & Jerry's Homemade Inc.</i> , No. 2:19-CV-00194, 2020 WL 2218858, at *8 (D. Vt. May 7, 2020)
Virginia	<i>Banh v. Am. Honda Motor Co., Inc.</i> , No. 2:19-cv-05984, 2019 WL 8683361, at *12 (C.D. Cal. Dec. 17, 2019) (applying Virginia law)
West Virginia	<i>Hebron v. Am. Isuzu Motors, Inc.</i> , 60 F.3d 1095, 1097 (4th Cir. 1995) (applying West Virginia law)
Wisconsin	<i>Simonz v. Brockman</i> , 23 N.W.2d 464, 466 (Wis. 1946)
Wyoming	<i>McLaughlin v. Michelin Tire Corp.</i> , 778 P.2d 59, 91 (Wyo. 1989)

STATES REQUIRING PRE-SUIT NOTICE FOR EXPRESS WARRANTY⁹

State	Authority
Alabama	<i>Hobbs v. Gen. Motors Corp.</i> , 134 F. Supp. 2d 1277, 1283 (M.D. Ala. 2001)
Arkansas	<i>Hartness v. Nuckles</i> , 475 S.W. 3d 558, 562 (Ark. 2015)
California	<i>Minkler v. Apple, Inc.</i> , 65 F. Supp. 3d 810, 817 (N.D. Cal. 2014)
Colorado	<i>Fiberglass Component Prod., Inc. v. Reichold Chems., Inc.</i> , 983 F. Supp. 948, 954 (D. Colo. 1997)
Connecticut	<i>Spencer v. Star Steel Structures, Inc.</i> , 900 A.2d 42, 45 (Conn. Ct. App. 2006)
Delaware	<i>Speakman Co. v. Harper Buffing Mach. Co., Inc.</i> , 583 F. Supp. 273, 276–77 (D. Del. 1984)
Florida	<i>Lamb v. Graco Children's Prods., Inc.</i> , No. 4:11-cv-477, 2012 WL 12871963, at *2 (N.D. Fla. Jan. 24, 2012)
Georgia	<i>Terrill v. Electrolux Home Prods., Inc.</i> , 753 F. Supp. 2d 1272, 1285 (S.D. Ga. 2010)
Illinois	<i>Ibarrola v. Kind, LLC</i> , 83 F. Supp. 3d 751, 761 (N.D. Ill. 2015)
Indiana	<i>Dzielak v. Whirlpool Corp.</i> , 26 F. Supp. 3d 304, 323 n.10 (D.N.J. 2014) (applying Indiana law)
Iowa	<i>McKnelly v. Sperry Corp.</i> , 642 F.2d 1101, 1107 (8th Cir. 1981) (applying Iowa law)
Kansas	<i>Unified Sch. Dist. No. 500 v. U.S. Gypsum Co.</i> , 788 F. Supp. 1173, 1176 (D. Kan. 1992)
Maryland	<i>Palmer v. CVS Health</i> , No. 1:17-cv-938, 2019 WL 6529163, at *7 n.19 (D. Md. Dec. 4, 2019)
Massachusetts	<i>Jacobs v. Yamaha Motor Corp., U.S.A.</i> , 649 N.E. 2d 758, 763 (Mass. 1995)
Michigan	<i>Eaton Corp. v. Magnavox Co.</i> , 581 F. Supp. 1514, 1532 (E.D. Mich. 1984)
Minnesota	<i>Podpeskar v. Makita U.S.A. Inc.</i> , 247 F. Supp. 3d 1001, 1006 (D. Minn. 2017)

⁹ The following states do not require express warranty pre-suit notice for personal injury claims: Alabama, Illinois, New York, Pennsylvania, South Carolina, Tennessee, and West Virginia.

State	Authority
Missouri	<i>Renaissance Leasing, LLC v. Vermeer Mfg. Co.</i> , 322 S.W.3d 112, 122 (Mo. 2010)
Mississippi	<i>Steel Dynamics Columbus, LLC v. Altech Env't USA Corp.</i> , 273 F. Supp. 3d 627, 644 (N.D. Miss. 2017)
Montana	<i>Fire Supply & Serv. v. Chico Hot Springs</i> , 639 P.2d 1160, 1164 (Mont. 1982)
Nebraska	<i>Sanford v. Ektelon/Prince Sports Grp., Inc.</i> , No. 8:97-cv-368, 1999 WL 33537914, at *7–8 (D. Neb. Nov. 5, 1999)
Nevada	<i>Banh v. Am. Honda Motor Co., Inc.</i> , No. 2:19-cv-05984, 2019 WL 8683361, at *11 (C.D. Cal. Dec. 17, 2019) (applying Nevada law)
New Hampshire	<i>Precourt v. Fairbank Reconstruction Corp.</i> , 856 F. Supp. 2d 327, 340 (D. N.H. 2012)
New Mexico	<i>Baranco v. Ford Motor Co.</i> , 294 F. Supp. 3d 950, 971–72 (N.D. Cal. 2018) (applying New Mexico law)
New Jersey	<i>Kury v. Abbott Labs., Inc.</i> , No. 3:11-cv-803, 2012 WL 124026, at *7 (D.N.J. Jan. 17, 2012)
New York	<i>Lugones v. Pete & Gerry's Organic, LLC</i> , No. 19-Civ-2097, 2020 WL 871521, at *11 (S.D.N.Y. Feb. 21, 2020)
North Carolina	<i>Sani-Pure Food Lab'ys, LLC v. bioMerieux, Inc.</i> , No. 13-cv-6643, 2014 WL 6386803, at *6 (D.N.J. Nov. 13, 2014) (applying North Carolina Law)
North Dakota	<i>Indus. Fiberglass v. Jandt</i> , 361 N.W.2d 595, 597–98 (N.D. 1985)
Ohio	<i>St. Clair v. Kroger Co.</i> , 581 F. Supp. 2d 896, 902–03 (N.D. Ohio 2008)
Oregon	<i>Redfield v. Mead, Johnson & Co.</i> , 512 P.2d 776, 781 (Or. 1973)
Pennsylvania	<i>Schmidt v. Ford Motor Co.</i> , 972 F. Supp. 2d 712, 719 (E.D. Pa. 2013)
Rhode Island	<i>Hydronic Enters. v. Danal Jewelry Co.</i> , No. 81-4011, 1988 WL 213409 (R.I. Super. Dec. 22, 1986)
South Carolina	<i>Terrill v. Electrolux Home Prods., Inc.</i> , 753 F. Supp. 2d 1272, 1284–85 (S.D. Ga. 2010) (applying South Carolina law)
Tennessee	<i>Bunn v. Navistar, Inc.</i> , 797 F. App'x 247, 253 (6th Cir. 2020) (applying Tennessee law)

State	Authority
Texas	<i>U.S. Tire-Tech, Inc. v. Boeran, B.V.</i> , 110 S.W.3d 194, 199 (Tex. App. 2003)
Utah	<i>Callegari v. Blendtec, Inc.</i> , No. 2:18-cv-308, 2018 WL 5808805, at *6 (D. Utah Nov. 6, 2018)
Vermont	<i>Ehlers v. Ben & Jerry's Homemade Inc.</i> , No. 2:19-cv-00194, 2020 WL 2218858, at *8 (D. Vt. May 7, 2020)
Virginia	<i>Banh v. Am. Honda Motor Co., Inc.</i> , No. 2:19-cv-05984, 2019 WL 8683361, at *12 (C.D. Cal. Dec. 17, 2019) (applying Virginia law)
West Virginia	<i>Hill v. Joseph T. Ryerson & Son, Inc.</i> , 268 S.E. 2d 296, 302–03 (W. Va. 1980) (interpreting W. Va. Code § 46-2-607(a)(3))
Wisconsin	<i>Blitz v. Monsanto Co.</i> , 317 F. Supp. 3d 1042, 1054 (W.D. Wis. 2018)

**STATES REQUIRING ABSENCE OF AN ADEQUATE REMEDY AT LAW
FOR UNJUST ENRICHMENT**

State	Authority
Arizona	<i>Ajose v. Interline Brands, Inc.</i> , 187 F. Supp. 3d 899, 915 (M.D. Tenn 2016) (applying Arizona law) (recognizing that lack of an adequate remedy at law is a prima facie element of an unjust enrichment claim under Arizona law)
Florida	<i>Am. Honda Motor Co., Inc. v. Motorcycle Info. Network, Inc.</i> , 390 F. Supp. 2d 1170, 1178 (M.D. Fla. 2005) (“It is well settled in Florida that unjust enrichment is an equitable remedy and is, therefore, not available where there is an adequate legal remedy. Thus, to properly state a claim for unjust enrichment, a party must allege that no adequate legal remedy exists”)
Iowa	<i>Mussmann v. Wal-Mart Stores, Inc.</i> , No. LA27486, 2001 WL 36234327 (Iowa Dist. Ct. Dec. 21, 2001) (setting forth the elements of an unjust enrichment claim, which included there be “no remedy at law that can appropriately address the claim”)
Louisiana	<i>Matheny v. Greer</i> , 668 So. 2d 1359, 1362 (La. Ct. App. 1996) <i>writ denied</i> , 672 So. 2d 923 (La. 1996) (noting elements of unjust enrichment claim, which included that there be no other adequate remedy at law)
Kansas	<i>Pinkney v. TBC Corp.</i> , No. 2:19-cv-02680, 2020 WL 1528544, at *7 (D. Kan. Mar. 31, 2020) (dismissing unjust enrichment claim where “[p]laintiff fail[ed] to plead the absence of an adequate remedy at law”)
North Dakota	<i>KLE Constr., LLC v. Twalker Dev., LLC</i> , 887 N.W.2d 536, 538 (N.D. 2016) (listing the elements of the cause of action and noting that the absence of a remedy provided by law is a necessary element)

**STATES REQUIRING A DIRECT BENEFIT BE CONFERRED ON
DEFENDANT FOR UNJUST ENRICHMENT**

State	Authority
Alabama	<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 257 F. Supp. 3d 372, 409 (S.D.N.Y. 2017), <i>modified on reconsideration</i> , No. 1:14-mc-2543 (JMF), 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017) (holding that, under Alabama law, “[a] defendant cannot be unjustly enriched if it does not have in its possession any money belonging to the plaintiff” and dismissing plaintiff’s unjust enrichment claim where plaintiff purchased her vehicle from a non-GM entity)
Delaware	<i>Vichi v. Koninklijke Philips Electr. N.V.</i> , 62 A.3d 26, 59–60 (Del. Ch. 2012) (“[A] plaintiff must show that there is some <i>direct</i> relationship between a defendant’s enrichment and a plaintiff’s impoverishment. In other words, there must be a showing that the defendant was enriched unjustly by the plaintiff who acted for the defendant’s benefit.”) (emphasis in original) (citation and internal quotation marks omitted)
Florida	<i>In re Packaged Seafood Prod. Antitrust Litig.</i> , 242 F. Supp. 3d 1033, 1090 (S.D. Cal. 2017) (dismissing unjust enrichment claim under Florida law and citing <i>Kopel v. Kopel</i> , 229 So. 3d 812, 818 (Fla. 2017) wherein “the Florida Supreme Court explicitly acknowledged that ‘to prevail on an unjust enrichment claim, the plaintiff must directly confer a benefit to the defendant’”)
Georgia	<i>Archer v. Holmes</i> , No. 1:17-cv-2051, 2018 WL 534475, at *5 (N.D. Ga. Jan. 23, 2018), <i>reconsideration denied</i> , No. 1:17-cv-2051, 2018 WL 3454899 (N.D. Ga. Apr. 9, 2018) (dismissing unjust enrichment claim and stating that “in Georgia, unjust enrichment claims lie only in those situations where a defendant has received a direct benefit from a plaintiff)
Idaho	<i>Sergeants Benevolent Ass’n Health & Welfare Fund v. Actavis, PLC</i> , No. 1:15-cv-6549, 2018 WL 7197233, at *60–61 (S.D.N.Y. Dec. 26, 2018) (applying Idaho law)
Kentucky	<i>Pixler v. Huff</i> , No. 3:11-cv-207, 2011 WL 5597327, at *11 (W.D. Ky. Nov. 17, 2011) (dismissing unjust enrichment claim and noting that “Kentucky courts have consistently found that the first element not only requires a benefit be

State	Authority
	conferred upon the defendant, but also that the plaintiff be the party conferring that benefit”)
Michigan	<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 257 F. Supp. 3d 372, 427 (S.D.N.Y. 2017), <i>modified on reconsideration</i> , No. 1:14-mc-2543, 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017) (applying Michigan law and dismissing Michigan plaintiffs’ unjust enrichment claims “because Michigan courts only employ the doctrine of unjust enrichment in cases where the defendant directly receives a benefit from the plaintiff.”)
Ohio	<i>Savett v. Whirlpool Corp.</i> , No. 1:12-cv-310, 2012 WL 3780451, at *7 (N.D. Ohio Aug. 31, 2012); <i>In re Dial Complete Mktg. & Sales Practices Litig.</i> , 312 F.R.D. 36, 72–73 (D.N.H. 2015) (applying Ohio law)
New Jersey	<i>Arlandson v. Hartz Mountain Corp.</i> , 792 F. Supp. 2d 691, 711 (D.N.J. 2011) (“Since a plaintiff must confer a benefit on the defendant to support an unjust enrichment claim, this element has been interpreted by New Jersey courts as a requirement that the plaintiff allege a sufficiently direct relationship with the defendant to support the claim.”)
New York	<i>Ga. Malone & Co. v. Rieder</i> , 973 N.E.2d 743, 747 (N.Y. 2012) (holding that “the relationship between [the plaintiff] and [the defendant] is too attenuated because they simply had no dealings with each other”)
North Dakota	<i>Apache Corp. v. MDU Res. Grp., Inc.</i> , 603 N.W.2d 891, 895 (N.D. 1999); <i>In re TFT-LCD (Flat Panel) Antitrust Litig.</i> , 599 F. Supp. 2d 1179, 1190–91 (N.D. Cal. 2009) (applying North Dakota law and finding that under <i>Apache Corp.</i> , a direct benefit is required for unjust enrichment claims)

**STATES PRECLUDING UNJUST ENRICHMENT WHERE THERE IS AN
ADEQUATE REMEDY AT LAW**

State	Authority
Alabama	<i>Cnty. Spirit Bank v. Fid. Nat'l Title Ins. Co. of N.Y.</i> , No. 3:09-cv-430-NW, 2009 WL 10688141, at *5 (N.D. Ala. June 22, 2009) (unjust enrichment, an equitable remedy, is only available when there is not available remedy at law)
Arizona	<i>Ajose v. Interline Brands, Inc.</i> , 187 F. Supp. 3d 899, 915 (M.D. Tenn. 2016) (applying Arizona law); <i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 339 F. Supp. 3d 262, 334 (S.D.N.Y. 2018) (applying Arizona law and noting that “a party must show the absence of a remedy at law” and it is immaterial whether the legal remedy is successful or viable)
California	<i>Philips v. Ford Motor Co.</i> , No. 5:14-cv-2989-LHK, 2015 WL 4111448, *16 (N.D. Cal. July 7, 2015) (dismissing unjust enrichment claim and noting that “[a] plaintiff seeking equitable relief in California must establish that there is no adequate remedy at law available”); <i>In re Ford Tailgate Litig.</i> , No. 3:11-cv-2953, 2014 WL 1007066, at *5 (N.D. Cal. Mar. 12, 2014), <i>order corrected on denial of reconsideration</i> , No. 3:11-cv-2953, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014) (dismissing unjust enrichment claim and noting that to the extent “unjust enrichment is available as an independent claim . . . it will not stand where the claim simply mirrors other statutory or tort claims”)
Colorado	<i>Harris Grp., Inc. v. Robinson</i> , 209 P.3d 1188, 1207 (Colo. Ct. App. 2009) (reversing jury award for unjust enrichment because “the company had an adequate remedy at law”)
Connecticut	<i>Town of Plainville v. Almost Home Animal Rescue & Shelter, Inc.</i> , 187 A.3d 1174, 1183 (Conn. Ct. App. 2018) (noting that “an action to recover on a theory of unjust enrichment is unavailable if there is an adequate remedy at law”)
Delaware	<i>Total Care Physicians, P.A. v. O’Hara</i> , No. Civ.A.99C-11-201-JRS, 2002 WL 31667901, at *10 (Del. Super. Ctr. Oct. 29, 2002) (dismissing plaintiff’s unjust enrichment claims as a matter of law and stating that “[w]hen a plaintiff may avail itself of an adequate remedy at law, this Court will not hear a claim sounding in unjust enrichment”); <i>Wahlcometroflex, Inc. v. Baldwin</i> , 991 A.2d 44, 49–50 (Me. 2010) (applying

State	Authority
	Delaware law and dismissing unjust enrichment claim where it was based on the same factual allegations as plaintiff's breach of fiduciary duty claim)
Florida	<i>Am. Honda Motor Co., Inc. v. Motorcycle Info. Network, Inc.</i> , 390 F. Supp. 2d 1170, 1178 (M.D. Fla. 2005) (dismissing unjust enrichment claim in amended counterclaim and noting that “[i]t is well settled in Florida that unjust enrichment is an equitable remedy and is, therefore, not available when there is an adequate legal remedy”); <i>Jovine v. Abbott Laboratories, Inc.</i> , 795 F. Supp. 2d 1331, 1342-43 (S.D. Fla. 2011) (noting that if a plaintiff seeks recovery under unjust enrichment for the exact same wrongful conduct that form the basis of her other claims, the unjust enrichment claim will be dismissed)
Hawaii	<i>Soule v. Hilton Worldwide, Inc.</i> , 1 F. Supp. 3d 1084, 1103 (D. Haw. 2014) (precluding unjust enrichment claim where plaintiff had an adequate remedy at law)
Idaho	<i>Mannos v. Moss</i> , 155 P.3d 1166, 1173 (Idaho 2007) (“Unjust enrichment is an equitable claim and ‘[e]quitable claims will not be considered when an adequate legal remedy is available.’”) (quoting <i>Iron Eagle Dev., L.L.C. v. Quality Design Sys., Inc.</i> , 65 P.3d 509, 514 (Idaho 2003))
Illinois	<i>Guinn v. Hoskins Chevrolet</i> , 836 N.E.2d 681, 704 (Ill. Ct. App. 2005) (“Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law”) (citation omitted)
Indiana	<i>Indiana ex rel. Zoeller v. Pastrick</i> , 696 F. Supp. 2d 970, 999 n. 7 (N.D. Ind. 2010) (noting that “[u]nder Indiana law, equitable principles such as unjust enrichment will not apply where there exists a remedy at law”) (citation omitted)
Kentucky	<i>U.S. v. Stevens</i> , 605 F. Supp. 2d 863, 869-70 (W.D. Ky. 2008) (noting that where a plaintiff “has an adequate remedy at law, equity will not consider a claim for unjust enrichment”) (citation omitted)
Louisiana	La. Civ. Code Ann. art. 2298 (“The remedy [of unjust enrichment] is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.”); <i>Walters v. MedSouth Rec. Mgmt., LLC</i> , 38 So. 3d 245, 246–47 (La. 2010) (“The unjust enrichment remedy is

State	Authority
	only applicable to fill a gap in the law where no express remedy is provided.”)
Massachusetts	<i>Shaulis v. Nordstrom, Inc.</i> , 865 F.3d 1, 16 (1st Cir. 2017) (dismissing plaintiff’s unjust enrichment claim even though plaintiff’s other legal claims were dismissed, because “[i]t is the availability of a remedy at law, not the viability of that remedy , that prohibits a claim for unjust enrichment”) (emphasis supplied)
Mississippi	<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 339 F. Supp. 3d 262, 335 (S.D.N.Y. 2018) (applying Mississippi law and noting that unjust enrichment is an equitable remedy that is unavailable when there is an adequate remedy at law, regardless of whether that adequate legal remedy is successful)
Missouri	<i>Amalaco, LLC v. Butero</i> , 593 S.W.3d 647, 653 (Mo. Ct. App. 2019), <i>reh'g and/or transfer denied</i> (Jan. 21, 2020), <i>transfer denied</i> (Mar. 17, 2020) (concluding that plaintiff was not entitled to bring claim for unjust enrichment where he had an adequate remedy at law)
Nebraska	<i>Pilot Inv. Grp. Ltd. v. Hofarth</i> , 550 N.W.2d 27, 33 (Neb. 1996) (recognizing that equitable remedies like unjust enrichment are generally not available where there is an adequate remedy at law)
Nevada	<i>Small v. Univ. Med. Ctr. of S. Nevada</i> , No. 2:13-cv-298, 2016 WL 4157309, at *3 (D. Nev. Aug. 3, 2016) (dismissing unjust enrichment claim where plaintiff had an adequate remedy at law)
New Jersey	<i>Duffy v. Charles Schwab & Co., Inc.</i> , 123 F. Supp. 2d 802, 814 (D.N.J. 2000) (“Restitution for unjust enrichment is an equitable remedy, available only when there is no adequate remedy at law”); <i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 339 F. Supp. 3d 262, 337-38 (S.D.N.Y. 2018) (applying New Jersey law and noting same)
New Mexico	<i>Figueroa v. Ethicon, Inc.</i> , No. 2:19-cv-1188 KWR/KRS, 2020 WL 1434249, at *3 (D.N.M. Mar. 24, 2020) (stating that “an unjust enrichment will fail if there is a “complete and adequate remedy at law”) (quoting <i>Sims v. Sims</i> , 930 P.2d 153, 159 (N.M. 1996))

State	Authority
New York	<i>Bourbia v. S.C. Johnson & Son, Inc.</i> , 375 F. Supp. 3d 454, 466 (S.D.N.Y. 2019) (although New York allows plaintiffs to plead unjust enrichment in the alternative, where it “is duplicative of other causes of action,” i.e., it “relies on the same conduct that forms the basis of [] other claims[,]” “it should be dismissed”)
North Carolina	<i>Hawks v. Brindle</i> , 275 S.E.2d 277, 282 (N.C. Ct. App. 1981) (affirming directed verdict on unjust enrichment claim where plaintiff had an adequate remedy at law)
Ohio	<i>Banks v. Nationwide Mut. Fire Ins. Co.</i> , No. 99AP-1413, 2000 WL 1742064, at *5 (Ohio Ct. App. Nov. 28, 2000) (unjust enrichment is only available to prevent injustice where there is no adequate remedy in contract or tort)
Oklahoma	<i>Naylor Farms, Inc. v. Anadarko OGC Co.</i> , No. 5:08-cv-668, 2011 WL 7267851, at *1 (W.D. Okla. June 15, 2011) (unjust enrichment is not available where a party has an adequate remedy at law, “regardless of whether the party actually recovers thereon”)
Oregon	<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 339 F. Supp. 3d 262, 339 (S.D.N.Y. 2018) (applying Oregon law and noting that unjust enrichment is an equitable remedy that is unavailable when there is an adequate remedy at law, regardless of whether that adequate legal remedy is successful)
Pennsylvania	<i>Meehan v. Cheltenham Twp.</i> , 189 A.2d 593, 595 (Pa. 1963) (holding that an adequate remedy at law existed so as to divest equity of jurisdiction of action for alleged unjust enrichment since law courts can provide remedy of money damages)
South Carolina	<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 339 F. Supp. 3d 262, 341 (S.D.N.Y. 2018) (applying South Carolina law and noting that unjust enrichment is an equitable remedy that is unavailable when there is an adequate remedy at law, regardless of whether that adequate legal remedy is successful)
South Dakota	<i>Schumacher v. Tyson Fresh Meats, Inc.</i> , No. 1:02-cv-1027, 2006 WL 7124778, at *4 (D.S.D. Apr. 10, 2006) (dismissing unjust enrichment claims, because, <i>inter alia</i> , “[i]t is firmly a established rule of law that a party cannot have an equitable remedy if an adequate remedy at law is available”) (citation omitted)

State	Authority
Utah	<i>Thorpe v. Wash. City</i> , 243 P.3d 500, 507 (Utah Ct. App. 2010) (affirming trial court’s refusal to award equitable remedy and noting that in Utah, “the law will not imply an equitable remedy where there is an adequate remedy at law”) (citation omitted)
Virginia	<i>R.M. Harrison Mech. Corp. v. Decker Indus., Inc.</i> , No. CL08–193, 2008 WL 10669311, at *7 (Va. Cir. Ct. Aug. 28, 2008) (stating that “[f]or a claim of unjust enrichment to stand, the plaintiff must have no adequate remedy at law against the demurring defendant”)
West Virginia	<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 339 F. Supp. 3d 262, 341-42 (S.D.N.Y. 2018) (applying West Virginia law and noting that unjust enrichment is an equitable remedy that is unavailable when there is an adequate remedy at law, regardless of whether that adequate legal remedy is successful)

**STATES WHERE MEDICAL MONITORING IS NOT RECOGNIZED AS
AN INDEPENDENT CAUSE OF ACTION**

State	Authority
Alabama	<i>Hinton ex rel. Hinton v. Monsanto Co.</i> , 813 So. 2d 827, 831-32 (Ala. 2001); <i>Houston Cnty. Health Care Auth. v. Williams</i> , 961 So. 2d 795, 811 (Ala. 2006)
Arkansas	<i>In re Prempro</i> , 230 F.R.D. 555, 569 (E.D. Ark. 2005) (citing <i>Baker v. Wyeth-Ayerst Laboratories Div.</i> , 992 S.W.2d 797, 799 (Ark. 1999))
Connecticut	<i>Bowerman v. United Illuminating</i> , No. X04Cv 940115436S, 1998 WL 910271, at *10 (Conn. Super. Ct. Dec. 15, 1998)
Georgia	<i>Parker v. Brush Wellman, Inc.</i> , 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005)
Indiana	<i>Hunt v. Am. Wood Preservers Inst.</i> , No. IP 02-0389, 2002 WL 34447541, at *1 (S.D. Ind. July 31, 2002).
Iowa	<i>Pickrell v. Sorin Grp. USA, Inc.</i> , 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018).
Kentucky	<i>Wood v. Wyeth-Ayerst Laboratories, Div. of Am. Home Prod.</i> , 82 S.W.3d 849, 859 (Ky. 2002)
Louisiana	La. Civ. Code Ann. art. 2315; <i>Landry v. Avondale Indus., Inc.</i> , 864 So.2d 117, 128 n. 2 (La. 2003)
Michigan	<i>Henry v. Dow Chem. Co.</i> , 701 N.W.2d 684, 686 (Mich. 2005)
Mississippi	<i>Paz v. Brush Engineered Materials, Inc.</i> , 949 So. 2d 1, 3-6 (Miss. 2007)
Nebraska	<i>Trimble v. Asarco, Inc.</i> , 232 F.3d 946, 963 (8th Cir. 2000), <i>abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.</i> , 545 U.S. 546 (2005); <i>Avila v. CNH Am., LLC</i> , No. 4:04-cv-3384, 2012 WL 13187721, at *5 (D. Neb. Aug. 30, 2012)
New Hampshire	<i>Brown v. Saint-Gobain Performance Plastics Corp.</i> , No. 16-cv-242, 2018 WL 10638396, at *1 (D.N.H. Dec. 6, 2018)
New Jersey	<i>Sinclair v. Merck & Co.</i> , 948 A.2d 587, 595 (N.J. 2008)
North Carolina	<i>Curl v. Am. Multimedia, Inc.</i> , 654 S.E.2d 76, 81 (N.C. Ct. App. 2007)

State	Authority
Oklahoma	<i>Cole v. ASARCO Inc.</i> , 256 F.R.D. 690, 695 (N.D. Okla. 2009); <i>McCormick v. Halliburton Co.</i> , 895 F. Supp. 2d 1152, 1156-57 (W.D. Okla. 2012)
South Carolina	<i>Rosmer v. Pfizer, Inc.</i> , No. 9:99-cv-228018, 2001 WL 34010613, at *5 (D.S.C. Mar. 30, 2001); <i>Easler v. Hoechst Celanese Corp.</i> , No. 7:14-cv-00048, 2014 WL 3868022, at *5 n.5 (D.S.C. Aug. 5, 2014)
Tennessee	<i>Bostick v. St. Jude Med., Inc.</i> , No. 2:03-2636, 2004 WL 3313614, at *14 (W.D. Tenn. Aug. 17, 2004)
Texas	<i>Norwood v. Raytheon Co.</i> , 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006)
Virginia	<i>Ball v. Joy Techs., Inc.</i> , 958 F.2d 36, 39 (4th Cir. 1991) (applying Virginia law)
Wisconsin	<i>Alsteen v. Wauleco, Inc.</i> , 802 N.W.2d 212, 219 (Wis. Ct. App. 2011)

STATES THAT HAVE NOT ADDRESSED WHETHER MEDICAL MONITORING MAY BE AN INDEPENDENT CAUSE OF ACTION

State	Authority
Alaska	<i>In re Nat'l Hockey League Players' Concussion Injury Litig.</i> , 327 F.R.D. 245, 262 (D. Minn. 2018) (addressing Alaska law)
Hawaii	<i>In re Nat'l Hockey League Players' Concussion Injury Litig.</i> , 327 F.R.D. 245, 262 (D. Minn. 2018) (addressing Hawaii law)
Idaho	<i>In re Nat'l Hockey League Players' Concussion Injury Litig.</i> , 327 F.R.D. 245, 262 (D. Minn. 2018) (addressing Idaho law)
Maine	Maine courts do not appear to have addressed the issue of medical monitoring.
Montana	Montana courts do not appear to have addressed the issue of medical monitoring.
New Mexico	New Mexico courts do not appear to have addressed the issue of medical monitoring.
Puerto Rico	<i>Barreras Ruiz v. Am. Tobacco Co.</i> , 180 F.R.D. 194, 197 (D.P.R. 1998) (examining Puerto Rican law).
Rhode Island	Rhode Island courts do not appear to have addressed the issue of medical monitoring.
South Dakota	South Dakota courts do not appear to have addressed the issue of medical monitoring.
Wyoming	Wyoming courts do not appear to have addressed the issue of medical monitoring.

**STATES PRECLUDING MEDICAL MONITORING WHERE IT IS ONLY
A MEASURE OF DAMAGES**

State	Authority
Arizona	<i>Burns v. Jaquays Mining Corp.</i> , 752 P.2d 28, 33 (Ariz. Ct. App. 1987)
California	<i>Potter v. Firestone Tire & Rubber Co.</i> , 863 P.2d 795, 823 (Cal. 1993)
Kansas	<i>Burton v. R.J. Reynolds Tobacco Co.</i> , 884 F. Supp. 1515, 1523 (D. Kan. 1995)
Maryland	<i>Exxon Mobil Corp. v. Albright</i> , 71 A.3d 30, 75-77 (Md. Ct. App. 2013)
Massachusetts	<i>Donovan v. Philip Morris USA, Inc.</i> , 914 N.E.2d 891, 901 (Mass. 2009) (recoverable if risk in harm is substantial and there has been a corresponding subcellular change)
Minnesota	<i>Bryson v. Pillsbury Co.</i> , 573 N.W.2d 718, 721 (Minn. Ct. App. 1998) (quoting <i>Werlein v. United States</i> , 746 F. Supp. 887, 901 (D. Minn. 1990))
Missouri	<i>Meyer ex rel. Coplin v. Fluor Corp.</i> , 220 S.W.3d 712, 717 (Mo. 2007) (recoverable if injury is reasonably certain to occur)
Nevada	<i>Sadler v. PacifiCare of Nev.</i> , 340 P.3d 1264, 1270 (Nev. 2014)
New York	<i>Caronia v. Philip Morris USA, Inc.</i> , 5 N.E.3d 11, 18-19 (N.Y. Ct. App. 2013) (recoverable with present physical injury)
North Dakota	<i>Mehl v. Canadian Pac. Ry. Ltd.</i> , 227 F.R.D. 505, 518 (D.N.D. 2005) (recoverable, if at all, with present physical injury)
Ohio	<i>Baker v. Chevron U.S.A. Inc.</i> , 533 F. App'x 509, 525 (6th Cir. 2013); <i>Elmer v. S.H. Bell Co.</i> , 127 F. Supp. 3d 812, 825 (N.D. Ohio 2015)
Oregon	<i>Lowe v. Philip Morris USA, Inc.</i> , 183 P.3d 181, 183 (Or. 2008)
Vermont	<i>Sullivan v. Saint-Gobain Performance Plastics Corp.</i> , No. 5:16-cv-125, 2019 WL 7282104, at *14 (D. Vt. Dec. 27, 2019)
Washington	<i>Duncan v. Nw. Airlines, Inc.</i> , 203 F.R.D. 601, 606 (W.D. Wash. 2001)

STATE PUNITIVE DAMAGES STANDARDS¹⁰

States	Permitted/ Burden of Proof	Standard of Conduct
Alabama	Yes; clear and convincing	Malice, willfulness, or wanton and reckless disregard of the rights of others
Alaska	Yes; clear and convincing	Outrageous conduct, malice, bad motive, or reckless indifference to the interests of another
Arizona	Yes; clear and convincing	Evil motives or willful or wanton disregard of the interests of others
Arkansas	Yes; clear and convincing	Wantonness or conscious indifference to the consequences such that malice may be inferred
California	Yes; clear and convincing	Fraud, oppression, malice, deliberate wrongdoing, or conscious disregard for the rights of others
Colorado	Yes (statutory only); beyond a reasonable doubt	Evil intent, purpose of causing injury, or acting with wanton and reckless disregard for the rights of another

¹⁰ This chart summarizes the general punitive damages standards for each state. Different states have state-specific and claim-specific statutory and common law standards that may vary whether and when punitive damages may be awarded, the burdens of proof and standard of conduct for punitive damages, and the caps or limits on punitive damages when awarded. These state-specific and claim-specific variances are not included in this chart, and Defendants reserve their right to contest punitive damages claims by state and by claim at the appropriate stage.

States	Permitted/ Burden of Proof	Standard of Conduct
Connecticut	Yes; preponderance of the evidence	Intentional and wanton violation of the rights of others or reckless indifference to those rights
Delaware	Yes; clear and convincing	Outrageous conduct because of evil motive or reckless indifference to the rights of others
Dist. of Columbia	Yes; clear and convincing	Fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's right, or other circumstances tending to aggravate the injury
Florida	Yes; clear and convincing	Intentional misconduct, gross negligence, malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or reckless indifference for the rights of others
Georgia	Yes; clear and convincing	Willful misconduct, malice, fraud, wantonness, oppression or that entire want of care that would raise the presumption of conscious indifference to consequences
Hawaii	Yes; clear and convincing	Acting wantonly or oppressively with such malice as implies a spirit of mischief or criminal indifference to civil obligations
Idaho	Yes; clear and convincing	Malicious conduct, fraud, gross negligence, or oppression

States	Permitted/ Burden of Proof	Standard of Conduct
Illinois	Yes; preponderance of the evidence	Fraud, actual malice, deliberate violence, oppression, outrageousness similar to a crime, or when the defendant acts willfully or with such gross negligence as to indicate a wanton disregard for the rights of others
Indiana	Yes; clear and convincing	Malice, fraud, gross negligence, oppressiveness that was not the result of a mistake or other human failing, a quasi-criminal state of mind, or willful and wanton misconduct
Iowa	Yes; clear and convincing	Willful and wanton disregard for the rights or safety of another
Kansas	Yes; clear and convincing	Willful or wanton conduct, fraud or malice
Kentucky	Yes; clear and convincing	Malice, willfulness, reckless or wanton disregard for the rights of others, or gross negligence
Louisiana	Yes (statutory only, not available for product liability); preponderance of the evidence	Wanton or reckless conduct involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent
Maine	Yes; clear and convincing	Express or implied malice
Maryland	Yes; clear and convincing	Actual malice characterized by evil motive, intent to injure, ill will, or fraud

States	Permitted/ Burden of Proof	Standard of Conduct
Massachusetts	Yes (in actions for death by negligence); undetermined	Malicious, willful, wanton or reckless conduct or gross negligence
Michigan	No	N/A
Minnesota	Yes; clear and convincing	Deliberate disregard for the rights or safety of others
Mississippi	Yes; clear and convincing	Actual malice, gross negligence that evidences a willful, wanton or reckless disregard for the safety of others, or actual fraud
Missouri	Yes; clear and convincing	Knew or had reason to know a high degree of probability existed that the action would result in injury
Montana	Yes; clear and convincing	Actual fraud or actual malice
Nebraska	No	N/A
Nevada	Yes; clear and convincing	Express or implied oppression, fraud, or malice
New Hampshire	Yes (statutory only, not available for product liability); undetermined	Wanton, malicious, or oppressive conduct or fraud
New Jersey	Yes; clear and convincing	Actual malice or wanton and willful disregard of persons who foreseeably might be harmed
New Mexico	Yes; preponderance of the evidence	Malicious, intentional, fraudulent, or oppressive conduct, or acts committed

States	Permitted/ Burden of Proof	Standard of Conduct
		recklessly or with a wanton disregard of the plaintiff's rights
New York	Yes; either preponderance of the evidence or clear and convincing	Malice, fraud, oppression, insult, wanton or reckless disregard of one's rights, or other circumstances of aggravation
North Carolina	Yes; clear and convincing	Fraud, malice, or willful or wanton conduct
North Dakota	Yes; clear and convincing	Oppression, fraud, or actual malice
Ohio	Yes; clear and convincing	Malice, aggravated or egregious fraud, oppression or insult
Oklahoma	Yes; clear and convincing	Wanton or reckless disregard for the rights of others, actual malice, fraud, or oppression
Oregon	Yes; clear and convincing	Malice or reckless and outrageous indifference to a highly unreasonable risk of harm and conscious indifference to the health, safety and welfare of others
Pennsylvania	Yes; clear and convincing	Acts so outrageous so as to demonstrate malicious, wanton, reckless, willful or oppressive conduct
Puerto Rico	No	N/A
Rhode Island	Yes; clear and convincing	Malice, bad faith, willfulness, recklessness, or wickedness amounting to criminality

States	Permitted/ Burden of Proof	Standard of Conduct
South Carolina	Yes; clear and convincing	Willful, wanton, or reckless conduct
South Dakota	Yes (statutory only); clear and convincing	Oppression, fraud, or malice, actual or presumed
Tennessee	Yes; clear and convincing	Intentional misconduct, fraud, malice, or recklessness
Texas	Yes; clear and convincing	Malice, fraud, willful conduct or gross negligence
Utah	Yes; clear and convincing	Willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others
Vermont	Yes; preponderance of the evidence	Malice or conduct marked by ill will, insult or oppression, or by a reckless or wanton disregard of one's rights
Virginia	Yes; preponderance of the evidence	Actual malice
Washington	No (statutory only)	N/A
West Virginia	Yes; preponderance of the evidence	Intentional, wanton, oppressive, or reckless misconduct, or acting with such malice as implies a spirit of mischief or criminal indifference to civil obligation
Wisconsin	Yes; clear and convincing	Intentional, wanton, willful, or reckless disregard of the plaintiff's rights

States	Permitted/ Burden of Proof	Standard of Conduct
Wyoming	Yes; preponderance of the evidence	Outrageous conduct, malice, or willful and wanton misconduct

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**COMPENDIUM OF UNREPORTED OR UNPUBLISHED AUTHORITIES
CITED IN MANUFACTURER DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS**

TABLE OF CONTENTS

Cases	Tab
<i>Abicht v. Pliva, Inc.</i> , No. 12-1278, 2013 WL 141724 (D. Minn. Jan. 9, 2013)	1
<i>Amarin Pharma, Inc. v. Int’l Trade Comm’n</i> , Nos. 2018-1247, 2018-114 (Fed. Cir. Mar. 27, 2018) (Corrected Brief for the United States as Amicus Curiae Supporting Appellee)	2
<i>Amarin Pharma, Inc. v. International Trade Com’n</i> , No. 19-152, 2019 WL 5784708 (U.S. Nov. 4, 2019) (Brief of Federal Respondent in Opposition).....	3
<i>Avram v. Samsung Electronics Am., Inc.</i> , Nos. 2:11-6973, 2:12-976, 2013 WL 3654090 (D.N.J. July 11, 2013).....	4
<i>Becker v. Smith & Nephew, Inc.</i> , No. 14-5452, 2015 WL 268857 (D.N.J. Jan. 20, 2015)	5
<i>Bell v. Boehringer Ingelheim Pharm., Inc.</i> No. 17-1153, 2018 WL 928237 (W.D. Pa. Feb. 15, 2018).....	6
<i>Bowman v. RAM Med., Inc.</i> , No. 10-4403, 2012 WL 1964452 (D.N.J. May 31, 2012).....	7
<i>Boyd v. Johnson & Johnson Consumers Cos., Inc.</i> , No. 09-cv-3135, 2010 WL 2265317 (D.N.J. May 31, 2010)	8
<i>Calender v. NVR Inc.</i> , 548 F. App’x 761 (3d Cir. 2013)	9
<i>Cole v. NIBCO, Inc.</i> , No. 3:13-cv-07871, 2015 WL 2414740 (D.N.J. May 20, 2015).....	10
<i>Cooper v. Medimetriks Pharms., Inc.</i> , No. 18-11987, 2019 WL 1370414 (D.N.J. Mar. 25, 2019)	11
<i>Crouch v. Johnson & Johnson Consumer Cos., Inc.</i> , No. 09-cv-2905, 2010 WL 1530152 (D.N.J. Apr. 15, 2010)	12
<i>D’Addario v. Johnson & Johnson</i> , No. 3:10-cv-15627, 2020 WL 3546750 (D.N.J. June 30, 2020).....	13

<i>Danon v. Vanguard Grp., Inc.</i> , 686 Fed. App'x 101 (3d Cir. 2017)	14
<i>Donovan v. Pub. Policy Ctr. of New Jersey</i> , No. 05-1181, 2006 WL 1373230 (D.N.J. May 17, 2006)	15
<i>Dopico v. IMS Trading Corp.</i> , No. 14-cv-1874, 2018 WL 4489677 (D.N.J. Sept. 18, 2018).....	16
<i>Dunbar v. Medtronic, Inc.</i> , No. 14-01529, 2014 WL 3056026 (C.D. Cal. June 25, 2014)	17
<i>Fishman v. Gen. Elec. Co.</i> , No. 2:12-cv-00585, 2013 WL 1845615 (D.N.J. Apr. 30, 2013)	18
<i>Forslund v. Stryker Corp.</i> , No. 09-2134, 2010 WL 3905854 (D. Minn. Sept. 30, 2010).....	19
<i>Glick v. Leatt Corp.</i> , No. 4:17-cv-00291, 2018 WL 9439696 (S.D. Iowa May 3, 2018), aff'd sub nom. <i>Glick v. W. Power Sports, Inc.</i> , 944 F.3d 714 (8th Cir. 2019).....	20
<i>Hammer v. Vital Pharms., Inc.</i> , No. 11-4124, 2012 WL 1018842 (D.N.J. Mar. 26, 2012).....	21
<i>Hoffman v. Nutraceutical Corp.</i> , No. 12-5803, 2013 WL 2650611 (D.N.J. June 10, 2013)	22
<i>Horowitz v. AT&T, Inc.</i> , No. 3:17-cv-4827, 2018 WL 1942525 (D.N.J. Apr. 25, 2018).....	23
<i>Hubert v. Gen. Nutrition Corp.</i> , No. 2:15-cv-01391, 2017 WL 3971912 (W.D. Pa. Sept. 8, 2017)	24
<i>In re Bard IVC Filters Prods. Liab. Litig.</i> , No. 15-md-02641, 2018 WL 4356638 (D. Ariz. Sept. 12, 2018).....	25
<i>In re Digitek Prods. Liab. Litig.</i> , No. 2:08-md-01968, 2009 WL 2433468 (S.D. W. Va. Aug. 3, 2009).....	26
<i>In re Fosamax (Alendronate Sodium) Prod. Liab. Litig. (No. II)</i> , No. 08-008, 2011 WL 5903623 (D.N.J. Nov. 21, 2011).....	27

<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , No. 14-md-2543 JMF, 2015 WL 3619584 (S.D.N.Y. June 10, 2015).....	28
<i>In re Katrina Canal Breaches Litig.</i> , 309 F. App'x 836 (5th Cir. 2009)	29
<i>In re Magnesium Oxide Antitrust Litig.</i> , No. 10-cv-5943, 2011 WL 5008090 (D.N.J. Oct. 20, 2011)	30
<i>In re Zimmer Nexgen Knee Implant Prod. Liab. Litig.</i> , No. 11-c-5468, 2012 WL 3582708 (N.D. Ill. Aug. 16, 2012).....	31
<i>Iowa Network Servs. v. AT&T Corp.</i> , No. 3:14-cv-3439, 2019 WL 4861438 (D.N.J. Oct. 2, 2019)	32
<i>James v. Johnson & Johnson Consumer Cos., Inc.</i> , No. 2:10-cv-03049, 2011 WL 198026 (D.N.J. Jan. 20, 2011)	33
<i>Koronthaly v. L'Oreal USA, Inc.</i> , 374 F. App'x 257 (3d Cir. 2010)	34
<i>Leonard v. Medtronic, Inc.</i> , No. 1:10-cv-03787-JEC, 2011 WL 3652311 (N.D. Ga. Aug. 19, 2011).....	35
<i>Levinson v. Johnson & Johnson Consumer Cos., Inc.</i> , No. 09-cv-3317, 2010 WL 421091 (D.N.J. Feb. 1, 2010).....	36
<i>Markland v. Insys Therapeutics, Inc.</i> , 758 F. App'x 777 (11th Cir. 2018)	37
<i>MDNet, Inc. v. Pharmacia Corp.</i> , 147 F. App'x 239 (3d Cir. 2005).....	38
<i>Medley v. Johnson & Johnson Consumer Cos.</i> , No. 2:10-cv-2291, 2011 WL 159674 (D.N.J. Jan. 18, 2011)	39
<i>Monk v. Wyeth Pharm., Inc.</i> , No. 16-cv-1273, 2017 WL 2063008 (W.D. Tex. May 11, 2017)	40
<i>Moore v. Medeva Pharms., Inc.</i> , No. 01-311-M, 2004 WL 57084 (D.N.H. Jan. 13, 2004)	41
<i>Sheeran v. Blyth Shipholding S.A.</i> , No. 1:14-cv-5482, 2015 WL 9048979 (D.N.J. Dec. 16, 2016)	42

<i>Sich v. Pfizer Pharm.</i> , No. 1:17-cv-2828, 2017 WL 4407930 (D.N.J. Oct. 4, 2017).....	43
<i>Simmons v. Stryker Corp.</i> , No 08-3451, 2008 WL 4936982 (D.N.J. Nov. 17, 2008).....	44
<i>Sweezey v. C.R. Bard Inc.</i> , No. 3:19-cv-2172, 2020 WL 1237394 (N.D. Tex. Mar. 12, 2020).....	45
<i>Thornton v. AstraZeneca Pharm. LP</i> , No. 1:17-cv-652, 2017 WL 2255776 (N.D. Ga. May 15, 2017)	46
<i>Torres-Hernandez v. CVT Prepaid Sols., Inc.</i> , No. 3:08-cv-1057, 2008 WL 5381227 (D.N.J. Dec. 17, 2008)	47
<i>Walters v. Carson</i> , No. 11-6545, 2012 WL 6595732 (D.N.J. Dec. 17, 2012).....	48

TAB 1



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [Phelps v. Wyeth, Inc.](#), D.Or., April 2, 2013

2013 WL 141724

United States District Court, D. Minnesota.

Marilyn ABICHT, Plaintiff,

v.

PLIVA, INC., Defendant.

Stephen White,

v.

PLIVA, Inc., Defendant.

Civ. Nos. 12–1278 (PAM/JJG), 12–2172 (PAM/JJG).

|
Jan. 9, 2013.**Attorneys and Law Firms**[Lucia J. W. McLaren](#), [Michael K. Johnson](#), [Rolf Fiebiger](#),
[Johnson Becker, PLLC](#), Mpls, MN, for Plaintiffs.[Jan R. Mclean Bernier](#), [Tracy J. Van Steenburgh](#), [Nilan Johnson Lewis PA](#), Mpls, MN, [Linda E. Maichl](#), [Tiffany Reece Clark](#), [Ulmer Berne LLP](#), Cincinnati, OH, [Rex A. Littrell](#), [Ulmer Berne LLP](#), Columbus, OH, for Defendants.**MEMORANDUM AND ORDER**[PAUL A. MAGNUSON](#), District Judge.

*1 This matter is before the Court on Defendant PLIVA, Inc.'s Motions for Judgment on the Pleadings in these related cases. For the reasons that follow, the Motions are granted.

BACKGROUND

Plaintiff Marilyn Abicht was prescribed the drug [Reglan](#) for digestive tract issues beginning in 1998, and took it until 2008. During that time, she was often given [Reglan's](#) generic equivalent, [metoclopramide](#), that was manufactured by Defendant PLIVA, Inc. She developed a serious neurological disorder called [tardive dyskinesia](#) as a result of her use of [metoclopramide](#). [Tardive dyskinesia](#) “is a severe and often permanent disfiguring neurological movement disorder.” [Bowman v. Wyeth, LLC](#), No. 10–1946, 2012 WL 684116, at *1 n. 1 (D.Minn. Mar.2, 2012) (Eriksen, J.).

Plaintiff Steven White also took [Reglan](#) or [metoclopramide](#) starting in 1998. He stopped taking [metoclopramide](#) in 2009. He has also been diagnosed as suffering from [tardive dyskinesia](#) brought on by his use of the drug.

There is no dispute that long-term use of [metoclopramide](#) can cause [tardive dyskinesia](#), such that since 2009 the label for both [Reglan](#) and the generic versions¹ contain the following warning: “Treatment with [metoclopramide](#) can cause [tardive dyskinesia](#), a serious movement disorder that is often irreversible.... Treatment with [metoclopramide](#) for longer than 12 weeks should be avoided in all but rare cases.” Physician's Desk Reference 2902 (65th ed.2011). As early as 1995, however, the label provided that “[tardive dyskinesia](#) ... may develop in patients treated with [metoclopramide](#)” and “[t]herapy longer than 12 weeks has not been evaluated and cannot be recommended.” Physician's Desk Reference 1635–36 (41st ed.1987). In 2004 the FDA approved a stronger warning on [Reglan's](#) label that use “should not exceed 12 weeks in duration.” [PLIVA, Inc. v. Mensing](#), — U.S. —, — S.Ct. 2567, 2572–73, 180 L.Ed.2d 580 (2011) (quotation omitted). Plaintiffs both contend that PLIVA failed to update the label for its version of metoclopramide to include this warning, among other claims.² The causes of action they raise include strict liability, breach of warranties, negligence, misrepresentation, fraud, negligence per se, Minnesota Deceptive Trade Practices Act, Minnesota Prevention of Consumer Fraud Act, and negligent infliction of emotional distress.

¹ Under the Hatch–Waxman Amendments to the Food Drug & Cosmetic Act (“FDCA”), generic equivalents are required to have the same label as the brand-name drug. 21 U.S.C. § 355(j)(2)(A)(v).

² Plaintiffs also contend that a 2003 label update was likewise not included in PLIVA's labeling. But this update involved the use of metoclopramide for pediatric and geriatric patients, and there is no evidence that either Abicht or White were very young or very old when they took metoclopramide.

DISCUSSION

A motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) is analyzed according to the same standards as a motion to dismiss under Rule 12(b)(6). [Westcott v. Omaha](#), 901 F.2d 1486, 1488 (8th Cir.1990). The Court must construe the allegations in the pleadings and reasonable inferences arising from the pleadings favorably to the non-moving party. [Morton](#)

v. Becker, 793 F.2d 185, 187 (8th Cir.1986). The Court should not, however, “blindly accept the legal conclusions drawn by the pleader from the facts.” *Id.* A motion for judgment on the pleadings will be granted only if “it appears beyond doubt that the [nonmovants] can prove no set of facts which would entitle [them] to relief.” *Id.*; see also *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

A. Preemption and Mensing

*2 The Supreme Court recently determined that an individual suffering from *tardive dyskinesia* as a result of her long-term use of *metoclopramide* could not bring state-law claims against PLIVA for failure to warn of the risks of *metoclopramide*. *PLIVA, Inc. v. Mensing*, — U.S. —, 131 S.Ct. 2567, 180 L.Ed.2d 580 (2011). Under the doctrine of impossibility preemption, the Court found that state-law duties that ostensibly required a generic drug's manufacturer to include stronger warnings on its label than those approved by the FDA for the brand-name drug were preempted, because the FDA required a generic drug's label to be the same as the brandname drug's label. Thus, it was impossible for a generic drug manufacturer to comply with state law and with federal law.

PLIVA argues here that this case is identical to *Mensing* and must be dismissed as preempted. And, to be sure, most of Plaintiffs' claims in these two cases are just the sort of failure-to-warn claims that *Mensing* prohibits, whether couched as strict liability, breach of warranties, negligence, misrepresentation, fraud, negligence per se, Minnesota Deceptive Trade Practices Act, Minnesota Prevention of Consumer Fraud Act, or negligent infliction of emotional distress, and those claims must be dismissed as preempted by *Mensing*. But Plaintiffs also raise a different claim, one that *Mensing* did not address: are claims that a generic drug failed to include warnings that the brand-name drug's label contained cognizable under state law?

B. “Sameness”

Plaintiffs base their failure-to-update claim on the FDA's requirement that “generic drug manufacturers have an ongoing federal duty of ‘sameness.’” *Mensing*, 131 S.Ct. at 2575. They contend that PLIVA's alleged failure to comply with this duty gives rise to claims under state law. But if the duty involved is a federal duty—and Plaintiffs do not argue that state law does or even could impose any duty of sameness—then that duty is enforceable only through federal law, not state law. And federal law not only expressly

preempts state law but also precludes any private cause of action for enforcement of the FDA's requirements. See *Buckman Co. v. Plaintiffs' Legal Comm.*, 532 U.S. 341, 349 n.4 (2001) (“The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit....”); *Riley v. Cordis Corp.*, 625 F.Supp.2d 769, 776–77 (D.Minn.2009) (Schiltz, J.) (“Thus, a private litigant cannot sue a defendant for violating the FDCA.”).

Federal law is the gravamen of Plaintiffs' failure-to-update claim here. They contend that PLIVA violated its duties under the FDCA by failing to include on the metoclopramide label the information the FDA approved for *Reglan's* label. But the enforcement of such a duty is exclusively the province of the federal government, not of state tort law. “[A] private litigant cannot bring a state-law claim against a defendant when the state-law claim is in substance (even if not in form) a claim for violating the FDCA—that is, when the state claim would not exist if the FDCA did not exist.” *Riley*, 625 F.Supp.2d at 777.

*3 Plaintiffs cite a litany of cases in support of their argument that a claim regarding a failure to update a drug's label is not preempted. Plaintiffs at times misrepresent the holdings in the cases they cite, and in any event most of them are not on point. For example, Plaintiffs contend that one case found “claims based on generic manufacturer's failure to upgrade to the current label may not be preempted.” (Pl.'s Opp'n Mem. (12–1278 Docket No. 19) at 18 (citing *Metz v. Wyeth, LLC*, No. 8:10cv2658, 2012 WL 1058870, at *8 (M.D.Fla. Mar.28, 2012)).) But *Metz* did not involve a claim regarding a manufacturer's failure to update a label. Rather, the plaintiffs in *Metz* claimed that the generic drug manufacturer failed adequately to communicate to physicians the warning in the 2004 label update. The court in *Metz* stated that it might not be impossible for the manufacturer to comply with its federal duties and “to more effectively communicate the FDA approved label to medical providers and/or consumers” as state law ostensibly required, and therefore that *Mensing* did not necessarily preempt this particular claim. *Metz*, 2012 WL 1058870, at *3. However, even if not preempted, those claims were barred by Florida law. *Id.* at *8.

Nor does the Eighth Circuit Court of Appeals' holding in *Lefavre v. KV Pharmaceutical Company*, 636 F.3d 935 (8th Cir.2011), compel a different conclusion. Although the *Lefavre* decision takes a narrow view of preemption under the FDCA, that decision issued several months before the Supreme Court's *Mensing* decision. Not only did *Mensing*

take a much broader view of FDCA preemption, especially when applied to a generic drug manufacturer's duty with respect to drug labeling, but the Supreme Court in *Mensing* also struck down the Eighth Circuit's own narrower FDCA preemption analysis. Thus, to the extent that *Lefavre* is on point, it is not persuasive in this situation.

To be certain, there are some decisions finding that claims regarding the failure to update a drug's labeling may not be preempted under *Mensing*. See, e.g., *Fisher v. Pelstring*, 817 F.Supp.2d 791, 805 (D.S.C.2011). According to *Fisher*, “a negligence action in which the standard of care is defined by statute is [not] the equivalent of private enforcement of the FDCA.” *Id.* at 834. This Court respectfully disagrees with the *Fisher* court's analysis. Where federal law supplies the duty, a state claim to enforce that duty is, in substance if not in form, a cause of action under federal law. And such private actions are not allowed under the FDCA. As such, Plaintiffs' failure-to-update claim fails as a matter of law.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED that:**

1. PLIVA's Motion for Judgment on the Pleadings in Civ. No. 12–1278 (Docket No. 14) is **GRANTED**;
2. PLIVA's Motion for Judgment on the Pleadings in Civ. No. 12–2172 (Docket No. 11) is **GRANTED**; and
- *4 3. These cases are **DISMISSED with prejudice**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

All Citations

Not Reported in F.Supp.2d, 2013 WL 141724, Prod.Liab.Rep. (CCH) P 19,015

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 2

Nos. 2018-1247, 2018-114

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

AMARIN PHARMA, INC., AMARIN PHARMACEUTICALS IRELAND LTD.,

Appellants,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee,

ROYAL DSM NV, DSM MARINE LIPIDS PERU S.A.C, DSM NUTRITIONAL
PRODUCTS LLC, DSM NUTRITIONAL PRODUCTS CANADA, INC.,
PHARMAVITE LLC, NORDIC NATURALS, INC., NORDIC PHARMA, INC.,

Intervenors.

On Appeal from the United States International
Trade Commission, No. 3247.
(caption continued on inside cover)

**CORRECTED BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING APPELLEE**

Of Counsel:

ROBERT P. CHARROW
General Counsel

REBECCA K. WOOD
Associate General Counsel
Chief Counsel, Food & Drug Admin.

ANNAMARIE KEMPIC
Deputy Chief Counsel, Litigation

JAMES C. FRASER
Associate Chief Counsel, Litigation
Department of Health & Human Services

CHAD A. READLER
Acting Assistant Attorney General

SCOTT R. MCINTOSH
JOSEPH F. BUSA
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0261

(caption continued from front cover)

In re: AMARIN PHARMA, INC.,
AMARIN PHARMACEUTICALS IRELAND LTD.,

Petitioners,

On Petition for Writ of Mandamus to the
United States International Trade Commission

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF THE UNITED STATES.....	1
STATEMENT OF THE CASE	2
A. FDA Regulation of Drugs and Dietary Supplements.....	2
B. The International Trade Commission.....	4
C. Factual Background and Proceedings Below.....	5
SUMMARY OF ARGUMENT	7
ARGUMENT: The Federal Food, Drug, and Cosmetic Act Precludes Private Enforcement Proceedings Like Amarin’s.....	8
A. Amarin’s Claims Are Private Attempts to Enforce the FDCA, and Are Therefore Prohibited.....	8
B. Amarin’s Arguments Are Without Merit.....	21
CONCLUSION.....	29
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Allergan, Inc. v. Athena Cosmetics, Inc.</i> , 738 F.3d 1350 (Fed. Cir. 2013).....	8, 9, 24, 25, 26, 27
<i>Alpharma, Inc. v. Pennfield Oil Co.</i> , 411 F.3d 934 (8th Cir. 2005)	20
<i>Baden Sports, Inc. v. Molten USA, Inc.</i> , 556 F.3d 1300 (Fed. Cir. 2009).....	12
<i>Buckman Co. v. Plaintiffs’ Legal Comm.</i> , 531 U.S. 341 (2001)	1, 3, 8, 10, 25
<i>Clock Spring, LP v. Wrapmaster, Inc.</i> , 560 F.3d 1317 (Fed. Cir. 2009).....	17
<i>Cottrell, Ltd. v. Biotrol Int’l, Inc.</i> , 191 F.3d 1248 (10th Cir. 1999)	21
<i>Dastar Corp. v. Twentieth Century Fox Film Corp.</i> , 539 U.S. 23 (2003)	12
<i>Dial A Car, Inc. v. Transp., Inc.</i> , 82 F.3d 484 (D.C. Cir. 1996).....	20-21
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	10
<i>Hi-Tech Pharm., Inc. v. Hodges Consulting, Inc.</i> , 230 F. Supp. 3d 1323 (N.D. Ga. 2016).....	24
<i>IQ Prods. Co. v. Pennzoil Prods. Co.</i> , 305 F.3d 368 (5th Cir. 2002)	20
<i>Mylan Labs., Inc. v. Matkari</i> , 7 F.3d 1130 (4th Cir. 1993)	19

<i>Mylan Pharm., Inc. v. Thompson</i> , 268 F.3d 1323 (Fed. Cir. 2001), <i>superseded by statute on other grounds</i> <i>as recognized in Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S</i> , 566 U.S. 399, 408 (2012).....	13, 19
<i>PDK Labs, Inc. v. Friedlander</i> , 103 F.3d 1105 (2d Cir. 1997).....	20
<i>PhotoMedex, Inc. v. Irwin</i> , 601 F.3d 919 (9th Cir. 2010)	17, 18
<i>POM Wonderful LLC v. Coca-Cola Co.</i> , 134 S. Ct. 2228 (2014).....	8, 21, 22, 23
<i>RadLAX Gateway Hotel, LLC v. Amalgamated Bank</i> , 566 U.S. 639 (2012).....	11
<i>Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.</i> , 902 F.2d 222 (3d Cir. 1990).....	18-19
<i>ThermoLife Int’l, LLC v. Gaspari Nutrition Inc.</i> , 648 F. App’x 609 (9th Cir. 2016)	23
<i>TianRui Grp. Co. v. Int’l Trade Comm’n</i> , 661 F.3d 1322 (Fed. Cir. 2011).....	13
<i>Ventas, Inc. v. United States</i> , 381 F.3d 1156 (Fed. Cir. 2004).....	9
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009).....	3

Statutes:

Federal Food, Drug, and Cosmetic Act:

21 U.S.C. § 301 <i>et seq.</i>	2
21 U.S.C. § 321(g)(1)	2, 16
21 U.S.C. § 321(g)(1)(B)	2
21 U.S.C. § 321(g)(1)(C)	2
21 U.S.C. § 321(p)(1).....	3

21 U.S.C. § 321(ff).....	15
21 U.S.C. § 321(ff)(1)	2
21 U.S.C. § 321(ff)(3)(B)(ii)	2
21 U.S.C. § 331(a).....	14
21 U.S.C. § 331(d)	3, 14
21 U.S.C. § 332	3, 11
21 U.S.C. § 333	3
21 U.S.C. § 334(a)(1)	3
21 U.S.C. § 337(a).....	1, 4, 7, 9, 10, 11, 15, 17, 26, 27, 28
21 U.S.C. § 337(b)	9
21 U.S.C. § 342(f)(1)(a)	3
21 U.S.C. § 351	14
21 U.S.C. § 352	14
21 U.S.C. § 355	3, 4, 9
21 U.S.C. § 381(a).....	11, 14
21 U.S.C. § 381(a)(3)	3
21 U.S.C. § 393	4, 9
52 Stat. 1040, 1046	12
H.R. Rep. No. 2139 (April 14, 1938).....	9
Lanham Act:	
15 U.S.C. § 1125(a).....	4
15 U.S.C. § 1125(a)(1)(B)	4, 16
Tariff Act of 1930:	
19 U.S.C. § 1334	27
19 U.S.C. § 1337(a)(1)	27, 28
19 U.S.C. § 1337(a)(1)(A)(i)	4, 17
19 U.S.C. § 1337(d)	4
46 Stat. 590, 703	12
28 U.S.C. § 517.....	1
Sherman Food, Drug, and Cosmetic Law,	
Cal. Health & Safety Code § 109875 <i>et seq.</i>	24
Unfair Competition Law,	
Cal. Bus. & Prof. Code § 17203	24

Rule:

Fed. R. App. P. 29(a)(2)..... 1

Other Authorities:

Black’s Law Dictionary (10th ed. 2014) 10

Initial Determination, *In re Certain Insulated Sec. Chests*,
USITC Inv. No. 337-TA-244, 1987 WL 451338 (June 17, 1986) 4

INTEREST OF THE UNITED STATES

This case presents the question whether private parties may seek to enforce the Federal Food, Drug, and Cosmetic Act (FDCA) through a private proceeding like the complaint that Amarin brought before the International Trade Commission. The United States submits this amicus brief to protect its interest in the proper resolution of that question. *See* 28 U.S.C. § 517; Fed. R. App. P. 29(a)(2).

“The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with” the FDCA. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4 (2001). Private parties are expressly prohibited from bringing “proceedings for the enforcement, or to restrain violations, of” the FDCA. 21 U.S.C. § 337(a). Yet that is precisely what Amarin seeks to do here. Amarin’s claims, though nominally brought under the Tariff Act, attempt to enforce or restrain violations of the FDCA because they seek—as a necessary component of the stated cause of action—to prove FDCA violations and compel obedience to the FDCA through the remedies provided by that statute. For that reason, the International Trade Commission correctly concluded that Amarin’s claims are precluded by the FDCA. The United States takes no position on the other issues in this case.

STATEMENT OF THE CASE

A. FDA Regulation of Drugs and Dietary Supplements

1. The Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.*, authorizes the Food and Drug Administration (FDA) to regulate, among other things, drugs and dietary supplements. Determining whether an article is a “drug” or a “dietary supplement” under the FDCA can involve difficult and complex analysis. In general, the term “drug” includes “articles (other than food)” that are “intended to affect the structure or any function of the body of man or other animals,” as well as “articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals.” *Id.* § 321(g)(1)(B), (C). A “dietary supplement” is a product that, among other factors, contains a “dietary ingredient[],” which includes, among other things, a vitamin, mineral, herb, or “a dietary substance for use by man to supplement the diet by increasing the total dietary intake.” *Id.* § 321(ff)(1).

These general definitions are further refined by other provisions of the FDCA. For example, a “dietary supplement” that otherwise might meet the definition of a “drug” is “not a drug * * * solely because” the label contains certain types of health-related claims. 21 U.S.C. § 321(g)(1). And the term “dietary supplement” excludes “an article authorized for investigation as a new drug,” where the investigation has been instituted and made public, unless before such authorization the article was “marketed as a dietary supplement or as a food.” *Id.* § 321(ff)(3)(B)(ii).

The FDCA treats “drugs” and “dietary supplements” differently. Unless a drug is “generally recognized” as “safe and effective for use under the conditions prescribed, recommended, or suggested” in its labeling, it is classified as a “new drug.” 21 U.S.C. § 321(p)(1). And the FDCA prohibits introducing a new drug into interstate commerce before it has been approved by FDA. *Id.* §§ 331(d), 355. To obtain pre-market approval, the drug sponsor has the burden of proving that a new drug is safe and effective for its intended use. *See Wyeth v. Levine*, 555 U.S. 555, 567 (2009). A sponsor that introduces a new drug into interstate commerce without complying with this requirement is subject to a variety of FDA enforcement measures, including criminal penalties (21 U.S.C. § 333), injunctive relief (*id.* § 332), forfeiture (*id.* § 334(a)(1)), and—most relevant here—exclusion of the drug from importation into the United States (*id.* § 381(a)(3)).

By contrast, “dietary supplements” do not require or receive pre-market approval for safety and efficacy. If FDA determines that a dietary supplement is “adulterated” food—because, for example, it “presents a significant or unreasonable risk of illness or injury,” 21 U.S.C. § 342(f)(1)(A)—the manufacturer may be subject to the same range of FDCA enforcement measures applicable to new drugs.

2. “The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with” the FDCA. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4 (2001). Congress gave the Secretary of Health and Human Services and FDA the authority to execute the

requirements of the FDCA. *See* 21 U.S.C. §§ 355, 393. And Congress prohibited private parties from bringing actions to enforce the FDCA: “[A]ll * * * proceedings for the enforcement, or to restrain violations, of this chapter shall be *by and in the name of the United States*.” *Id.* § 337(a) (emphasis added).

B. The International Trade Commission

The Tariff Act of 1930 prohibits “[u]nfair methods of competition and unfair acts in the importation of articles” into the United States, where such acts have the “threat or effect” of “destroy[ing] or substantially injur[ing] an industry in the United States.” 19 U.S.C. § 1337(a)(1)(A)(i). Private parties may submit claims under this provision to the International Trade Commission for adjudication. If the Commission finds a violation, it “shall direct that the articles concerned” be “excluded from entry into the United States.” *Id.* § 1337(d).

The Tariff Act does not fully define what constitutes an “unfair act” or “unfair method of competition.” Through adjudication, the Commission has interpreted those terms to include conduct violating the false-advertising provisions of the Lanham Act, 15 U.S.C. § 1125(a). *See, e.g.*, Initial Determination, *In re Certain Insulated Sec. Chests*, USITC Inv. No. 337-TA-244, 1987 WL 451338, at *2 (June 17, 1986). The Lanham Act prohibits using in commercial advertising any “term” that “misrepresents the nature, characteristics, [or] qualities” of goods. 15 U.S.C. § 1125(a)(1)(B).

C. Factual Background and Proceedings Below

1. Amarin obtained approval from FDA to market a new drug to treat severe hypertriglyceridemia. Appx9, Appx14-15. The drug consists of capsules of an ethyl ester form of eicosapentaenoic acid that is synthetically produced from fish oils. Appx9, Appx11, Appx14-15. Amarin alleges that other manufacturers also synthetically derive eicosapentaenoic acid (and close relatives) and import articles “predominantly comprised” of those ingredients into the United States. Appx9. Those manufacturers allegedly label and market those articles as “dietary supplements,” and also allegedly market them as suitable for treating various diseases. Appx9, Appx11, Appx14-15, Appx17-18.

Amarin filed a complaint with the International Trade Commission, seeking to exclude these articles from the United States under the Tariff Act. Appx4-114. The complaint alleged that the accused articles do not qualify as “dietary supplements” under the FDCA and instead constitute “new drugs,” for which the manufacturers should have, but did not, obtain FDA approval of their safety and efficacy prior to marketing them in the United States, as required by the FDCA. Appx16.

Based on these allegations, Amarin presented two legal claims to the Commission. In one claim, Amarin contended that the importation of the articles violates the Tariff Act “based on the standards set forth in the FDCA.” Appx56; *see* Appx56-59. In other words, Amarin alleged that the articles were marketed in violation of the FDCA, and that importation of articles marketed in violation of the

FDCA is an “unfair act” for that reason. In the other claim, Amarin argued that labeling the articles as “dietary supplements” is an “unfair act” in violation of the Tariff Act because it constitutes false advertising under the Lanham Act. Appx16; *see* Appx31-56. Amarin reasoned that labeling the articles as “dietary supplements” is “literally false” because the articles do not qualify as “dietary supplements” under the FDCA, and it also “hides the material fact that the products are actually unapproved ‘new drugs.’” Appx55.

2. FDA submitted a letter to the Commission asking it to dismiss the complaint. FDA noted that it had not determined whether the articles were drugs or dietary supplements. Appx627. FDA explained that Congress gave FDA enforcement authority over the FDCA and prohibited private parties from bringing proceedings to enforce the FDCA. Appx630. And, FDA explained, the complaint that Amarin filed with the Commission “attempt[s] an unlawful private FDCA enforcement action.” Appx627. Amarin’s claims “all depend on the allegation that the products at issue are falsely labeled as ‘dietary supplements’ because they do not meet the FDCA definition of ‘dietary supplements’ and instead meet the FDCA definition of ‘new drugs.’” Appx631. Accordingly, FDA concluded, “in order to resolve any of [Amarin’s] claims, the Commission will necessarily have to step into the shoes of the FDA,” but “the FDCA precludes such action.” Appx632.

3. The Commission dismissed the complaint. The Commission held that “Amarin’s complaint does not allege an unfair method of competition or an unfair act cognizable under” the Tariff Act. Appx1. The Commission explained that “the Lanham Act allegations in this case are precluded by the Food, Drug and Cosmetic Act,” and that “the Food and Drug Administration is charged with the administration of the FDCA.” *Id.*

SUMMARY OF ARGUMENT

A. The International Trade Commission correctly held that the Federal Food, Drug, and Cosmetic Act precludes Amarin’s complaint. The FDCA prohibits private proceedings “for the enforcement, or to restrain violations, of” that statute. 21 U.S.C. § 337(a). The FDCA instead commits enforcement exclusively to the federal government to ensure that complex enforcement decisions are made with the benefit of FDA’s scientific and regulatory expertise. As a consequence, private parties, like Amarin, may not initiate proceedings in a court or administrative agency to remedy alleged violations of the FDCA. Nor can private parties circumvent that prohibition by wrapping their FDCA enforcement claims inside some *other* cause of action. The FDCA prohibits “all” private proceedings to enforce or restrain violations of the FDCA, *id.*, including private claims that are nominally brought under another statute but seek to prove violations of the FDCA and compel obedience to that statute—as the courts of appeals have consistently concluded.

B. Amarin’s arguments to the contrary are without merit. To be sure, private parties may bring suit to remedy violations of statutes that create private causes of action, so long as those suits are *not* attempts to enforce the FDCA. That is why, for example, false advertising about the content of fruit juice can be remedied in a private action under the Lanham Act, where the claim does not seek to prove or remedy a violation of the FDCA’s juice-labeling provisions but instead rests on allegations entirely independent of the FDCA. *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014). Nor does the FDCA preempt claims brought under state law that seek to prove and remedy violations of state statutes parallel to but independent of the FDCA. *See Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350 (Fed. Cir. 2013). But where a private party, like Amarin, seeks to prove and remedy violations of the FDCA itself, as a necessary element of its stated cause of action, its claims are precluded by the FDCA’s prohibition on private enforcement proceedings.

ARGUMENT

THE FEDERAL FOOD, DRUG, AND COSMETIC ACT PRECLUDES PRIVATE ENFORCEMENT PROCEEDINGS LIKE AMARIN’S.

A. Amarin’s Claims Are Private Attempts to Enforce the FDCA, and Are Therefore Prohibited.

1. “The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with” the FDCA. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4 (2001). Congress gave the Secretary of Health and Human Services and FDA the authority to execute the

requirements of the FDCA. *See* 21 U.S.C. §§ 355, 393. And Congress expressly provided that “all such proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be *by and in the name of the United States*”—not private parties. *Id.* § 337(a) (emphasis added); *see* H.R. Rep. No. 2139, at 5 (April 14, 1938).

The only exception to this rule is that “[a] State may bring in its own name and within its jurisdiction proceedings for the civil enforcement” of specific provisions of the FDCA related to food. 21 U.S.C. § 337(b). In narrowly drawing that lone exception, Congress underscored that, otherwise, only the United States may bring “proceedings for the enforcement, or to restrain violations, of” the FDCA. *Id.* § 337(a); *see Ventas, Inc. v. United States*, 381 F.3d 1156, 1161 (Fed. Cir. 2004) (“[T]he maxim *expressio unius est exclusio alterius* presumes that [enumerated exceptions] are the only exceptions Congress intended.”). For that reason, this Court has correctly noted that, outside this single exception, “[t]he FDA—and the FDA alone—has the power and the discretion to enforce the FDCA.” *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1359 (Fed. Cir. 2013).

Centralizing FDCA enforcement authority within FDA ensures that FDA’s expertise will inform often-difficult factual and legal determinations, such as which requirements apply to particular articles and whether an article is being distributed in violation of the FDCA. *See* Appellee Br. 27-37 (illustrating the technical issues that would arise in adjudicating Amarin’s claims). It also ensures that discretionary determinations—like whether enforcement measures should be pursued for a

violation, and if so, which remedies are appropriate—will be made by policymakers, not private parties. And it promotes uniformity. Private parties, of course, must reach their own determinations about what the FDCA requires in the first instance, and courts may need to determine if the FDCA has been violated when the federal government brings FDCA enforcement proceedings. But Congress deliberately chose to centralize within FDA the crucial decision whether to seek to prove and redress alleged violations of the FDCA. Doing so maximizes the benefits of centralized enforcement. *Cf. Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (discussing those benefits).

2. The FDCA’s prohibition on private “proceedings for the enforcement, or to restrain violations, of” the Act, 21 U.S.C. § 337(a), means that private parties may not bring suit under the FDCA itself to remedy what they allege to be violations of the Act. It also means that private parties may not circumvent this straightforward prohibition by invoking some *other* cause of action, under another federal statute, in order to bring what is, at bottom, still an action “for the enforcement” or “to restrain violations” of the FDCA. *See Buckman*, 531 U.S. at 353 (preempting state fraud claims that “exist solely by virtue of the FDCA”).

A proceeding “for the enforcement” of the FDCA is one that seeks “[t]o give force or effect” and “compel obedience to” the FDCA. *Black’s Law Dictionary* (10th ed. 2014) (defining “to enforce”). Similarly, a proceeding to “restrain violations” of the FDCA seeks to prove and redress such violations. In order to give meaningful

effect to Congress’s mandate that “*all*” such proceedings to enforce or restrain violations of the FDCA “shall be by and in the name of the United States,” 21 U.S.C. § 337(a) (emphasis added), the FDCA precludes those private proceedings that rely on alleged violations of the FDCA as a necessary component of their cause of action and that seek to redress or restrain those FDCA violations. That is particularly clear where the private proceeding seeks remedies like those available under the FDCA, such as injunctive relief, *id.* § 332, or refusal of admission of articles into the United States, *id.* § 381(a).

That conclusion is reinforced by traditional principles of statutory construction. Where “Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions,” and where one such specific solution contradicts a more-general statute, the “specific provision is construed as an exception to the general one” in order to “eliminate the contradiction.” *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Here, the FDCA is a highly reticulated regime of requirements for very specific articles—including drugs and dietary supplements—and, as part of that comprehensive scheme to solve particular problems, the FDCA prohibits private proceedings to enforce or restrain violations of the FDCA. By contrast, the Tariff Act states general requirements—no “unfair acts” in the “importation of articles”—that are applicable to a far larger universe of articles, and it creates a private cause of action to enforce those general requirements. The FDCA’s careful prohibition on private enforcement proceedings cannot be fully

implemented if a private party may use the Tariff Act to enforce or restrain violations of the FDCA. Accordingly, the more-specific provisions of the FDCA control.

That conclusion is reinforced by the timeline. When Congress enacted the Tariff Act in 1930, it allowed private parties to file complaints with the Commission alleging “unfair acts” in the importation of articles and seeking to exclude those articles from the United States. *See* 46 Stat. 590, 703. The question whether private parties could use that mechanism to exclude articles alleged to violate the FDCA first arose in 1938, when the FDCA was enacted. And, at that first available opportunity, Congress made clear that its new and specific regulatory regime could not be enforced through private enforcement proceedings of any stripe. *See* 52 Stat. 1040, 1046 (prohibiting “all” private enforcement). Congress thus did not extend the Tariff Act to cover violations of the FDCA; it preferred instead to leave FDCA enforcement to the comprehensive framework it created in that more-specific statute.

The Supreme Court and this Court applied similar reasoning when limiting the scope of the Lanham Act in order to give full force to the Copyright and Patent Acts. These courts held that claims alleging false statements about the authorship of a written work, or origin of an innovation, are not cognizable under the false-advertising provision of the Lanham Act because, among other reasons, entertaining such claims under the Lanham Act would avoid the more-specific regulation of those subjects under the Copyright and Patent Acts. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-35 (2003); *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d

1300, 1307 (Fed. Cir. 2009); *see also TianRui Grp. Co. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1333 (Fed. Cir. 2011) (The Tariff Act “cannot be used to circumvent express congressional limitations on the scope of substantive U.S. patent law.”).

Similarly, this Court held in *Mylan Pharmaceuticals, Inc. v. Thompson*, 268 F.3d 1323, 1332-33 (Fed. Cir. 2001), *superseded by statute on other grounds as recognized in Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 408 (2012), that a claim nominally seeking declaratory judgment regarding non-liability for patent infringement was actually an improper attempt to privately enforce the FDCA. The plaintiff argued that it should be declared to not be liable for infringement because the defendant had violated a provision of the FDCA. *Id.* Because no cause of action existed to challenge that type of FDCA violation, this Court held that the prohibition on private FDCA enforcement proceedings precluded entertaining the plaintiff’s suit under the Declaratory Judgment and Patent Acts. *Id.*

For these reasons, permitting private parties to enforce and restrain violations of the FDCA using the Tariff Act would permit what Congress prohibited. The specific provisions of the FDCA govern, and they preclude extending the provisions of the earlier and more-general Tariff Act to enforce the FDCA.

3. Both of the claims that Amarin submitted to the International Trade Commission constitute private efforts to enforce or restrain violations of the FDCA, and both are therefore precluded.

a. One of Amarin’s claims contends that the Commission should exclude articles from entry into the United States because those articles allegedly violate several provisions of the FDCA. Amarin claims that the importation of the accused articles is an “unfair act,” within the meaning of the Tariff Act, “*based upon the standards set forth in the FDCA.*” Appx56 (emphasis added). Amarin elaborates that the accused articles are allegedly “misbranded drugs in violation of the standards set forth in Section 502 of the FDCA, [21 U.S.C.] § 352, and adulterated drugs, in violation of Section 501 of the FDCA, *id.* § 351.” Appx57; *see also* Appx57-59 (alleging other violations). Amarin further contends that the introduction of these allegedly adulterated and misbranded drugs “is prohibited by Section 301(d) and (a) of the FDCA[,] [21 U.S.C.] § 331(a), (d).” Appx59. Amarin also explains that “the FDCA prohibits unapproved ‘new drugs,’ and adulterated and misbranded ‘drugs,’ from entering the United States under Section 801(a) of the FDCA, 21 U.S.C. § 381(a),” and argues that, under that provision of the FDCA, FDA “must refuse * * * admission to the United States” of unapproved, adulterated, and misbranded drugs. *Id.*

In sum, Amarin seeks to prove a series of alleged FDCA violations and to remedy those violations by excluding unapproved, adulterated, and misbranded drugs from importation into the United States. In advancing this claim, Amarin provides no reason, other than the alleged violations of the FDCA, to conclude that the importation of the accused articles constitutes an “unfair act” within the meaning of

the Tariff Act. Instead, Amarin candidly admits that this claim seeks relief “based upon the standards set forth in the FDCA.” Appx56. For these reasons, Amarin’s claim is a private proceeding “for the enforcement, or to restrain violations, of” the FDCA, 21 U.S.C. § 337(a), and Amarin is therefore prohibited from pursuing that claim.

b. Amarin’s false-advertising claim is no different. In that claim, Amarin contends that the accused articles should be excluded from entry into the United States because labeling on, or advertisements about, those articles is allegedly false or misleading, in violation of the false-advertising provision of the Lanham Act, such that importation of those articles would constitute an “unfair act” under the Tariff Act. Appx31-56. But this claim, too, is expressly predicated on proving, and seeks remedies for, alleged violations of the FDCA.

Amarin contends that labeling on the accused articles “falsely asserts that the products are ‘dietary supplements,’” where the articles “cannot meet the definition of ‘dietary supplement’ in Section 201(ff) of the FDCA, 21 U.S.C. § 321(ff).” Appx33. Amarin’s complaint devotes over twelve pages to identifying provisions of the FDCA that govern what is and is not a “dietary supplement,” alleging facts about the articles, and explaining why, in Amarin’s view, the articles do not meet the FDCA’s definition of “dietary supplement.” Appx34-47. Amarin further alleges that the articles “are actually unapproved ‘new drugs’ under the FDCA,” within the meaning of “Section

201(g)(1) of the FDCA,” 21 U.S.C. § 321(g)(1). Appx47. The complaint devotes another eight pages to identifying the provisions of the FDCA that govern what constitutes a “drug” and a “new drug,” alleging facts about the articles, and explaining why, in Amarin’s view, the articles qualify as unapproved “new drugs” under the FDCA. Appx47-55. Amarin also identifies warning letters and other statements by FDA regarding what Amarin alleges are similar articles presenting similar violations of the FDCA. Appx37-38, Appx50-51.

Amarin relies on these alleged FDCA violations to establish the central element of Amarin’s false-advertising claim. Appx55-56. The Lanham Act makes it unlawful to use in commercial advertising any “term” that “misrepresents the nature, characteristics, [or] qualities” of goods. 15 U.S.C. § 1125(a)(1)(B). Amarin’s only argument for why the accused articles’ labeling is false or misleading is that it is “literally false” to call the articles “dietary supplements” when they allegedly do not meet the FDCA’s definition of that term and instead are unapproved “new drugs.” Appx55. Amarin provides no reason, other than these alleged FDCA violations, to conclude that the labeling or advertising makes a false or misleading statement. Amarin also relies on these alleged FDCA violations for another element of its false-advertising claim—materiality—alleging that “[i]f consumers knew that the products were illegally marketed unapproved ‘new drugs’ and that, as such, it was unclear whether the products were safe and effective, it would influence the consumers’ purchasing decisions.” *Id.* Amarin’s false-advertising claim, like Amarin’s other claim,

is thus expressly predicated on alleging, proving, and restraining a series of FDCA violations.

It makes no difference that Amarin's claims require proof of additional matters beyond the alleged violations of the FDCA. To prevail on either of its two claims, for example, Amarin will need to prove that importation of the articles that violate the FDCA will harm Amarin's business. *See Clock Spring, LP v. Wrapmaster, Inc.*, 560 F.3d 1317, 1329 n.10 (Fed. Cir. 2009) (a false-advertising plaintiff must show that it "has been or is likely to be injured as a result of the [false] statement"); 19 U.S.C. § 1337(a)(1)(A)(i) (a Tariff Act complainant must show a "threat or effect" of "destroy[ing] or substantially injur[ing] an industry in the United States"). But the existence of these additional elements in Amarin's claims does not change the fact that Amarin's claim to relief ultimately requires that it prove what are alleged to be violations of the FDCA; nor does it change the fact that Amarin seeks to redress and restrain those FDCA violations. Indeed, Amarin seeks remedies like those that are available to the government—and only to the government—in an FDCA enforcement proceeding. Accordingly, Amarin's claims are private actions "for the enforcement, or to restrain violations, of" the FDCA, and they are prohibited for that reason. 21 U.S.C. § 337(a).

4. That conclusion is consistent with the consensus of the courts of appeals that have addressed this issue. For example, in *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919 (9th Cir. 2010), a medical-device manufacturer brought a false-advertising claim under

the Lanham Act against a competitor who allegedly advertised its device as “FDA approved” when, the plaintiff contended, the competitor’s device was different enough from a previously-approved device that the competitor was required by the FDCA to make a further filing with FDA, but had not done so. *Id.* at 923-28. The Ninth Circuit held that “[b]ecause the FDCA forbids private rights of action under that statute, a private action brought under the Lanham Act may not be pursued when, as here, the claim would require litigation of the alleged underlying FDCA violation in a circumstance where the FDA has not itself concluded that there was such a violation.” *Id.* at 924. The court explained that to permit adjudication of the false-advertising claim “would, in effect, permit [the plaintiff] to assume enforcement power which the [FDCA] does not allow and require the finder of fact to make a decision that the FDA itself did not make.” *Id.* at 930.

The Third Circuit reached the same conclusion in *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990), where a drug manufacturer brought a false-advertising claim under the Lanham Act against a competitor, alleging that the labeling on the competitor’s drug lists an ingredient as “inactive” when the FDCA allegedly required that the ingredient be labeled as “active.” *Id.* at 230. The court noted that the plaintiff had provided no reason to think that the labeling was false or misleading other than the contention that the labeling violated the FDCA, and the court noted that FDA had not concluded whether the ingredient at issue was active or inactive or taken enforcement action accordingly. *Id.* at 230-31. The court held that

adjudication of the claim would improperly “usurp” FDA’s exclusive authority, emphasizing that the FDCA does not “create[] an express or implied private right of action,” and concluding that what the FDCA “do[es] not create directly, the Lanham Act does not create indirectly, at least not in cases requiring original interpretation” of the FDCA. *Id.* at 231.

Similarly, in *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993), a drug manufacturer brought a false-advertising claim under the Lanham Act against competitors who implicitly represented that their generic drugs were “properly approved by the FDA” by placing those drugs on the market in alleged violation of the FDCA. The Fourth Circuit recognized that a false-advertising claim might proceed if the plaintiff could identify representations in the drug’s packaging or labeling that misled consumers in a way independent of the FDCA. *Id.* But the Fourth Circuit held that “permitting [the plaintiff] to proceed on the theory that the defendants violated [the Lanham Act] merely by placing their drugs on the market would, in effect, permit [the plaintiff] to use the Lanham Act as a vehicle by which to enforce” the FDCA, which, the court noted, the plaintiff “is not empowered” to do. *Id.* This Court quoted this passage with approval in another case, also called *Mylan*, 268 F.3d at 1332, to support this Court’s holding that a claim brought as a declaratory judgment action was actually an improper attempt to enforce the FDCA through a private enforcement proceeding.

Finally, the Second Circuit held in *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1113 (2d Cir. 1997), that an inventor developing a weight-loss product had no standing to bring a false-advertising claim against a competitor under the Lanham Act. In support of that holding, the court concluded that the plaintiff’s “dogged insistence that [the defendant’s] products are sold without proper FDA approval suggests” that the plaintiff’s “true goal is to privately enforce alleged violations of the FDCA,” but “no such private right of action exists.” *Id.*¹

The courts of appeals have applied the same principle consistently in contexts involving other statutory schemes that also prohibit private enforcement actions. For example, in *IQ Products Co. v. Pennzoil Products Co.*, 305 F.3d 368, 374 (5th Cir. 2002), the Fifth Circuit held that the Federal Hazardous Substances Act’s prohibition on private enforcement actions precluded adjudication of a false-advertising claim that was predicated on the allegation that a product’s labeling violated the Act and was false or misleading for that reason. Similarly, in *Dial A Car, Inc. v. Transportation, Inc.*,

¹ *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934 (8th Cir. 2005), is not to the contrary. There, an antibiotic manufacturer brought a false-advertising claim against a competitor whose product was approved by FDA for certain uses but who allegedly falsely advertised additional, unapproved uses. *Id.* at 935-37. The Eighth Circuit held that this claim was cognizable, distinguishing the cases above. It was undisputed in *Alpharma* that the product was a “drug” and that FDA approval was required for each intended use. The court explained that there was thus no need to make a “preemptive determination” about how FDA would categorize the article at issue. *Id.* at 940. The claim rested on whether FDA had approved the competitor’s drug for additional uses—a factual issue that FDA had partially addressed. *Id.* at 939. By contrast, Amarin’s claims rest on disputed allegations about the proper FDCA classification of certain articles, a determination at the heart of FDCA enforcement that FDA has not made.

82 F.3d 484, 489-90 (D.C. Cir. 1996), the D.C. Circuit held that a false-advertising claim was not a proper vehicle by which a taxi company could sue a competitor for advertising itself to be lawfully permitted to operate in the District of Columbia. The Lanham Act could not be used “to interpret and *enforce* municipal regulations” (emphasis in original), at least where the Taxicab Commission had not clearly addressed the issue already. *Id.* at 490; *see also Cottrell, Ltd. v. Biotrol Int’l, Inc.*, 191 F.3d 1248, 1255 (10th Cir. 1999) (holding that plaintiff could not bring a claim seeking enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act “dressed up as a Lanham Act claim”).

B. Amarin’s Arguments Are Without Merit.

1. Amarin chiefly contends that the Supreme Court’s decision in *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014), has already settled the question presented in this case. Br. 2, 4, 18, 44-54. But Amarin’s reliance on *POM Wonderful* is fundamentally misplaced.

In *POM Wonderful*, a juice manufacturer brought a false-advertising claim under the Lanham Act against the manufacturer of a competing juice product. 134 S. Ct. at 2233. The plaintiff alleged that the competitor’s labeling misled consumers by prominently featuring the words “pomegranate” and “blueberry” in large type on the product’s label, even though the juice contained only small amounts of each, *id.* at 2233, 2235—allegations entirely independent of the FDCA. Indeed, the plaintiff in *POM Wonderful* did not cite the FDCA, allege that the competitor’s labeling violated

the FDCA, or allege that any such violation was the reason that the labeling was false or misleading. *See* First Am. Compl., *POM Wonderful LLC v. The Coca Cola Co.*, No. 08-cv-6237 (C.D. Cal., filed July 27, 2009) (Dkt. No. 53).

The district court and court of appeals in *POM Wonderful* held that the FDCA nonetheless precluded the plaintiff's false-advertising claim because regulations under the FDCA, which contain detailed provisions governing juice labeling, occupied the field, permitting some features of the defendant's label and prohibiting none of the features alleged to be misleading. 134 S. Ct. at 2236. But the Supreme Court reversed, holding that there was no conflict in fully enforcing both the FDCA and the Lanham Act in that case, where the plaintiff's claims were predicated on statements made on labeling regulated by the FDCA, but were not predicated on proving and remedying violations of the FDCA.

POM Wonderful thus stands for the proposition that the FDCA does not occupy the field of food labeling. False-advertising claims are not precluded by the FDCA simply because the FDCA independently regulates food labeling. As the Court characterized its holding in *POM Wonderful*, "Congress did not intend the FDCA to preclude Lanham Act suits *like POM's*." 134 S. Ct. at 2241 (emphasis added). And POM, as the Court emphasized, sought "to enforce the Lanham Act, not the FDCA or its regulations." *Id.* at 2239.

POM Wonderful therefore did not decide the question presented here: whether the FDCA’s prohibition on private proceedings to enforce or restrain violations of the FDCA precludes a private party’s claims that seek to prove and stop violations of the FDCA by invoking a private cause of action under another statute. Amarin alleges that the labeling on the accused articles constitutes an “unfair act” under the Tariff Act, and “false” advertising under the Lanham Act, solely *because* the articles allegedly violate the FDCA’s requirements. Amarin’s claims thus come into direct conflict with the government’s exclusive enforcement authority under the FDCA. And *POM Wonderful* expressly left open the question whether the FDCA precludes private causes of action brought under other statutes where those statutes and the FDCA “cannot be implemented in full at the same time.” 134 S. Ct. at 2240.

In the wake of *POM Wonderful*, courts have recognized this distinction between false-advertising claims that rest on FDCA violations and those that do not. Courts have permitted adjudication of false-advertising claims involving allegations not predicated on proving FDCA violations, like claims that a dietary supplement was falsely advertised as “safe” and “natural” when it was neither, under the common meaning of those words. *See ThermoLife Int’l, LLC v. Gaspari Nutrition Inc.*, 648 F. App’x 609, 612 (9th Cir. 2016) (unpublished). But they have properly continued to hold that Lanham Act claims predicated on proving and restraining FDCA violations are precluded, consistent with the consensus among the courts of appeals on that

issue before *POM Wonderful*. See, e.g., *Hi-Tech Pharm., Inc. v. Hodges Consulting, Inc.*, 230 F. Supp. 3d 1323, 1331 (N.D. Ga. 2016); Appellee Br. 24-25 (collecting cases).

2. Taking a different tack, Amarin argues (Br. 54-56) that the Commission’s conclusion that the FDCA precludes Amarin’s claims “cannot be reconciled” with this Court’s opinion in *Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350 (Fed. Cir. 2013). But *Allergan* is fully consistent with the Commission’s conclusion.

The plaintiff in *Allergan* sold an eyelash-growth product and sued a competitor for alleged violations of California’s Sherman Food, Drug, and Cosmetic Law, see Cal. Health & Safety Code § 109875 *et seq.*, which parallels the FDCA. The plaintiff alleged that the competitor was wrongly marketing an eyelash-growth product as a “cosmetic” when it was actually an unapproved “new drug,” under California law. *Allergan*, 738 F.3d at 1353. The plaintiff brought the action under California’s Unfair Competition Law, which creates a cause of action to remedy violations of state business laws like the Sherman Law. Cal. Bus. & Prof. Code § 17203.

This Court held in *Allergan* that the FDCA did not impliedly preempt the plaintiff’s state-law claim. 738 F.3d at 1355. The Court reasoned that California’s Sherman Law regulated in areas—health and safety—that “implicate an historic state power that may be vindicated under state law tort principles” absent a “clear and manifest purpose of Congress” to preempt such state law. *Id.* Applying this presumption against preemption, the Court “d[id] not find a clear purpose by Congress to preempt the state law claim at issue.” *Id.* And the Court concluded that

the Sherman Law “is not an obstacle to realizing federal goals” because “it contains provisions that parallel the FDCA, such that the statutes have consistent goals.” *Id.* at 1355-56. The Court distinguished *Buckman*, 531 U.S. 341, which held that the FDCA preempted a state tort claim predicated on alleged fraud against FDA. The *Allergan* Court reasoned that the tort action in *Buckman* “existed—unlike [the *Allergan* plaintiff’s] claim—‘solely by virtue of the FDCA disclosure requirements.’” 738 F.3d at 1356 (quoting *Buckman*, 531 U.S. at 352-53). The claim in *Allergan* existed solely by virtue of independent state law.

Allergan does not support Amarin’s argument that private parties may use the Tariff Act to enforce or restrain violations of the FDCA. The *Allergan* claim did not run afoul of the FDCA’s prohibition on private enforcement proceedings because the claim did not attempt to enforce the FDCA. Rather, the claim sought to enforce compliance with an independent state statute—the Sherman Law—using a state cause of action that permits private enforcement of the Sherman Law. To be sure, the contents of the Sherman Law paralleled the FDCA. But the Sherman Law was not dependent on the FDCA for its existence. And it was this independent state law, not the FDCA, that the *Allergan* plaintiff sought to enforce in a private action for unfair competition under state law.

Amarin, by contrast, seeks to prove and remedy violations of the FDCA itself through the claims brought under the Tariff Act, and the FDCA prohibits such private enforcement proceedings. *Accord* U.S. Amicus Br., *Athena Cosmetics, Inc. v.*

Allergan, Inc., No. 13-1379, 2015 WL 2457643, at *18 (U.S. May 26, 2015) (distinguishing *Allergan* from cases, like *PDK Labs*, that are “essentially efforts to enforce the FDCA itself, rather than parallel state law”); U.S. Amicus Br., *Albertson’s, Inc. v. Kanter*, No. 07-1327, 2008 WL 5151069, at *8 (U.S. Dec. 5, 2008) (“Although 21 U.S.C. 337 precludes private actions to enforce the FDCA itself, Section 337 does not prohibit private actions to enforce parallel state requirements.”).

That distinction—between suits to enforce the independent Sherman Law and impermissible suits to enforce the FDCA—is bolstered by the federalism interests at issue in *Allergan*, which are absent here. This Court noted in *Allergan* that California’s Sherman Law was enacted pursuant to the state’s “historic police powers,” and the Court therefore applied a presumption against preemption, which, it held, the FDCA did not overcome. 738 F.3d at 1355; accord U.S. Amicus Br., *Athena*, 2015 WL 2457643, at *11-17 (relying on the presumption against preemption). In so holding, this Court left for state law the interpretation and enforcement of state law within California. And it did so secure in the knowledge that private actions under state law to enforce state law would have no necessary consequence for the proper interpretation and enforcement of the FDCA itself.

Not so, here. Amarin’s claims seek to enforce and restrain violations of the FDCA—a federal statute. Adjudication of those claims would directly enforce the FDCA, with nationwide effect. Worse, nothing in Amarin’s theory would seem to prevent other private commercial competitors from bringing claims under the

Lanham Act in federal courts across the country seeking to prove and remedy alleged FDCA violations, with potentially precedential effect. That would effectively circumvent FDA’s exclusive control over how products are regulated under the FDCA and which products warrant enforcement proceedings. And it would significantly diminish the benefits that Congress secured in centralizing “all” decisions to bring FDCA enforcement proceedings. 21 U.S.C. § 337(a). As discussed above, Amarin’s claims are precluded by the FDCA under the normal tools of statutory construction. And, unlike in *Allergan*, there is no extra thumb on the scale in analyzing that question—no presumption against preemption to protect independent state law—because there are no federalism interests at stake. *See* 738 F.3d at 1356 (applying the presumption against preemption and distinguishing preclusion cases like *PhotoMedex*).

3. Finally, Amarin appears to argue (Br. 5, 18, 51, 63) that two provisions of the Tariff Act override the FDCA’s express prohibition on private enforcement proceedings. Amarin notes that the Commission’s remedies are “in addition to any other provision of law,” 19 U.S.C. § 1337(a)(1), and that the Tariff Act generally requires that other parts of the Executive Branch “shall cooperate fully” with the Commission “for the purposes of aiding and assisting its work,” *id.* § 1334.

Neither provision qualifies the FDCA’s flat prohibition on “all” private proceedings “for the enforcement, or to restrain violations, of” the FDCA. 21 U.S.C. § 337(a). The “in addition” provision does not address when a complainant’s claim is

cognizable (the question here); it conditionally indicates that “when” the Commission finds an “unfair act” in a claim properly before it, the Tariff Act’s remedies shall be “in addition” to any others. 19 U.S.C. § 1337(a)(1). Moreover, the “in addition” provision preserves other remedies—an issue unrelated to whether the later-enacted *FDCA* displaces an application of the *Tariff Act* that is incompatible with the *FDCA*’s specific prohibition on private enforcement proceedings. The “shall cooperate” provision speaks to how agencies assist the Commission where the Commission has jurisdiction. It does not blithely require all other federal agencies to make regulatory enforcement determinations that are exclusively reserved to those agencies in their organic acts, much less override the clear language of 21 U.S.C. § 337(a).

CONCLUSION

For the foregoing reasons, this Court should hold that the FDCA precludes
Amarin's claims.

Respectfully submitted,

CHAD A. READLER

Acting Assistant Attorney General

SCOTT R. MCINTOSH

/s/ Joseph F. Busa

JOSEPH F. BUSA

Attorneys, Appellate Staff

Civil Division, Room 7537

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington, DC 20530

(202) 353-0261

Joseph.F.Busa@usdoj.gov

Of Counsel:

ROBERT P. CHARROW

General Counsel

REBECCA K. WOOD

Associate General Counsel

Chief Counsel, Food & Drug Admin.

ANNAMARIE KEMPIC

Deputy Chief Counsel, Litigation

JAMES C. FRASER

Associate Chief Counsel, Litigation

Department of Health & Human Services

March 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 29 and 32(a). This brief was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface. This brief contains 6,995 words.

/s/ Joseph F. Busa

JOSEPH F. BUSA

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2018, I electronically filed the foregoing corrected brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Joseph F. Busa

JOSEPH F. BUSA

Counsel for the United States

TAB 3

2019 WL 5784708 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

AMARIN PHARMA, INC., et al., Petitioners,
v.
INTERNATIONAL TRADE COMMISSION, et al.

No. 19-152.
November 4, 2019.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Brief for the Federal Respondent in Opposition

Dominic L. Bianchi, General Counsel.

Wayne W. Herrington, Assistant General Counsel.

Houda Morad, Attorney Advisor, Office of the General Counsel, U.S. International Trade, Commission, Washington, D.C. 20436.

Noel J. Francisco, Solicitor General, Department of Justice, Washington, D.C. 20530-0001, SupremeCtBriefs@usdoj.gov, (202) 514-2217.

***I QUESTION PRESENTED**

Whether a private party's claim under the Lanham Act, 15 U.S.C. 1051 *et seq.*, presented in a complaint seeking an unfair-trade-practices investigation by the United States International Trade Commission under 19 U.S.C. 1337, is cognizable when that claim is based solely on an alleged violation of the new-drug provisions of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, and the Food and Drug Administration has not determined that the FDCA has been violated.

***II ADDITIONAL RELATED PROCEEDING**

United States Court of Appeals (Fed. Cir.):

Amarin Pharma, Inc. v. International Trade Comm'n (In re Amarin Pharma, Inc.), No. 18-114 (May 1, 2019)

***III TABLE OF CONTENTS**

Opinions below	1
Jurisdiction	1
Statement	1
Argument	10
Conclusion	22

TABLE OF AUTHORITIES

Cases:

<i>Buckman Co. v. Plaintiffs' Legal Comm.</i> , 531 U.S. 341 (2001)	4, 12
<i>Cheney v. United States Dist. Court</i> , 542 U.S. 367 (2004)	11, 21, 22
<i>Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH</i> , 843 F.3d 48 (2d Cir. 2016)	10, 16
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985)	20
<i>Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.</i> , 510 U.S. 27 (1993)	18
<i>POM Wonderful LLC v. Coca-Cola Co.</i> , 573 U.S. 102 (2014)	4, 9, 10, 13, 14
<i>Textron, Inc. v. U.S. Int'l Trade Comm'n</i> , 753 F.2d 1019 (Fed. Cir. 1985)	3
<i>Wood v. Allen</i> , 558 U.S. 290 (2010)	18
Statutes and regulations:	
Administrative Procedure Act, 5 U.S.C. 701 <i>et seq.</i>	19
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 <i>et seq.</i>	3
21 U.S.C. 321	15
21 U.S.C. 321(g)(1)	3, 5, 15
21 U.S.C. 321(p)	3, 15
*IV 21 U.S.C. 321(ff)	3, 5, 15
21 U.S.C. 321(ff)(3)(A)	3
21 U.S.C. 331(b)	3
21 U.S.C. 337(a)	4, 7, 11, 12, 15, 17
21 U.S.C. 337(b)	4, 14
21 U.S.C. 352(a) (Supp. IV 2016)	3, 5
21 U.S.C. 352(n)	5
21 U.S.C. 355(a)	3, 5
Tariff Act of 1930, as amended, 19 U.S.C. 1202 <i>et seq.</i>	1
19 U.S.C. 1330(d)(5)	2, 18
19 U.S.C. 1333(g)	7
19 U.S.C. 1334	15
19 U.S.C. 1337	passim
19 U.S.C. 1337(a)	16
19 U.S.C. 1337(a)(1)	2, 16
19 U.S.C. 1337(a)(1)(A)	1, 2, 11
19 U.S.C. 1337(b)	8, 19
19 U.S.C. 1337(b)(1)	2, 8, 17, 19, 20
19 U.S.C. 1337(c)	2, 10, 11, 18, 19, 20
19 U.S.C. 1337(d)	19, 20
19 U.S.C. 1337(d)-(g)	19
19 U.S.C. 1337(d)(1)	2, 18, 20
19 U.S.C. 1337(e)	19, 20
19 U.S.C. 1337(e)(1)	2, 18, 20
19 U.S.C. 1337(f)	19
19 U.S.C. 1337(f)(1)	2, 18, 20
19 U.S.C. 1337(g)	19
19 U.S.C. 1337(g)(1)	2, 18
19 U.S.C. 1337(g)(1)(B)	20
19 U.S.C. 1337(j)(1)(B)	20
19 U.S.C. 1337(j)(2)	18, 20
*V 19 U.S.C. 1337(j)(4)	20
Trademark Act of 1946, ch. 540, 60 Stat. 427 (15 U.S.C. 1051 <i>et seq.</i>)	3
15 U.S.C. 1125(a)(1)(B)	2, 3, 11
28 U.S.C. 1295(a)(6)	2, 8, 10, 11, 18, 19
19 C.F.R.:	
Section 210.9(a)	2

Section 210.10(a)(1)

2

***1 OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-38) is reported at [923 F.3d 959](#). The decision of the United States International Trade Commission (Pet. App. 39-42) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2019. The petition for a writ of certiorari was filed on July 30, 2019. The jurisdiction of this Court is invoked under [28 U.S.C. 1254\(1\)](#).

STATEMENT

1. a. The Tariff Act of 1930, as amended, [19 U.S.C. 1202 et seq.](#), prohibits certain “[u]nfair methods of competition and unfair acts in the importation of articles *** into the United States, or in the sale of such articles by the owner, importer, or consignee.” [19 U.S.C. 1337\(a\)\(1\)\(A\)](#). Congress has directed the United States *2 International Trade Commission (Commission) to “investigate any alleged violation of [Section 1337] on complaint under oath or upon its initiative,” [19 U.S.C. 1337\(b\)\(1\)](#), if “one-half of the number of commissioners voting agree that the investigation should be made,” [19 U.S.C. 1330\(d\)\(5\)](#). See [19 C.F.R. 210.9\(a\)](#), [210.10\(a\)\(1\)](#). Once “an investigation is initiated,” the Commission must set a target date for the agency’s “final determination.” [19 U.S.C. 1337\(b\)\(1\)](#).

After completing its investigation, the Commission “shall determine *** whether or not there is a violation of [Section 1337]” unless the matter is resolved by a consent order or agreement between the private parties. [19 U.S.C. 1337\(c\)](#). If the Commission finds such a violation, the violation “shall be dealt with, in addition to any other provision of law, as provided in [Section 1337].” [19 U.S.C. 1337\(a\)\(1\)](#); see [19 U.S.C. 1337\(c\)](#). Section 1337 authorizes the Commission to exclude the offending articles “from entry into the United States” and/or to issue a cease-and-desist order, unless the Commission finds that the “effect of such” exclusion or order on certain public interests warrants a different course. [19 U.S.C. 1337\(d\)\(1\)](#), (e)(1), (f)(1) and (g)(1). “Any person adversely affected by a final determination of the Commission under [Section 1337](d), (e), (f), or (g)” may obtain judicial review in the Federal Circuit, [19 U.S.C. 1337\(c\)](#), which possesses corresponding jurisdiction to review “the final determinations of the [Commission] relating to unfair practices in import trade, made under section [1]337,” [28 U.S.C. 1295\(a\)\(6\)](#).

b. The Commission has long understood the “[u]nfair methods of competition and unfair acts” prohibited by Section 1337, [19 U.S.C. 1337\(a\)\(1\)\(A\)](#), to include the importation of articles that violate [15 U.S.C. 1125\(a\)\(1\)\(B\)](#), *3 a provision of the Trademark Act of 1946 (Lanham Act), ch. 540, 60 Stat. 427 ([15 U.S.C. 1051 et seq.](#)). Section 1125(a)(1)(B) makes it unlawful for any person to “use[] in commerce any word, term, name, symbol, or device, or any combination thereof” that “in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities *** of his or her or another person’s goods.” [15 U.S.C. 1125\(a\)\(1\)\(B\)](#); see, e.g., *Textron, Inc. v. U.S. Int’l Trade Comm’n*, 753 F.2d 1019, 1023 (Fed. Cir. 1985). The Commission therefore may investigate, as a possible violation of Section 1337, an allegation of false or misleading representations involving imported articles.

This case concerns the intersection between (1) the Commission’s general authority to investigate such Lanham Act violations under Section 1337 and (2) the authority of the Food and Drug Administration (FDA), acting through the United States, to enforce the Federal Food, Drug, and Cosmetic Act (FDCA), [21 U.S.C. 301 et seq.](#) As relevant here, the FDCA generally prohibits any person from introducing, or delivering for introduction, into interstate commerce any “new drug,” unless an FDA-approved application for that drug is effective. [21 U.S.C. 355\(a\)](#); see [21 U.S.C. 321\(g\)\(1\)](#) and (p) (defining “drug” and “new drug”). Cf. [21 U.S.C. 321\(ff\) and \(3\)\(A\)](#) (defining “dietary supplement,” which generally is “deemed to be a food” under the

FDCA, to “include an article that is approved as a new drug” in certain contexts). The FDCA also prohibits the “misbranding” of a drug through the use of false or misleading labeling. 21 U.S.C. 331(b); 21 U.S.C. 352(a) (Supp. IV 2016).

The United States has exclusive authority to bring enforcement actions for violations of the FDCA's new-drug provisions. “Except as provided in [Section 337](b)” - *4 which authorizes a State to enforce FDCA provisions governing adulterated food within that State - “all such proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States.” 21 U.S.C. 337(a); see 21 U.S.C. 337(b). Section 337(a) thus “leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the [FDCA's] provisions.” *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n.4, 352 (2001); see *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 109 (2014) (“Private parties may not bring [FDCA] enforcement suits.”).

2. a. Petitioners market Vascepa, an FDA-approved drug that contains eicosapentaenoic acid, a type of Omega-3 fatty acid commonly known as EPA. Pet. App. 4. This case concerns petitioners' complaint (*id.* at 96-229) asking the Commission to “commence an investigation into the [allegedly] unlawful importation or sale” of “synthetically produced” Omega-3 fish oil products. *Id.* at 105. The complaint alleges that such Omega-3 products are “falsely labeled, and/or promoted for use as, or in[,] ‘dietary supplements.’” *Ibid.* (citation omitted). Such labeling and promotion, the complaint contends, constitute “an unfair act and/or unfair method of competition under Section [1]337,” because the Omega-3 products so marketed are not “b1 ‘dietary supplements’ but [rather] are actually unapproved ‘new drugs’ under the [FDCA].” *Ibid.*; see *id.* at 106 (stating that other Omega-3 products “comprised of common fish oil” are “not synthetically produced” and are permissibly marketed as “dietary supplements”).

The complaint asserts two related claims for investigation. Petitioners' primary claim is that the labeling and promotion of the Omega-3 products as “dietary *5 supplements” violate the Lanham Act and, hence, Section 1337. Pet. App. 130-161. The complaint recognizes that a Lanham Act claim requires “a false or misleading statement of fact” about a product. *Id.* at 131. It alleges that the “[l]abeling and/or promoti[on]” of the Omega-3 products for use in, or as, “ ‘dietary supplements’ ” was “literally false,” because such products “cannot meet the definition of ‘dietary supplement’ in Section 201(ff) of the FDCA, 21 U.S.C. § 321(ff),” and “are actually unapproved ‘new drugs’ ” under the FDCA. *Id.* at 133-134; see *id.* at 134-150 (arguing that the products do not satisfy Section 321(ff)'s requirements for “dietary supplements”); *id.* at 151-159 (arguing that the products are “drugs” under 21 U.S.C. 321(g)(1) and are unapproved “new drugs”).

Petitioners' secondary claim is that the importation and sale of synthetically produced Omega-3 products “constitute unfair acts or unfair methods of competition under Section [1]337 based upon the standards set forth in the FDCA.” Pet. App. 161; see *id.* at 161-165. The complaint argues that the FDCA prohibits the “introduction *** into interstate commerce of any unapproved ‘new drug,’” and that the introduction of the private respondents' products into interstate commerce “violates the standards set forth in Section 505(a) of the FDCA, [21 U.S.C. 355(a)],” because their products “are actually unapproved ‘new drugs.’” *Id.* at 161. The complaint further alleges the private respondents' conduct violates other FDCA provisions as well. *Id.* at 162-165; see, e.g., *id.* at 162 (asserting violation of the FDCA's prohibition against false or misleading statements in labeling and promotional materials for drugs, 21 U.S.C. 352(a) (Supp. IV 2016) and (n), because describing the Omega-3 products as “ ‘dietary supplements’ ” is allegedly “false[.]”).

*6 b. While petitioners' investigation request was pending, FDA submitted to the Commission a letter (Pet. App. 232-245) “request[ing] that the Commission decline to initiate the requested investigation,” *id.* at 244. FDA stated that “Congress has authorized only FDA to initiate FDCA enforcement actions.” *Id.* at 233. FDA also stated that, under the FDCA's “complex statutory scheme, determinations of whether a product is a dietary supplement require case-specific analysis,” and that “very small differences in factors such as an ingredient's chemical structure or history of presence in the food supply can mean the difference between dietary-ingredient status and non-dietary-ingredient status.” *Id.* at 235. FDA further stated that it was “in the process of developing a guidance document for industry on when a dietary supplement ingredient is [a new dietary ingredient]” that requires pre-marketing regulatory compliance, *id.* at 235-236, and was contemplating the development of “an authoritative list of pre-October 15, 1994, dietary ingredients [exempt from that requirement] based on independent and verifiable data,”

id. at 237. FDA cautioned that a “Commission finding on issues raised in [petitioners’] Complaint here could conflict” with such FDA guidance. *Ibid.*

c. The Commission declined to institute an investigation and dismissed petitioners’ complaint. Pet. App. 39-42. The agency determined that petitioners’ “complaint does not allege an unfair method of competition or an unfair act” that is “cognizable” under [Section 1337](#). *Id.* at 40. The Commission stated that “the Lanham Act allegations in this case are precluded by the [FDCA],” which “the [FDA] is charged with *** administ[ering].” *Ibid.*

*7 3. Petitioners filed a petition for review and a separate mandamus petition in the court of appeals, which the court consolidated for its review. Pet. App. 5.

The Commission, as respondent, defended its decision not to institute an investigation. The Commission explained that “[petitioners’] claims are entirely predicated on a violation of the FDCA”; that “Congress [has] expressly and exclusively assigned to the FDA” the authority to “interpret[] and appl[y]” the FDCA “in the first instance”; and that, “[w]ithout sufficient guidance from the FDA,” petitioners’ claims before the Commission were not cognizable. Commission C.A. Br. 16-17, 20. The Commission stated that petitioners would later be “free to file a new complaint” if “FDA issues sufficient guidance with respect to the accused products such that the Commission is not required to interpret the FDCA in the first instance and [petitioners’] claims are otherwise no longer precluded by the FDCA.” *Id.* at 58.¹

¹ In the court of appeals, the Commission appeared through its own attorneys as authorized by [19 U.S.C. 1333\(g\)](#).

The United States, as amicus curiae, argued that the United States’ exclusive authority to “enforce[], or to restrain violations, of [the FDCA],” [21 U.S.C. 337\(a\)](#), precludes private parties from asserting a claim nominally based on another statute if, “as a necessary element” of that claim, the party must establish (and thus seek redress for) a “violation[] of the FDCA itself.” U.S. Corrected C.A. Amicus Br. 7-8.

4. The court of appeals denied petitioners’ petition for review and petition for mandamus. Pet. App. 1-38.

a. i. The court of appeals held that it possessed jurisdiction to review the Commission’s decision not to institute a [Section 1337\(b\)](#) investigation. Pet. App. 6-11. *8 The court stated that its statutory jurisdiction to review “final determinations of the [Commission] relating to unfair practices in import trade, made under section [1]337,” [28 U.S.C. 1295\(a\)\(6\)](#), requires a “final determination decision *on the merits*.” Pet. App. 6-7 (citation omitted). The court concluded, however, that the Commission’s decision not to investigate here was “‘intrinsically’ ” a “‘determination *on the merits*’ ” because that decision reflected the agency’s view that petitioners’ claims “were precluded by the FDCA.” *Id.* at 8 (citation omitted).

ii. Petitioners contended that the Tariff Act imposes a “mandatory duty to institute an investigation in this case” by directing that the Commission “ ‘shall investigate any alleged violation of [[Section 1337](#)].’ ” Pet. App. 11 (quoting [19 U.S.C. 1337\(b\)\(1\)](#)). The court of appeals rejected that argument. *Id.* at 11-13. It read the Tariff Act to provide that “the Commission may decline to institute an investigation where a complaint fails to state a cognizable claim under [Section] [1]337.” *Id.* at 13.

iii. The court of appeals upheld the Commission’s determination that petitioners’ [Section 1337](#) claims were not cognizable because the FDCA precludes those claims. Pet. App. 13-21. The court thus denied petitioners’ petition for review, *id.* at 22, and, to the extent petitioners continued to seek mandamus, denied mandamus relief, *id.* at 11 n.3, 22.

The court of appeals held that petitioners’ [Section 1337](#) claims ultimately rest on alleged “violations of the FDCA.” Pet. App. 16-17. The court reasoned that petitioners’ Lanham Act claim alleging false or misleading marketing of “products as ‘dietary supplements,’ ” when the products allegedly are “ ‘unapproved ‘new drugs’ ” under the FDCA,^{b1}” necessarily requires “proving violations *9 of the FDCA.” *Ibid.* (quoting petitioners’ complaint). “Every allegation” supporting petitioners’ separate unfair-competition claim “based on the standards set forth in the FDCA” similarly “rests on an alleged violation of the FDCA.” *Id.* at

17. The court further observed that “FDA has not provided guidance as to whether the products at issue in this case should be considered ‘new drugs’ that require approval.” *Id.* at 1819. The court concluded that “a complainant fails to state a cognizable claim under [Section] [1]337 where that claim is based on proving violations of the FDCA and where the FDA has not taken the position that the articles at issue do, indeed, violate the FDCA.” *Id.* at 19.

The court of appeals explained that its holding was consistent with *POM Wonderful*, *supra*. Pet. App. 19-20. The court observed that *POM Wonderful* did not involve a Lanham Act claim that “require[d] proving a violation of the FDCA.” *Id.* at 20. The court viewed this Court’s decision as holding only that regulation of a particular product under the FDCA does “not categorically preclude a Lanham Act claim based on [that] product.” *Ibid.* The court explained that *POM Wonderful* does not address the distinct question whether a claim “based solely on alleged violations of the FDCA’s requirements” would be precluded. *Ibid.*

The court of appeals observed that its “limited holding” concerning [Section 1337](#) claims based solely on violations of the FDCA, in circumstances where FDA has not provided guidance about the status of disputed products, was “consistent with the Commission’s arguments” that such “claims are precluded *at least* until the FDA has provided guidance as to whether the products at issue are dietary supplements.” Pet. App. 19. The *10 court stated that, although “the United States, as amicus, appears to seek a broader ruling - that all such claims are precluded *regardless* of whether the FDA has provided guidance” - the court did “not [need to] address that broader question here,” because no relevant FDA guidance yet exists. *Ibid.*

b. Judge Wallach dissented. Pet. App. 22-38. Although he “agree[d] with the majority’s conclusion that the [Commission] did not err in declining to institute an investigation,” he would have ruled for the Commission under a different jurisdictional “approach.” *Id.* at 23. Judge Wallach would have held that the court of appeals lacked jurisdiction over the petition for review because the Commission’s decision not to investigate is not a “final determination” reviewable under [19 U.S.C. 1337\(c\)](#) and [28 U.S.C. 1295\(a\)\(6\)](#). Pet. App. 22-35. Judge Wallach concluded that the court instead possessed only mandamus jurisdiction, and he “agree[d] with the majority’s conclusion that [petitioners] ha[ve] failed to demonstrate that [they are] entitled to the extraordinary relief of mandamus.” *Id.* at 35, 37; see *id.* at 23, 35-37.

ARGUMENT

Petitioners challenge the court of appeals’ holding that the FDCA precludes their Lanham Act claim. Pet. 22-28. Petitioners further contend that the decision below conflicts with this Court’s decision in *POM Wonderful LLC v. Coca-Cola Co.*, [573 U.S. 102](#) (2014), see Pet. 22-25, and with the Second Circuit’s application of *POM Wonderful* in *Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, [843 F.3d 48](#) (2016), see Pet. 28-33. The decision of the court of appeals is correct, does not conflict with *POM Wonderful* or *Church & Dwight Co.*, and does not independently warrant *11 review absent a relevant conflict of authority. Furthermore, this case would be a poor vehicle for review, because the court of appeals lacked jurisdiction under [19 U.S.C. 1337\(c\)](#) and [28 U.S.C. 1295\(a\)\(6\)](#) to review the Commission’s refusal to institute an investigation. Although the court of appeals did possess mandamus jurisdiction, petitioners do not present their arguments through the limited lens of mandamus, which requires a “clear and indisputable” right to relief, *Cheney v. United States Dist. Court*, [542 U.S. 367](#), 381 (2004) (citation omitted).

1. Petitioners’ [Section 1337](#) claims are “based entirely on - and could not exist without - the FDCA,” because each “rests on an alleged violation of the FDCA” and “requires proving violations of the FDCA.” Pet. App. 17-18. The court of appeals correctly held that those claims were not cognizable under [Section 1337](#) because the FDCA “preclude[s]” private enforcement through such purely derivative claims, at least where “FDA has not taken the position that the articles at issue do, indeed, violate the FDCA.” *Id.* at 19; see *id.* at 14 (citing [21 U.S.C. 337\(a\)](#)).

a. Petitioners do not dispute that their [Section 1337](#) claims are ultimately premised on allegations that the FDCA was violated. As construed by the Commission, [Section 1337](#)’s ban on “[u]nfair methods of competition and unfair acts in the importation of articles *** into the United States” that threaten certain adverse effects on industry or commerce, [19 U.S.C. 1337\(a\)\(1\)\(A\)](#), includes Lanham Act violations involving the use in commercial advertising or promotion of a word or term that “misrepresents

the nature, characteristics, [or] qualities” of relevant goods, 15 U.S.C. 1125(a)(1)(B). See *12 pp. 2-3, *supra*. The Lanham Act misrepresentation alleged here is the purported mislabeling as “ ‘dietary supplements’ ” of certain products that petitioners assert “are actually unapproved ‘new drugs’ ” under the FDCA. Pet. App. 134, 156-160; see pp. 4-5, *supra*.

Subject to an exception that is not implicated here, however, “all *** proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States.” 21 U.S.C. 337(a). That provision “leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the [FDCA’s] provisions.” *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4, 352 (2001). Section 337(a) thus precludes a private party from pursuing a claim that requires proof of a “violation of FDCA requirements” and thus exists “solely by virtue of the FDCA.” *Id.* at 352-353. Allowing private litigants to bring claims that are purely derivative of FDCA requirements would displace the complex scientific and administrative judgments that actions to restrain FDCA violations require, and that Congress has vested exclusively in an expert federal agency (*i.e.*, FDA) exercising its authority through the United States.

The court of appeals thus correctly held that, at least if FDA has not already determined that an FDCA violation has occurred, a derivative Section 1337 claim “based entirely” on an alleged FDCA violation is precluded. Pet. App. 18-19. The court emphasized that its “limited holding” did not resolve whether such a claim would continue to be precluded even after FDA has made that determination, because that “broader question” was not presented in this case. *Id.* at 19.

*13 b. Petitioners do not squarely join issue with the court of appeals’ rationale. Instead, they argue that the court’s decision “conflicts with *POM Wonderful*,” Pet. 22-25, and fails to account for the Commission’s independent unfair-trade-practices authority under Section 1337, Pet. 26-28. Petitioners are wrong.

i. *POM Wonderful* did not involve a Lanham Act claim that was purely derivative of the FDCA. *POM Wonderful* instead addressed whether the FDCA precluded a traditional Lanham Act claim alleging that “misleading product descriptions” on beverage labeling had caused consumer “confusion” diminishing POM’s beverage sales. *POM Wonderful*, 573 U.S. at 106, 110. That claim did not depend on any showing that the labeling violated the FDCA. See *ibid.*; *id.* at 118-119 (name of juice blend was affirmatively authorized by FDA). The Court’s conclusion that “Congress did not intend the FDCA to preclude Lanham Act suits like POM’s,” *id.* at 121; see *id.* at 106 (addressing “suits like the one brought by POM”), thus does not speak to claims like petitioners’.

Central to the Court’s decision was its conclusion that the FDCA and the Lanham Act are designed to “complement each other with respect to food and beverage labeling,” so that “the FDCA and its regulations are *** [not] a ceiling on the regulation of [that] labeling.” *POM Wonderful*, 573 U.S. at 119; see *id.* at 106, 115, 118. The Court explained that “Lanham Act suits draw upon th[e] market expertise” of competitors that “manufacture or distribute products,” that have “detailed knowledge regarding how consumers rely upon certain sales and marketing strategies,” and whose “awareness of unfair competition practices may be far more *14 *** accurate than that of agency rulemakers and regulators.” *Id.* at 115 (citation omitted). The Court acknowledged that Congress intended FDA to be responsible for actions based on “the FDCA and the detailed prescriptions of its implementing regulations.” *Ibid.*; see *id.* at 109 (“Private parties may not bring [FDCA] enforcement suits.”); cf. 21 U.S.C. 337(b) (vesting States with some authority over adulterated food). But the Court viewed FDA’s technical expertise and authority over the FDCA in the food context as addressing considerations different from those relevant to the typical Lanham Act claim before it, because FDA does not have “the same perspective or expertise in assessing market dynamics that day-to-day competitors possess.” 573 U.S. at 115; cf. *id.* at 109 (noting “the less extensive role the FDA plays in the regulation of food than in the regulation of drugs”).

In this case, by contrast, the court of appeals did not rely on the mere existence of FDCA regulation to preclude petitioners’ claim. Unlike the claims in *POM Wonderful*, petitioners’ Lanham Act claim is wholly derivative of the FDCA’s distinct requirements for “ ‘drugs’ ” and “ ‘dietary supplements’ ” and ultimately “requires proving violations of the FDCA.” Pet. App. 17-18. Rather than draw upon the Lanham Act’s “complement[ary]” regulatory provisions that “impose ‘different requirements and protections,’ ” *POM Wonderful*, 573 U.S. at 115 (citation omitted), petitioners seek to restrain a violation of the FDCA itself. See Pet. App.

20 (concluding that petitioners' claim "stands in stark contrast to" the "Lanham Act claim in *POM Wonderful*," which "did not require proving a violation of the FDCA").

ii. Petitioners argue (Pet. 26-28) that their complaint to the Commission sought to assert "separate rights" *15 under Section 1337 and did not seek "remedies under the FDCA." They acknowledge, however, that "the unfair trade practices" that they challenge "reflect violations of the FDCA," Pet. 27, and they do not assert any Section 1337 claim that could be proved *without* establishing an FDCA violation.

Petitioners appear to suggest that their Lanham Act claim is a freestanding claim because it relies on the Lanham Act's independent prohibition against the misleading use of terms in commercial labeling. But the only basis for their misleading-labeling claim is that the Omega-3 fish oil labeling at issue is inconsistent with the FDCA's definitions of "drug," "new drug," and "dietary supplement," 21 U.S.C. 321(g)(1), (p), and (ff). See Pet. App. 113, 133-141, 151-159 (complaint relying on those definitions). Like all of the definitions in Section 321, those definitions apply only "[f]or the purposes of [the FDCA]." 21 U.S.C. 321. Because petitioners assert a wholly derivative claim that relies solely upon alleged violations of the FDCA, in a circumstance where FDA has not found any such violation, their claim impermissibly intrudes on FDA's exclusive authority to "restrain [FDCA] violations." 21 U.S.C. 337(a).

iii. Petitioners suggest (Pet. 20) that the court of appeals' analysis "overlooks key provisions in the Tariff Act that are designed to prevent any intrusion on FDA's proper prerogatives." The provisions petitioners invoke (Pet. 21) are inapposite.

One such provision states that the Commission shall "in appropriate matters" act in "cooperation" with other federal agencies, which "shall cooperate fully with the commission for the purposes of aiding and assisting in its work." 19 U.S.C. 1334. That textual reference to "appropriate matters" involving the "[Commission]'s *16 work" is fully consistent with the court of appeals' determination that petitioners cannot bring to the Commission matters that the FDCA reserves for FDA. Section 1337(a) is similarly unhelpful to petitioners' argument. It states that unlawful acts violating that provision, "when found by the Commission to exist[,] shall be dealt with, in addition to any other provision of law, as provided in [Section 1337]." 19 U.S.C. 1337(a)(1). That provision makes clear that the exclusion and cease-and-desist orders specified in Section 1337 supplement other statutory remedies *if* the Commission has found a violation. It does not define the circumstances in which the Commission must or should determine whether a violation has occurred.

2. a. Petitioners contend (Pet. 28-30) that the decision below conflicts with the Second Circuit's decision in *Church & Dwight Co.*, *supra*. Petitioners' reliance on *Church & Dwight Co.* is misplaced.

Church & Dwight Co. involved a Lanham Act claim that, like the claim in *POM Wonderful*, did not depend on proof of an FDCA violation. The false-advertising claim in *Church & Dwight Co.* alleged that the defendant's pregnancy test, which was the first to estimate the number of weeks that its user had been pregnant, was misleading because it communicated the number of weeks since a woman's ovulation, rather than the more standard estimate of the number of weeks "since the woman's last menstrual period." 843 F.3d at 53. Although FDA had determined that the product's labeling satisfied FDCA requirements, the court held that the Lanham Act challenge could go forward because the FDCA's labeling requirements did not displace the Lanham Act's distinct provisions governing "the capacity of the representations to mislead." *Id.* at 63. The *17 plaintiff therefore could attempt to prove its claim without impinging on FDA's exclusive authority "to restrain [FDCA] violations." 21 U.S.C. 337(a). Thus, like this Court in *POM Wonderful*, the Second Circuit had no occasion to address the distinct situation presented here, where a plaintiff presents a Lanham Act claim that is wholly derivative of an alleged FDCA violation.

b. Petitioners also contend (Pet. 20-21) that review is warranted because "[t]he Federal Circuit is the only court with direct appellate jurisdiction over final decisions and determinations by the Commission," such that "no further caselaw development is likely to occur," Pet. 20. But questions concerning the interplay between the Lanham Act and the FDCA - and, in particular, the question whether a Lanham Act claim can go forward if it is premised on an allegation that the defendant's labeling violates

the FDCA - can arise in district court litigation and can be decided by the regional courts of appeals. If a decision in such a case produces a conflict of authority, the Court can then consider whether its review is warranted.

To the extent that petitioners contend (Pet. 22) that their assertion of a Lanham Act claim under Section 1337 of the Tariff Act separately warrants review, that contention is misplaced. Petitioners argue (*ibid.*) that their Section 1337 claim reflects a special “private right[] of action” designed to “protect domestic industry.” But petitioners misapprehend the nature of the Tariff Act provisions at issue.

Unlike a traditional private right of action (like a direct Lanham Act claim) that allows a plaintiff to sue to enforce its own rights in court, the procedure that petitioners invoked is a mechanism for seeking administrative action by the Commission. 19 U.S.C. 1337(b)(1); see *18 19 U.S.C. 1330(d)(5) (investigation proceeds if “one-half of the number of commissioners voting agree that the investigation should be made”). The Commission may decline to exclude articles from the United States or to issue a cease-and-desist order, even when it has found a Section 1337 violation “as a result of [its] investigation,” if the Commission concludes that the articles should not be excluded or the order should not issue in light of various public-policy considerations. 19 U.S.C. 1337(d)(1); see 19 U.S.C. 1337(e)(1), (f)(1) and (g)(1). And even if the Commission determines such action is warranted, the President may disapprove that determination “for policy reasons” and thus deprive the determination of any “force or effect.” 19 U.S.C. 1337(j)(2).²

² Petitioners appear to dispute (Pet. 6-7) the court of appeals' holding that the Commission may decline to investigate allegations in a private complaint under Section 1337 if, *inter alia*, the “complaint fails to state a cognizable claim,” Pet. App. 13; see *id.* at 11-13. But “the fact that [petitioners have] discussed this issue in the text of [their] petition for certiorari does not bring it before” this Court, because “Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.” *Wood v. Allen*, 558 U.S. 290,304 (2010) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)). The only question on which petitioners seek review is the logically distinct question whether a litigant asserts a cognizable Lanham Act claim under Section 1337 when that claim depends on an alleged FDCA violation. Pet. i.

3. Even if review were otherwise warranted, this case would be a poor vehicle for the Court's consideration of the question presented. The court of appeals held that it had jurisdiction to hear petitioners' petition for review under 19 U.S.C. 1337(c) and 28 U.S.C. 1295(a)(6). See Pet. App. 6-10. As the dissenting judge below explained, however, the court lacked jurisdiction under *19 those provisions, and it was authorized to consider only petitioners' separate petition for mandamus. See *id.* at 23-37 (Wallach, J.) (agreeing that the Commission “did not err in declining to institute an investigation,” but finding that review is limited to mandamus).

a. The Federal Circuit possesses jurisdiction to review a “final determination of the Commission under [Section 1337](d), (e), (f), or (g),” using standards for judicial review set forth in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 19 U.S.C. 1337(c); accord 28 U.S.C. 1295(a)(6) (“final determinations of the [Commission] relating to unfair practices in import trade, made under section [1]337”). But the Tariff Act makes clear that a “final determination” under Section 1337 occurs only *after* the Commission has initiated an investigation. The agency's decision not to conduct an investigation is not a reviewable “final determination.”

i. Section 1337(b) directs the Commission to “establish a target date for its final determination” “within 45 days after an investigation is initiated.” 19 U.S.C. 1337(b)(1). That final determination is governed by Section 1337(c), which provides that the “Commission shall determine, with respect to each investigation conducted by it under [Section 1337], whether or not there is a violation of [Section 1337].” 19 U.S.C. 1337(c) (emphasis added). If the Commission finds a violation after such investigation and decides to take action under subsections (d)-(g) of Section 1337 - which authorize it to exclude articles from the United States, see 19 U.S.C. 1337(d), (e), and (g), and to order a person to cease and desist violations of Section 1337, see 19 U.S.C. 1337(f) and (g) - the Commission must then transmit its determination to the President, who may disapprove that determination and thus strip it of any “force or effect,” *20 19 U.S.C. 1337(j)(1)(B) and (2). If the President approves the

determination or declines to disapprove it within 60 days, the Commission's determination "shall become final" "for purposes of *** [Section 1337](c)." 19 U.S.C. 1337(j)(4). Under Section 1337(c), the Federal Circuit then has jurisdiction to review the "final determination of the Commission under [Section 1337](d), (e), (f), or (g)." 19 U.S.C. 1337(c).

Those provisions demonstrate that the "final determination" for which the Tariff Act authorizes judicial review is the Commission's determination "after an investigation is initiated," 19 U.S.C. 1337(b)(1), that the Commission must make "with respect to each investigation conducted by it," 19 U.S.C. 1337(c). In addition, Congress has authorized review only of a "final determination of the Commission under [Section 1337](d), (e), (f), or (g)," *ibid.*, and those subsections govern the Commission's consideration of an exclusion or cease-and-desist order "during" or "as a result of an investigation." 19 U.S.C. 1337(d)(1) and (e)(1); see 19 U.S.C. 1337(f)(1) (action "[i]n addition to, or in lieu of," action under Section 1337(d) and (e)); 19 U.S.C. 1337(g)(1)(B) (action after issuing "notice of investigation"). The Commission's decision not to institute an investigation thus is not a "final determination" reviewable under Section 1337.

That statutory framework is consistent with the normal "presumption that agency decisions not to institute proceedings" "for investigating possible [statutory] violations" are "unreviewable" under the APA. *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (emphasis omitted). The Court in *Heckler v. Chaney* applied that principle in holding that courts could not review FDA's refusal to take enforcement actions under the FDCA. *Id.* at 828. The Tariff Act does not suggest that the Federal Circuit *21 has broader authority to review the Commission's refusal to commence an investigation here.

ii. The court of appeals largely ignored the governing statutory text. See Pet. App. 6-10; cf. *id.* at 24-31 (dissenting opinion analyzing the statutory text). The court instead deemed Section 1337(c)'s use of the term "final determination" to refer to a " 'final determination decision *on the merits*' " and then concluded that the Commission's decision not to initiate an investigation in this case "is 'intrinsically a final determination, i.e., a determination *on the merits*,' " because the Commission based its decision on its view that petitioners' "complaint failed to state a cognizable claim under [Section 1]337." *Id.* at 7-8 (citation omitted). As explained above, however, the Commission declined to decide whether the challenged product label violated the Lanham Act, because resolution of that issue would have required the agency to decide an FDCA question that is reserved for FDA. In any event, whether or not the Commission's refusal to commence an investigation is properly deemed a "merits" decision, it is not the sort of "final determination" for which Section 1337(c) authorizes review.

b. Because the Federal Circuit lacked appellate jurisdiction, the Court could review only the court of appeals' denial of petitioners' separate petition for mandamus. See Pet. App. 11 n.3, 22. For two reasons, review of that mandamus decision would not provide the Court a suitable opportunity to resolve the question petitioners present.

First, the court of appeals stated that petitioners had "failed to explain how [they] would satisfy the traditional mandamus requirements" reflected in *Cheney v. United States District Court*, *supra*, see Pet. App. 11 n.3, and the court appears to have denied mandamus as *22 "moot" in light of its rejection of petitioners' contentions under normal APA review, Pet. App. 22. Cf. *id.* at 35-37 (dissenting opinion concluding that mandamus standard was not met). That limited analysis makes this case a poor vehicle to resolve the mandamus question.

Second, the mandamus standard requires that petitioners establish not only error but a "clear and indisputable" right to relief. *Cheney*, 542 U.S. at 381 (citation omitted). A determination that petitioners failed to establish a clear and indisputable right to proceed before the Commission would not definitively resolve whether the Commission correctly declined to institute an investigation based on petitioners' complaint. Perhaps for that reason, petitioners do not appear to seek this Court's review of the court of appeals' denial of their mandamus petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Dominic L. Bianchi

General Counsel

Wayne W. Herrington

Assistant General Counsel

Houda Morad

Attorney Advisor

Office of the General Counsel

U.S. International Trade Commission

Noel J. Francisco

Solicitor General

November 2019

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 4



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Schwartz v. Vizio, Inc.](#), C.D.Cal., May 23, 2017

2013 WL 3654090

United States District Court, D. New Jersey.

Lynne AVRAM, on behalf of herself and
all others similarly situated, Plaintiff,

v.

SAMSUNG ELECTRONICS

AMERICA, INC., et al., Defendants.

Margaret Lark, on behalf of herself and
all others similarly situated, Plaintiff,

v.

Samsung Electronics America,
Inc., et al., Defendants.

Civ. Nos. 2:11–6973(KM), 2:12–976(KM).

|

July 11, 2013.

Attorneys and Law Firms

[Antonio Vozzolo](#), [Christopher Marlborough](#), Faruqi & Faruqi, LLP, New York, NY, [Caroline F. Bartlett](#), [Carella Byrne](#), [James E. Cecchi](#), [Lindsey H. Taylor](#), Carella Byrne Cecchi Olstein Brody & Agnello, P.C., Roseland, NJ, [Yitzchak Kopel](#), Bursor & Fisher PA, New York, NY, for Lynne Avram.

[Benjamin F. Johns](#), Chimicles & Tikellis, LLP, Haverford, PA, for Margaret Lark.

[James J. O'Hara](#), [John Maloney](#), [Joseph Christopher Brennan](#), Graham Curtin, P.A., Morristown, NJ, for Samsung Electronics America, Inc., et al.

OPINION[KEVIN McNULTY](#), District Judge.

*1 The Department of Energy (DOE) Energy Star program permits manufacturers of appliances, including refrigerators, to affix a label indicating that the appliance meets certain standards of energy efficiency. Such appliances, Plaintiffs allege, cost more to purchase, but supposedly save money in the long run by reducing electricity bills. Lynne Avram and Margaret Lark, putative class action plaintiffs in these consolidated actions, each bought refrigerator model RF26VAB, manufactured by Defendant Samsung Electronics

America, Inc. (“Samsung”), from Defendant Lowe's Home Centers, Inc. (“Lowe's”). At the time of purchase, the refrigerators bore the Energy Star label. Sometime thereafter, however, DOE determined that this refrigerator model did not meet the Energy Star program's requirements. Avram and Lark allege that they therefore have not received what they paid for. They assert causes of action for breach of express warranty, breach of the implied warranty of merchantability, violation of the Magnuson–Moss Warranty Act, violation of the Maryland and New Jersey consumer fraud statutes, and unjust enrichment.

Now before the court are the motions of Samsung and Lowe's to dismiss each complaint. Defendants argue that the warranty claims are preempted by the Energy Policy and Conservation Act and that the Complaints' allegations are otherwise insufficient as a matter of law.

Samsung and Lowe's motions to dismiss are granted in part and denied in part. Specifically, I will dismiss (1) Avram's claim of breach of the implied warranty of merchantability against Samsung; (2) the claims of violation of the state consumer fraud statutes; and (3) the unjust enrichment causes of action against Samsung. The rest of the claims survive.

I. BACKGROUND ¹

¹ The allegations of the Complaints have not yet been tested by any fact finder. This discussion, as it must, assumes their truth solely for the purpose of analyzing Defendant's Rule 12(b)(6) motion. *See* pp. 6–7, *infra*.

A. The Energy Star Program

The Energy Policy and Conservation Act of 1975 (the “ECPA”), 42 U.S.C. § 6291, *et seq.*, created an energy conservation program for major household appliances. (Avram Compl. ¶ 12 [Civ. No. 11–6973, Docket No. 1]; Lark Compl. ¶ 12 [Civ. No. 12–973, Docket No. 1]). A few years later, the National Energy Conservation Policy Act of 1978 granted the United States Department of Energy (“DOE”) the authority to establish minimum energy efficiency standards for, *inter alia*, home refrigerator-freezers. (Avram Compl. ¶ 12; Lark Compl. ¶ 12). Later, the National Appliance Energy Conservation Act of 1987 established minimum energy efficiency standards for refrigerator-freezers. (Avram Compl. ¶ 12; Lark Compl. ¶ 12).

The Energy Star program, enacted as part of the Energy Policy Act of 2005, is

a voluntary program to identify and promote energy-efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling of, or other forms of communication about, products and buildings that meet the highest energy conservation standards.

42 U.S.C. § 6294a. DOE and the Environmental Protection Agency (“EPA”) jointly administer the program. *Id.* In general, to earn the Energy Star label, refrigerators and freezers must be at least 20% more energy efficient than the minimum mandated by federal law. (Avram Compl. ¶ 13; Lark Compl. ¶ 13).

*2 The Energy Star logo is an important marketing tool. It conveys a message that the purchaser can maximize his or her energy savings and help to protect the environment. (Avram Compl. ¶ 14; Lark Compl. ¶ 14). In essence, the consumer pays more to purchase an Energy Star-compliant appliance, but the appliance costs less to operate. (Avram Compl. ¶ 2; Lark Compl. ¶ 2).

B. Avram's Refrigerator Purchase

Because Avram was concerned about the environment, when she shopped for a new refrigerator, she looked only at Energy Star models. (Avram Compl. ¶ 17). On June 26, 2009, Avram purchased her new refrigerator at a Lowe's retail store in Scottsdale, Arizona for \$1,213.20 plus tax. (*Id.*). That purchase price included a substantial premium based on claims that the refrigerator was energy efficient and met the qualifications of Energy Star program. (*Id.*). Avram would not have purchased the refrigerator had she known it was not Energy Star-compliant. (*Id.*).

C. Lark's Refrigerator Purchase

On November 1, 2009, Lark purchased the refrigerator at a Lowe's retail store in Maryland for about \$2,100. (Lark Compl. ¶ 17; Lark Opp. at 2). That purchase price included a substantial premium based on claims that the refrigerator

was energy efficient and met the qualifications of Energy Star program. (Lark Compl. ¶ 17).

D. DOE Finds That the Refrigerators Do Not Meet the Energy Star Program's Requirements

On February 18, 2010, DOE alerted Samsung that its testing showed that the refrigerators did not meet the Energy Star efficiency requirements. (Avram Compl. ¶ 18; Lark Compl. ¶ 18). About three weeks later, on March 8, 2010, Samsung representatives met with DOE regarding the test results. (Avram Compl. ¶ 19; Lark Compl. ¶ 19). DOE permitted Samsung to submit its own test results. (Avram Compl. ¶¶ 19–20; Lark Compl. ¶¶ 19–20). In DOE's estimation, however, Samsung's testing failed to establish that the refrigerators met Energy Star standards. (Avram Compl. ¶ 20; Lark Compl. ¶ 20). On March 16, 2010, DOE sent Samsung a letter stating that the refrigerators had failed DOE tests for the Energy Star program and that Samsung had failed to rebut that conclusion. (Avram Compl. ¶ 21; Lark Compl. ¶ 21). DOE then referred the matter to EPA for appropriate action. (Avram Compl. ¶ 21; Lark Compl. ¶ 21). EPA and Samsung eventually entered into an informal, private agreement under which Samsung agreed to stop manufacturing or selling the refrigerators. (Avram Compl. ¶ 22).

As a result, Avram and Lark did not receive the benefit of the Energy Star bargain. They paid a price premium for what purported to be an Energy Star product but did not receive the energy savings they had paid for. (Avram Compl. ¶ 23; Lark Compl. ¶ 22).

E. Avram and Lark File Class Action Complaints

On November 30, 2011, Avram filed a Complaint on behalf of herself and a class of similarly situated individuals. That Complaint alleges that Defendants' manufacture and sale of a refrigerator that falsely claimed to be Energy Star-compliant give rise to the following causes of action: breach of express warranty, breach of the implied warranty of merchantability, violations of Magnuson–Moss Warranty Act (“Magnuson–Moss”) and the New Jersey Consumer Fraud Act (“NJCFA”), and unjust enrichment.

*3 On February 17, 2012, Lark filed a nearly identical class action complaint alleging the same causes of action, with one exception. Instead of a claim under the NJCFA, Lark's complaint alleges a violation of the Maryland Consumer Protection Act (“MCPA”).

On June 20, 2012, then-Magistrate Judge Shipp granted Lark's motion to consolidate the two cases. Subject matter jurisdiction over these consolidated actions is predicated on three grounds. Over the federal law claim, the Court has federal question jurisdiction. 28 U.S.C. § 1331. Over the related state law claims, the Court has supplemental jurisdiction. 28 U.S.C. §§ 1367. Finally, because the Complaint alleges that there are over 100 class members, the aggregate amount in controversy exceeds \$5 million, and at least one class member is diverse from the defendants,² the Court has diversity jurisdiction under 28 U.S.C. § 1332(d). Venue is proper because Samsung resides in the District of New Jersey, the Defendants do business throughout the District, and a substantial part of the events giving rise to the Plaintiffs' claims took place in New Jersey. 28 U.S.C. § 1391.

² Avram is a citizen of Arizona, Lark is a citizen of Maryland, Samsung is a Delaware corporation with a principal place of business in New Jersey, and Lowe's is incorporated and has its principal place of business in North Carolina.

Prior to the consolidation order and in lieu of filing an answer, Lowe's and Samsung each moved to dismiss each complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b) (6).

II. LEGAL STANDARDS AND BACKGROUND

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The moving party, ordinarily the defendant, bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir.2005). For purposes of a motion to dismiss, the well-pleaded factual allegations of the complaint must be taken as true, with all reasonable inferences drawn in plaintiff's favor. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008) (established "reasonable inferences" principle not undermined by intervening Supreme Court case law).

In recent years, the United States Supreme Court has elaborated on the standards that a court is to apply in analyzing a Rule 12(b) (6) motion to dismiss, particularly in light of the pleading requirements of Federal Rule of Civil Procedure 8(a)(2). Although a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide

the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus the factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, demonstrating that it is "plausible on its face." See *id.* at 570; see also *Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 64 (3d Cir.2008). 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' ... it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678.

*4 The United States Court of Appeals for the Third Circuit has explicated the *Twombly/Iqbal* standard on several occasions. See, e.g., *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 70–73 (3d Cir.2011); *Santiago v. Warminster Twp.*, 629 F.3d 121, 129–30 (3d Cir.2010); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209–211 (3d Cir.2009). The Court of Appeals recently summarized the three-step process for analyzing a Rule 12(b)(6) motion:

To determine whether a complaint meets the pleading standard, our analysis unfolds in three steps. First, we outline the elements a plaintiff must plead to state a claim for relief. See [*Iqbal*, 556 U.S.] at 675; *Argueta*, 643 F.3d at 73. Next, we peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth. See *Iqbal*, 556 U.S. at 679; *Argueta*, 643 F.3d at 73. Finally, we look for well-pled factual allegations, assume their veracity, and then "determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Argueta*, 643 F.3d at 73. This last step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Bistran v. Levi, 696 F.3d 352, 365 (3d Cir.2012).

Samsung and Lowe's assert that the state consumer protection law claims sound in fraud and therefore must be pleaded with additional particularity. See Section III.E, *infra*. For claims of fraud, Federal Rule of Civil Procedure 9(b) imposes a heightened pleading requirement, over and above that of Rule 8(a). Specifically, it requires that "in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." Fed.R.Civ.P.

9(b). “Malice, intent, knowledge, and other conditions of a person’s mind,” however, “may be alleged generally.” *Id.* That heightened pleading standard requires the plaintiff to “state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which it is charged.” *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir.2007) (internal quotation and citation omitted).

In general, “[t]o satisfy this heightened standard, the plaintiff must plead or allege the date, time, and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.” *Id.* “Plaintiff must also allege who made the misrepresentation to whom and the general content of the misrepresentation.” *Lum v. Bank of Am.*, 361 F.3d 217, 224 (3d Cir.2004) (internal citation omitted); *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276–77 (3d Cir.2006) (“Rule 9(b) requires, at a minimum, that plaintiffs support their allegations of fraud with all of the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue.”) (internal quotation and citation omitted)).

*5 [Plaintiffs] need not, however, plead the “date, place or time” of the fraud, so long as they use an “alternative means of injecting precision and some measure of substantiation into their allegations of fraud.” The purpose of Rule 9(b) is to provide notice of the “precise misconduct” with which defendants are charged and to prevent false or unsubstantiated charges. Courts should, however, apply the rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants.

Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 658 (3d Cir.1998) (quoting *Seville Indus. Machinery v. Southmost Machinery*, 742 F.2d 786, 791 (3d Cir.1984) and citing *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99 (3d Cir.1983)).

III. DISCUSSION³

³ Avram and Lark requested permission to file a surreply brief addressing new arguments and statements requiring correction that allegedly are to be found in the Defendants’ reply briefs. This District’s Local Rules require leave of the Court to file a surreply. *See* L.R. 7.1(d)(6). I find

that the Defendants’ reply briefs do not raise new arguments or contain statements requiring correction. Therefore I do not authorize the filing of a surreply.

Samsung and Lowe’s have filed similar motions to dismiss each count of Avram’s and Lark’s Complaints. I address each claim in turn, and include a choice-of-law analysis for the state law claims.

A. Preemption of Avram’s and Lark’s Warranty Claims

Avram and Lark assert warranty-based claims under Magnuson–Moss, as well as state-law causes of action for breach of express warranty and breach of the implied warranty of merchantability. Samsung and Lowe’s argue that these claims (the “Warranty Claims”) are preempted by the ECPA, as amended by the National Appliance Energy Conservation Act (“NAECA”). Specifically, they cite 42 U.S.C. § 6297(g), which provides that any disclosure of energy use, cost, or efficiency “required to be made” pursuant to ECPA does not create an express or implied warranty. I find that the claims are not preempted because the Energy Star program is voluntary. Use of the Energy Star logo is permitted, not “required,” by the ECPA.

a. Preemption

“Federal preemption doctrine provides Congress with the power to preempt state legislation if it so intends.” *Treasurer of New Jersey v. U.S. Dep’t of Treasury*, 684 F.3d 382, 406 (3d Cir.2012). Preemption comes in three varieties: “express preemption and two types of implied preemption, field preemption and conflict preemption.” *Id.* (citing *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir.2010)). Express preemption exists “when a federal enactment contains language that is explicit about its preemptive effect.” *Treasurer of New Jersey*, 684 F.3d at 406. Here, Section 6297 of NAECA contains an express preemption provision, so the issue of whether NAECA preempts the warranty claims in this case is squarely presented. *Medtronic, Inc. v. Lohr*, 518 U.S. 476, 484 (1996).

The Supreme Court has counseled courts considering a preemption issue to stick close to the text of the statute, while taking two presumptions into account.

First, the court must presume “that Congress does not cavalierly pre-empt state-law causes of action.” *Medtronic*,

518 U.S. at 485. “In all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied’ we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Conversely, the presumption against preemption may not apply where Congress’s statute applies to a field that “the States have not traditionally occupied.” *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347–48, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001).

*6 Second, the court must presume “that the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (quoting *Medtronic*, 518 U.S. at 485). And “Congress’ intent is, of course, primarily discerned from the language of the pre-emption statute and the statutory framework surrounding it.” *Medtronic*, 518 U.S. at 485 (quotation marks and citations omitted).

Guided by these principles, I now analyze whether Avram’s and Lark’s state law warranty claims are preempted by the federal statutory regime.

i. *Analysis*

NAECA includes a warranty preemption provision, which states:

Any disclosure with respect to energy use, energy efficiency, or estimated annual operating cost which is required to be made under the provisions of this part shall not create an express or implied warranty under State or Federal law that such energy efficiency will be achieved or that such energy use or estimated annual operating costs will not be exceeded under conditions of actual use.

42 U.S.C. § 6297(g).

Hewing to the text of the provision, as I must, I find that Avram’s and Lark’s claims are not preempted. The Energy Star

program is voluntary; the associated disclosures of energy efficiency are not “required to be made” by statute. 42 U.S.C. § 6294a(a) (Energy Star is “a *voluntary program* to identify and promote energy-efficient products ... in order to reduce energy consumption, improve energy security, and reduce pollution through *voluntary labeling* of, or other forms of communication about, products and buildings that meet the highest energy conservation standards.”) (emphasis added). Had Congress intended to preempt warranty claims as to all such disclosures, it could simply have stated that “no disclosure *made under* the provisions of this part creates a warranty.” But it did not; it limited the preemptive effect to disclosures “*required to be made*” under the statute. I cannot assume that Congress’s insertion of the words “required to be” was accidental, or that the words themselves are superfluous and meaningless.⁴ Indeed, I can imagine a reason for it: Congress may have wished to create a safe harbor for standardized efficiency disclosures that, like automobile mileage figures, are useful for comparative purposes even if they seldom reflect what happens when the product is in use. But be that as it may, the statutory wording is clear.

4 Of course, if the statute contained nothing but mandatory disclosure provisions, those words could be dismissed as superfluous description. But it doesn’t; it is a mix of mandatory and non-mandatory provisions.

Samsung and Lowe’s argue that manufacturers *are* required to affix labels to their products disclosing their energy consumption, *see* 42 U.S.C. § 6296(a) (“Each manufacturer of a covered product [including refrigerators] ... *shall* provide a label which meets, and is displayed in accordance with, the requirements of such rule.”) (emphasis added). Of course, an appliance’s energy consumption figures will determine whether it is Energy Star-eligible. But although manufacturers are required to disclose those energy consumption figures, they are not required to participate in the Energy Star program or to affix the Energy Star logo to their products. *See* 42 U.S.C. § 6294a(a) (Energy Star is a “voluntary program” implemented through “voluntary labeling”).

*7 Plaintiffs’ claims are not based on the energy consumption disclosures, but rather on the Energy Star logo itself.⁵ This circumstance factually distinguishes other decisions that have given effect to the warranty preemption provision of Section 6297. *See Jurgensen v. Felix Storch, Inc.*, Civ. No. 12–1201, 2012 WL 2354247, at *1 (S.D.N.Y. June

14, 2012) (subsequent DOE testing determined that “Energy Guide labels to the Freezers ... “substantially understated their energy consumption.”); *Gee v. Viking Range Corp.*, Civ. No. 4:07–87, 2008 WL 4416442, at *1 (N.D.Miss. Sept.24, 2008) (claims for breach of express warranty and implied warranty of merchantability based on defect in design and energy use greater than disclosed on the label). Those cases held that breach of warranty claims based on the products' failure to live up to the manufacturers' required disclosures of energy consumption figures were preempted by NAECA. Participation in the Energy Star Program, because it is not “required,” does not trigger the preemption provision.

5 Certain of Plaintiffs' claims, it is true, could be read to include claims of inefficiency in operation, in addition to claims based on the inappropriateness of the Energy Star designation. I will not, however, dismiss valid claims that are arguably overbroad.

The statutory scheme is clear. A disclosure that is “required” by Congress does not create a warranty, but one (like Energy Star) that is optional may constitute an actionable warranty. A warranty claim based on such a voluntary, non-“required” disclosure is not preempted.

B. Breach of Express Warranty

I find that the Complaints sufficiently allege that the Energy Star logo constitutes an express warranty, which defendants breached. Any disclaimer in the user manual's Limited Warranty is ineffective; at least, it cannot be presumed effective as a matter of law for purposes of a motion to dismiss.

a. Choice of Law

As to the state law claims, I must consider which state's law applies, and I must do so separately as to each plaintiff, each defendant, and each claim. See *Gray v. Bayer Corp.*, Civ. No. 08–4716, 2011 WL 2975768, at *5 (D.N.J. July 21, 2011) (Linares, J.) (“While it might be desirable for the sake of efficiency to settle upon one state, such as New Jersey, and apply its law in lieu of the other 49 jurisdictions, due process requires individual consideration of the choice of law issues raised by each class member's case before certification.”) (quoting *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J.1998)).

“[I]n a diversity action, a district court must apply the choice of law rules of the forum state to determine what law will

govern the substantive issues of a case.” *Warriner v. Stanton*, 475 F.3d 497, 499–500 (3d Cir.2007) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). New Jersey uses the most significant relationship test, which consists of two prongs. *Maniscalco v. Brother Int'l Corp. (USA)*, 793 F.Supp.2d 696, 704 (D.N.J.2011) *aff'd sub nom. Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202 (3d Cir.2013). First, the court must determine whether a conflict actually exists between the potentially applicable laws. *P.V. v. Camp Jaycee*, 197 N.J. 132, 144, 962 A.2d 453, 460 (2008) (“Procedurally, the first step is to determine whether an actual conflict exists. That is done by examining the substance of the potentially applicable laws to determine whether there is a distinction between them.”) (internal quotations omitted). “[I]f no conflict exists, the law of the forum state applies.” *Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 717 (D.N.J.2011) (quoting *P.V.*, 197 N.J. at 143, 962 A.2d at 453).

*8 If a conflict exists, the court then moves to the second prong: it must determine “which state has the ‘most significant relationship’ to the claim at issue by weighing the factors” in the applicable section of the Restatement (Second) of Conflict of Laws. For contract actions, the applicable section is Restatement § 188. *Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 134 N.J. 96, 102, 629 A.2d 885, 888 (1993).

Under New Jersey law, to state a claim for breach of express warranty, “Plaintiffs must properly allege: (1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description.” *Snyder*, 792 F.Supp.2d at 721 (citing N.J. Stat. Ann. § 12A:2–313) (other internal citation omitted). Arizona and North Carolina law are substantially similar. See *Ariz.Rev.Stat. Ann. § 47–2313* (defining an express warranty as “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain” or “[a]ny description of the goods which is made part of the basis of the bargain.”); N.C. Gen.Stat. Ann. § 25–2–313 (same).

The parties do not identify any significant distinction among these states' laws with respect to this issue. For the purposes of the pending motions,⁶ with respect to a claim of breach of express warranty, no significant conflict exists between the laws of Arizona, North Carolina and New Jersey.

Accordingly, I will apply the law of the forum state, New Jersey. *See, e.g., Snyder*, 792 F.Supp.2d at 717.

6 “Applying the factors necessary to determine choice of law for a contract or quasi-contract claim” may be “a very fact-intensive inquiry,” such that the analysis sometimes is more appropriate at the class certification stage. *Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 721 (D.N.J.2011). Nevertheless, “[s]ome choice of law issues may not require a full factual record and may be amenable to resolution on a motion to dismiss.” *Harper v. LG Electronics USA, Inc.*, 595 F.Supp.2d 486, 491 (D.N.J.2009). This is determined issue-by-issue. *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 700 (D.N.J.2011). These Complaints, I find, contain allegations sufficient to permit a choice-of-law determination.

b. Analysis

Avram's and Lark's allegations are straightforward: The Energy Star logo was an affirmation that the product was Energy Star compliant; they purchased the refrigerators because of the logo; and the refrigerators did not, in fact, meet the Energy Star requirements. The parties dispute, however, whether the allegations establish the first two elements of a breach of express warranty: that the seller made an affirmation or promise about the product, and that it became the basis of the bargain.

i. Energy Star Logo as an Affirmation or Promise

“A statement can amount to a warranty, even if unintended to be such by the seller, ‘if it could fairly be understood ... to constitute an affirmation or representation that the [product] possesses[s] a certain quality or capacity relating to future performance.’ ” *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 570 (7th Cir.1993) (applying New Jersey law and quoting *Gladden v. Cadillac Motor Car Div., General Motors Corp.*, 416 A.2d 394, 396, 83 N.J. 320 (1980)). “[W]hether a given statement constitutes an express warranty is normally a question of fact for the jury.” *Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 721–22 (D.N.J.2011); *see also Union Ink Co., Inc. v. AT & T Corp.*, 352 N.J.Super. 617, 645, 801 A.2d 361 (App.Div.2002) (“Whether the advertisements contained material misstatements of fact, or were merely puffing, as alleged by defendants, presents a question to be determined by the trier of fact.”).

*9 Avram's and Lark's Complaints allege that refrigerators that carry the Energy Star logo meet the program's requirements of using 20% less energy than the minimum federal standard. (Avram Compl. ¶ 2; Lark Compl. ¶ 2). The refrigerators were sold with the logo, but subsequent DOE testing revealed that they did not meet Energy Star efficiency requirements. (Avram Compl. ¶ 1; Lark Compl. ¶ 1). The Complaints sufficiently allege that, by attaching the Energy Star label to the refrigerators, Samsung and Lowe's affirmed that the refrigerators qualified for the program. *See Taylor v. JVC Americas Corp.*, Civ. No. 07–4059, 2008 WL 2242451, at *5 (D.N.J. May 30, 2008) (warranty claim sufficiently pled by allegations that packaging said the product was a “1080p” television, but television did not accept a 1080p signal).

Defendants cite two cases in which courts held that the Energy Star logo did not support a claim of breach of express warranty. I find them distinguishable.

In *Savett v. Whirlpool Corp.*, Civ. No. 12–310, 2012 WL 3780451 (N.D. Oh. Aug. 31, 2012), the court simply found that the complaint simply failed to allege any particular statement or promise that the logo conveyed. *Id.* at *9. Here, by contrast, the Complaints allege that Energy Star logo conveys that the refrigerator is at least 20% more energy efficient than the minimum federal standard.⁷ *Rossi v. Whirlpool Corp.*, Civ. No. 12–125, 2013 WL 1312105 (E.D. Cal. Mar. 28, 2013) applies California law in a manner that does not square with cases from this District that apply New Jersey law. *See Hemy v. Perdue Farms, Inc.*, Civ. No. 11–888, 2013 WL 1338199, at *7, *10 (D.N.J. Mar. 31, 2013) (complaint sufficiently alleges that a “humanely raised” label would be understood by consumers to encompass the slaughtering process); *Taylor*, *supra*, 2008 WL 2242451 at *5.

7 Avram's and Lark have, in addition, asked the court to take judicial notice of DOE survey results that show that the majority of households understand and rely on Energy Star labels when making purchasing decisions. (See National Awareness of Energy Star for 2011: Analysis of CEE Household Survey, Ex. C to Request for Judicial Notice at ES–1 to ES–1 [Docket No. 37–4]). Such information might provide further support of Plaintiffs' position, but is not necessary for purposes of this motion.

Applying New Jersey law, I find that the Complaints adequately allege that the Energy Star logo would be

understood by consumers as an affirmation of fact or a promise regarding the energy efficiency of the refrigerators.

ii. *Basis of the Bargain*

“Under New Jersey law, a representation is presumed to be part of the basis of the bargain ‘once the buyer has become aware of the affirmation of fact or promise’ and can be rebutted by ‘clear affirmative proof that the buyer knew that the affirmation of fact or promise was untrue.’ ” *Viking Yacht Co. v. Composites One LLC*, 496 F.Supp.2d 462, 469 (D.N.J.2007) (quoting *Liberty Lincoln–Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 825 (3d Cir.1999) (other internal quotation omitted)).

Samsung and Lowe's contend that the Complaints fail to allege that the Energy Star logo was part of the basis of the bargain. Avram, however, alleges that she had decided to purchase only a refrigerator that sported the Energy Star label. (Avram Compl. ¶ 17). While Lark did not limit her search in the same way, one can reasonably infer from her complaint that she knew the Energy Star label was on the refrigerator, understood its meaning, and paid a higher price based on it. (See, e.g., Lark Compl. ¶ 17 (Lark's purchase of the refrigerator “included a substantial price premium due to its supposed energy efficiency and ENERGY STAR® qualification.”)). Defendants did not—indeed, at this procedural stage, probably could not—rebut the allegations by proving that Avram and Lark were not in fact misled. That is not to say that such a rebuttal could not eventually be made, but, at this stage, I find that Avram and Lark have stated a claim for breach of express warranty.

iii. *Disclaimer via Samsung's Limited Warranty*

*10 Only one point remains: whether Samsung successfully disclaimed the warranty. Samsung and Lowe's argue that, by offering a Limited Warranty that expressly disclaims all others, Samsung effectively negated any warranty based on the Energy Star logo.

Both the UCC and New Jersey law allow manufacturers to limit their liability (other than for personal injury) through disclaimers. *Alloway v. Gen. Marine Indus., L.P.*, 149 N.J. 620, 630, 695 A.2d 264, 269 (1997); see N.J. Stat. Ann. § 12A:2–316. Such a disclaimer must be so clear and conspicuous that a reasonable purchaser would notice it. *Gladden v. Cadillac Motor Car Div.*, 83 N.J. 320, 331, 416 A.2d 394, 400 (1980).

The refrigerator's manual states that “Energy star labeled this product could save your energy costs.” [sic] (User Manual at 2, Ex. A to O'Hara Dec. [Docket No. 6–2]).⁸ The Limited Warranty in the manual “covers manufacturing defects in materials and workmanship encountered in normal, noncommercial use of the product.” (*Id.* at 42). The Limited Warranty contains an express disclaimer: “THERE ARE NO EXPRESS WARRANTIES OTHER THAN THOSE LISTED AND DESCRIBED ABOVE.... SAMSUNG SHALL NOT BE LIABLE FOR ... FAILURE TO REALIZE SAVINGS OR OTHER BENEFITS....” (*Id.* at 43).

⁸ The Limited Warranty is not referred to in either complaint and therefore would not ordinarily be considered as part of a motion to dismiss. I nevertheless consider it, but find it ineffective as a disclaimer.

“[U]nder U.C.C. § 2–316, a warranty disclaimer inconsistent with an express warranty is inoperative.” *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 570 (7th Cir.1993) (citing N.J. Stat. Ann. § 12A:2–316); *Gladden*, 83 N.J. at 330, 416 A.2d at 399. Because I have found that the Energy Star logo constitutes an express warranty, this attempt to disclaim it would be ineffective.⁹ I note, too, the potential for unfairness if an express warranty is displayed to the purchaser when he parts with his money at the store, but the disclaimer appears at page 42 of a manual sealed inside the product's packaging. At best, such an alleged disclaimer would present an issue of fact. Either way, the motion to dismiss must be denied.

⁹ The Limited Warranty covers parts and labor on the refrigerator generally for one year, and on the sealed refrigeration system for five years. (*Id.* at 42). I do not reach the issue of whether these claims, if brought under the Limited Warranty, would be untimely.

C. Breach of the Implied Warranty of Merchantability

Samsung and Lowe's argue that the implied warranty of merchantability claims should be dismissed because neither complaint adequately alleges that the refrigerators failed in their “ordinary purpose,” which is to keep food cold. Avram and Lark respond that this appliance was sold as a high-efficiency refrigerator with a more particular ordinary purpose: to keep food cold *in compliance with Energy Star efficiency standards*. As to each plaintiff's claim against each

defendant, I must determine I must first determine which state's law applies. I conclude that New Jersey law governs both plaintiffs' implied warranty claims against Lowe's, as well as Lark's claim against Samsung. Avram's claim against Samsung, however, is governed by Arizona law.

1. *Avram's implied warranty claim against Samsung*

Avram, a citizen of Arizona, asserts a state law implied warranty of merchantability claim against Samsung, a citizen of New Jersey, in a New Jersey federal court.

*11 I must first determine which law applies—New Jersey's or Arizona's. The first step is to see whether these two states' laws conflict. *P.V. v. Camp Jaycee*, 197 N.J. 132, 144, 962 A.2d 453, 460 (2008). They do. For an implied warranty of merchantability claim, Arizona requires contractual privity, but New Jersey does not. *Compare Flory v. Silvercrest Indus.*, 129 Ariz. 574, 579, 633 P.2d 383, 388 (1981) (“economic losses are not recoverable for breach of implied warranty in the absence of privity of contract”) with *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 582, 489 A.2d 660, 674 (1985) (“We conclude that the absence of privity between a remote supplier and an ultimate purchaser should not preclude the extension to the purchaser of the supplier's warranties made to the manufacturer.”) The conflict matters because Avram (who purchased the refrigerator from Lowe's) is not in privity with Samsung (the remote manufacturer of the refrigerator).

Having established that a conflict exists, the Court must determine “which state has the ‘most significant relationship’ to the claim at issue by weighing the factors” in Section 188 of the Restatement (Second) of Conflict of Laws. *Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 134 N.J. 96, 102, 629 A.2d 885, 888 (1993). Those factors are: “(1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.” *Spence-Parker v. Delaware River & Bay Auth.*, 656 F.Supp.2d 488, 498–99 (D.N.J.2009) (citing *Restatement (Second) of Conflicts* § 188(2)).

Those factors point to the conclusion that Arizona law applies to Avram's claim against Samsung. Avram shopped for, purchased, installed and used the refrigerator in Arizona, where she lives. Those facts imply that the first four factors favor Arizona. The last factor—the residence and place of incorporation of the parties—is more or less neutral, in that

one party is a citizen of Arizona, and the other of New Jersey (the co-plaintiff and co-defendant are located elsewhere). Accordingly, Arizona law will apply to Avram's claim of breach of the implied warranty of merchantability as against Samsung.

Avram's implied warranty claim against Samsung falls afoul of Arizona's requirement of privity of contract. *See Flory, supra*. Privity does not exist because Avram purchased her refrigerator from Lowe's, not Samsung. (Avram Compl. ¶ 17). Accordingly, her breach of warranty claim against Samsung, the remote manufacturer, must be dismissed. *See Haugland v. Winnebago Indus.*, 327 F.Supp.2d 1092, 1097 (D.Ariz.2004) (because “privity is absent in this case, Plaintiffs implied warranty of merchantability claims ... will be dismissed.”); *Yee v. Nat'l Gypsum Co.*, Civ. No. 09–8189, 2010 WL 2572976, at *2 (D.Ariz. June 22, 2010) (dismissing implied warranty claim against manufacturer because plaintiff “cannot [establish privity] because he bought the drywall not from [the manufacturer], but from Lowe's.”).

2. *Lark's implied warranty claim against Samsung and both Plaintiffs' implied warranty claims against Lowe's*

*12 The remaining implied warranty of merchantability claims—Lark's claim against Samsung and both plaintiffs' claims against Lowe's—present “false conflicts.” They are therefore governed by the law of the forum state, New Jersey.

Lark, a citizen of Maryland, sues Samsung, a citizen of New Jersey, for breach of the implied warranty of merchantability. For purposes of this claim, there is no significant difference between Maryland and New Jersey law. *Compare Pulte Home Corp. v. Parex, Inc.*, 174 Md.App. 681, 755, 923 A.2d 971, 1013 (2007) (“In an action based on breach of warranty it is necessary for the plaintiff to show the existence of the warranty, the fact that the warranty was broken and that the breach of warranty was the proximate cause of the loss sustained.”), with *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 601 n. 8 (3d Cir.2012) (“To state a claim for breach of the implied warranty of merchantability, a plaintiff must allege (1) that a merchant sold goods, (2) which were not ‘merchantable’ at the time of sale, (3) injury and damages to the plaintiff or its property, (4) which were caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury.” (internal citation and quotation omitted)). Accordingly, New Jersey law will govern Lark's claim against Samsung for breach of the

implied warranty of merchantability. See *Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 717 (D.N.J.2011).

As to Avram's and Lark's implied warranty claims against Lowe's, North Carolina law is added to the mix; Lowe's is incorporated and has its principal place of business in North Carolina. Unlike New Jersey, but like Arizona, North Carolina requires privity. Compare *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 582, 489 A.2d 660, 674 (1985) ("We conclude that the absence of privity between a remote supplier and an ultimate purchaser should not preclude the extension to the purchaser of the supplier's warranties made to the manufacturer."), and *Ace Am. Ins. Co. v. Grand Banks Yachts, Ltd.*, 587 F.Supp.2d 697, 705 (D.Md.2008) ("Maryland has expressly abolished the requirement for contractual privity to sue for breach of the implied warranty of merchantability" (citing Md.Code Ann., Com. Law § 2-314(1)(b) ("Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer."))), with *Kelly v. Georgia-Pac. LLC*, 671 F.Supp.2d 785, 796 (E.D.N.C.2009) ("Under North Carolina common law, privity of contract is generally required to assert an implied warranty claim.").

With respect to claims against Lowe's, however, this is a "false conflict," wherein "the laws of the two jurisdictions would produce the same result on the particular issue presented." *Williams v. Stone*, 109 F.3d 890, 893 (3d Cir.1997). Avram and Lark bought their refrigerators from Lowe's and are in privity with Lowe's; lack of privity is therefore a non-issue. Accordingly, I will disregard the nominal conflict with North Carolina law; New Jersey law will govern Avram's and Lark's claims against Lowe's for breach of the implied warranty of merchantability.

*13 "[T]he UCC, as adopted by New Jersey, specifically states that an implied warranty of merchantability ensures that goods sold are 'fit for the ordinary purposes for which such goods are used.' " *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 706 (D.N.J.2011) (quoting N.J. Stat. Ann. § 12A:2-314(f)). It "does not impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality." *Liebersson v. Johnson & Johnson Consumer Companies, Inc.*, 865 F.Supp.2d 529, 542 (D.N.J.2011) (internal quotations and citations omitted). Put a different way, "merchantability is defined as the product sold 'should be of the general kind described and reasonably fit for the general purpose for which it should have been sold.' " *Id.* (quoting *Adams v. Peter*

Tramontin Motor Sales, Inc., 42 N.J.Super. 313, 321, 126 A.2d 358 (App.Div.1956) (emphasis added) (other internal quotation and citation omitted). Generally, a court will find a good to be unfit for its ordinary purpose "when [it] can identify one of three general types of defects: manufacturing defects, design defects, and failure to give the buyer proper instructions with respect to the goods." *Liebersson*, 865 F.Supp.2d at 542.

But what is the general, "ordinary purpose" of these refrigerators? Self-evidently, they are designed to keep perishables cold, and no one contends that they failed to do that. Avram and Lark, however, stress that these refrigerators were sold as high-efficiency appliances that would keep food cold in accordance with Energy Star efficiency standards. And they did allegedly fail to do that.

An impairment of the "ordinary purpose" of a product is one that is central to the product's value or function. Compare *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J.Super. 441, 450, 240 A.2d 195, 200 (Law Div.1968) (where the car the plaintiff purchased broke down less than a mile from the dealership, the car was "substantially defective" and in breach of the implied warranty of merchantability), with *Green v. Green Mountain Coffee Roasters, Inc.*, 279 F.R.D. 275, 283 (D.N.J.2011) (rejecting implied warranty of merchantability claim that a single-cup brewing system, although it brewed beverages, failed to brew precisely one cup), and *Liebersson*, 865 F.Supp.2d at 543 (finding no breach of the implied warranty of merchantability where soap and lotion did not help babies sleep, as advertised, because the soap was "clearly manufactured for the purpose of washing and moisturizing babies' skin" and it did do that).

Based on the allegations in the Complaints, I find that the Energy Star label puts the refrigerators closer to the car in *Zabriskie* than to the coffeemaker in *Green* or the soap in *Liebersson*. Soporific qualities and precise portion control do not, so far as I am aware, embody any settled consumer expectation as to baby soap or coffee makers. (Avram Compl. ¶ 1; Lark Compl. ¶ 1). An Energy Star sticker, by contrast, stands for a level of efficiency, defined in relation to statutory standards, for which consumers allegedly are willing to pay a premium. (Avram Compl. ¶ 2; Lark Compl. ¶ 2). The eventual presentation of evidence might or might not establish Plaintiffs' claim; I cannot say, however, that they have failed to state one.

*14 Accordingly, I dismiss Avram's claim of breach of the implied warranty of merchantability as against Samsung under Arizona law. The remaining implied warranty claims, analyzed under New Jersey law, meet federal pleading requirements and will not be dismissed.

D. Magnuson–Moss Warranty Act Claims

Magnuson–Moss is “a remedial statute designed to protect the purchasers of consumer goods from deceptive warranty practices.” *Miller v. Willow Creek Homes, Inc.*, 249 F.3d 629, 630 (7th Cir.2001) (citation omitted). It provides for a private right of action whenever when a purchaser is “damaged by the failure of a ... warrantor ... to comply with any obligation under [Magnuson–Moss], or under a written warranty” 15 U.S.C. § 2310(d)(1). Logically, “Magnuson–Moss claims based on breaches of express and implied warranties under state law depend upon those state law claims.” *Cooper v. Samsung Elec. Am., Inc.*, Civ. No. 07–3853, 2008 WL 4513924, at *6 (D.N.J. Sept. 30, 2008) (citing *In re Ford Motor Co. Ignition Switch Prods. Liability Litig.*, 19 F.Supp.2d 263, 267 (D.N.J.1998)).

Samsung and Lowe's argue that Plaintiffs' Magnuson–Moss claims are based on invalid state-law warranty claims, and therefore should be dismissed. As discussed in Sections III.B and C, above, however, all but one of the state-law causes of action for breach of express and implied warranties are legally sufficient and they will not be dismissed. Consequently, the Magnuson–Moss claim survives as well.

In addition, the Magnuson–Moss claims meet federal pleading standards. A “written warranty” is:

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time ...

which ... becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6).

The allegations of the Complaint easily would support an inference that the refrigerators are consumer products

and the Defendants are suppliers within the meaning of the statute.¹⁰ As discussed in Section III.B, above, the Complaints adequately allege that the Energy Star logo constitutes a written affirmation of fact relating to the refrigerators' performance that became part of the basis of the bargain.

¹⁰ “Consumer product” is defined as any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed). 15 U.S.C. § 2301(1). A “supplier” is any person engaged in the business of making a consumer product directly or indirectly available to consumers. 15 U.S.C. § 2301(4).

The Complaints state claims under Magnuson–Moss. Samsung and Lowe's motions to dismiss the Magnuson–Moss claims are denied.

E. State Consumer Protection Statute Claims

a. Avram's New Jersey Consumer Fraud Act Claim

Avram brings a claim under the New Jersey Consumer Fraud Act against Samsung only. I find that the law of Arizona applies, and that the NJCFA claim must therefore be dismissed as a matter of law.¹¹

¹¹ Should New Jersey law apply, Samsung argues, the NJCFA claim should be dismissed because it does not state an ascertainable loss nor are its allegations pleaded with particularity. Because I find that Arizona law applies, I do not reach those issues.

*15 Step one of the choice-of-law analysis requires the Court to determine if an actual conflict exists between New Jersey and Arizona law. As both parties acknowledge, there is a conflict. The Arizona Consumer Fraud Act (the “ACFA”) (1) requires reliance, *Kuehn v. Stanley*, 208 Ariz. 124, 129, 91 P.3d 346, 351 (Ct.App.2004) (“An injury occurs when a consumer relies, even unreasonably, on false or misrepresented information.”); (2) has a one-year statute of limitations, *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045 (9th Cir.2011); (3) does not permit treble damages and (4) allows only the attorney general to collect attorneys' fees. *Ariz.Rev.Stat. Ann.* § 44–1534.

New Jersey, by contrast, (1) does not require reliance, *Liebertson v. Johnson & Johnson Consumer Companies, Inc.*, 865 F.Supp.2d 529, 538 (D.N.J.2011) (stating elements of NJCFA claim, which do not include reliance); (2) has a six-year statute of limitations, *Dilorio v. Structural Stone & Brick Co., Inc.*, 368 N.J.Super. 134, 142, 845 A.2d 658, 663 (App.Div.2004); (3) imposes treble damages and (4) provides for an award of attorneys' fees. N.J. Stat. Ann. § 56:8–19.

In short, the ACFA and the NJCFA conflict. Accordingly, I move to step two to see which state has the most significant relationship to the claim, using the factors outlined in the applicable subsection of Section 148 of the Restatement (Second) of Conflict of Laws. *Maniscalco v. Brother Int'l Corp. (USA)*, 793 F.Supp.2d 696, 704 (D.N.J.2011) (citing *P.V. v. Camp Jaycee*, 197 N.J. 132, 143–44, 962 A.2d 453, 460 (2008).

The subsection of the Restatement that applies to this case is Section 148(2),¹² which states:

¹²

Restatement Section 148(1) states:

(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

I find that Section 148(1) does not apply, because the representations and the reliance did not both occur in any single state. Any representations were made in New Jersey, but received in Arizona, where Avram allegedly relied upon them. To the extent that that the applicability of Section 148(1) is suggested by *Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D. 437 (D.N.J.2009), I find the case distinguishable. See *Maniscalco*, 793 F.Supp.2d 696, 707 (distinguishing *Agostino* because the *Agostino* defendant “intended the fraudulent bills be read by each plaintiff in his or her home state,” while the facts in *Maniscalco* did “not concern the direct targeting of plaintiffs whose identities and

addresses [were] known.”). There is no evidence that Samsung or Lowe's directly and knowingly targeted Avram or anyone else.

(2) When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Restatement (Second) of Conflict of Laws § 148(2) (1971). Simple factor-counting is not the whole of the analysis, but it is a starting point. Four of the *Section 148(2)* factors favor the application of Arizona law, one favors New Jersey, and one is neutral. Specifically, the first two and last two favor Arizona law: in Arizona, Avram received the representations and acted in reliance on them in purchasing and using the refrigerator. The third factor—that Samsung made the representations in New Jersey—favors New Jersey law. The remaining factor—the residence, place of incorporation, and place of business of the parties—is evenly balanced. In sum, the 148(2) factors point to Arizona law.

*16 Courts are also admonished, however, not merely to count the 148(2) factors, but to weigh them in light of the principles stated in Section 6 of the Restatement. *Camp Jaycee*, 197 N.J. at 147, 962 A.2d at 463; see also Restatement § 148 cmt. B. Those policies are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6. “Reduced to their essence, the § 6 principles are: (1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states.” *Camp Jaycee*, 197 N.J. at 147, 962 A.2d at 463.

Avram's Arizona residence weighs heavily in favor of that state's law. “The interests of interstate comity favor applying the law of a state where the injured party resides.” *Montich v. Miele USA, Inc.*, 849 F.Supp.2d 439, 450 (D.N.J.2012) (citing *Fink v. Ricoh Corp.*, 365 N.J.Super. 520, 585, 839 A.2d 942 (Law Div.2003) (stating this factor “clearly require[s] application of the law of any potential claimant's state of residence because application of any other state's law would frustrate the domiciliary state's legislative policies....”)).

The second factor, the interests of the parties, looks to the law the parties reasonably expected would apply. See *Fu v. Fu*, 160 N.J. 108, 123, 733 A.2d 1133 (1999); see also Restatement § 6, comment g (“Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state.”). It is given more weight in the context of a voluntary commercial transaction, like this one, in which the parties can be said to have “molded” their conduct, as opposed to, say, a personal-injury tort case. See *Agostino*, 256 F.R.D. at 463 (“the interests of the parties ‘is of extreme importance in the field of contracts,’ but it ‘plays little or no part in a choice-of-law question in the field of torts.’ ” (quoting *Fu v. Fu*, 160 N.J. 108, 123, 733 A.2d 1133, 1141 (2009) (internal quotation omitted))). Avram purchased, took delivery of, and

used the refrigerator in Arizona, and Samsung surely knew its products would be sold there; the application of Arizona law defeats no legitimate expectation of either party. Conversely, I see no indication that Avram knew where Samsung was headquartered, or that she ever dreamed that her refrigerator purchase bore any relation to New Jersey or its laws.

*17 The third factor focuses on which law would further the “fundamental goals of tort law,” which are deterrence and compensation. *Id.* Taken literally, this factor might imply that the more plaintiff-favorable law always wins. But the determination is more systematic and respectful of state policy judgments. True, NJCFA is probably more generous to plaintiffs and stern with manufacturers than is the ACFA. But “[s]imply because New Jersey has struck a particular balance between consumer protection and the promotion of business within its borders does not suggest that its interest in deterrence should displace the policy goals of its fellow states. Those states have instead struck their own legislative balances, awarding compensation based on differing standards of, *inter alia*, intent, causation, reliance, and damages.” *Gray v. Bayer Corp.*, Civ. No. 08-4716, 2011 WL 2975768, at *5 (D.N.J. July 21, 2011). Avram had no contacts with New Jersey, but substantial ones with Arizona. She directly purchased the refrigerator from a third party with no ties to New Jersey. Application of ACFA would further Arizona's interest in compensating purchasers for harms they may have suffered. New Jersey's interest, however, in compensating out-of-state consumers is minimal, and the state's contacts with this litigation have come only because Samsung's headquarters happen to be located there. I thus see “little reason to conclude that New Jersey's deterrent interest with respect to one party should be elevated above” Arizona's. See *id.* In other words, this factor is at best neutral, but tends to lean in favor of Arizona.

The fourth factor is neutral. There is no indication that the interests of judicial administration favor either state.

Fifth, the states' competing interests also tilt to Arizona. “[E]very state has an interest in having its law applied to its resident claimants.” *Montich v. Miele USA, Inc.*, 849 F.Supp.2d 439, 450 (internal quotation and citation omitted). Arizona, the state where the plaintiff “claimant” resides, and where the bulk of the contacts occurred, has the stronger interest in protecting its consumers from harm, regulating incursions by foreign corporations, and determining the scope of recovery for its citizens. See *id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, 123 S.Ct.

1513, 155 L.Ed.2d 585 (2003) (“[E]ach State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.”)).

In short, I apply New Jersey conflicts law and find that the Restatement § 148(2) factors, interpreted in light of the policies stated in § 6, strongly point to the application of Arizona law. Other judges in this District, analyzing analogous cases, have come to a similar conclusion. See, e.g., *Agostino*, 256 F.R.D. at 463 (Chesler, J.); *Gray v. Bayer Corp.*, Civ. No. 08–4716, 2011 WL 2975768, at *5 (D.N.J. July 21, 2011) (Linares, J.).

Avram, however, cites *In re Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46 (D.N.J.2009) (Debevoise, J.), which applied the NJCFA to a claim that a New Jersey corporation had made in-state misrepresentations affecting an out-of-state plaintiff. There, Judge Debevoise found that, under the circumstances, the actions emanating from New Jersey and this State's strong interest in regulating its corporations outweighed other, contrary factors. See *id.* at 64–70. The facts of *Mercedes-Benz* are distinguishable in my view. There, the defendant's extensive, possibly nefarious steps in New Jersey might have lent greater weight to this State's interest in regulating domestic corporations. *Id.* at 51–54, 66. More to the point, no subsequent case has followed *Mercedes-Benz*, and many have found that its reasoning went too far. See, e.g., *Montich v. Miele USA, Inc.*, 849 F.Supp.2d 439, 449–50 (D.N.J.2012) (collecting criticism of, and distinguishing, *Mercedes-Benz*, and finding, “[b]ased on these facts and the weight of the precedent in this Circuit,” that California law applied where “Plaintiff purchased the washing machine from a store in California, took delivery of the machine in California, used the machine at her home in California, and allegedly suffered injury in California.”); *In re Vioxx Products Liab. Litig.*, 861 F.Supp.2d 756, 765 (E.D.La.2012) (declining to apply the NJCFA and stating “only one factor seems to weigh in favor of the application of New Jersey law. This was enough for the *Mercedes-Benz* court to apply New Jersey law to out-of-state litigants, but as noted above that opinion is an outlier. Under similar facts, many more cases have applied the consumer fraud law of plaintiffs home state.”); *Gray v. Bayer Corp.*, 2011 WL at *6 (“While this Court agrees with the court in *Mercedes-Benz* that due consideration must be given to New Jersey's deterrent interest in enforcing the NJCFA, the Court concludes that, given the substantial contacts between Plaintiff's claims and the states where One–A–Day WeightSmart was purchased, to disregard the individual laws of those states in favor of a blanket application of New

Jersey law would ignore their strong compensatory interest in this matter and would threaten to upset the balance of our federal system. The Court thus follows the weight of authority counseling against the application of the NJCFA to out-of-state consumers.”); *Moloney v. Microsoft Corp.*, No. 09–2047, 2011 WL 5864064, at *9, 2011 U.S. Dist. LEXIS 134841, at *28 (D.N.J. Nov. 21, 2011) (“This Court is similarly unsatisfied with the justifications provided in the *Mercedes-Benz* decision.”); *Agostino v. Quest Diagnostics Inc.*, No. 04–4362, 2010 WL 5392688, *9, 2010 U.S. Dist. LEXIS 135310, *28 (D.N.J. Dec. 22, 2010) (“Parting ways, however, with Judge Debevoise's assessment in *Mercedes*, this Court does not consider that New Jersey's interest in deterring fraudulent conduct perpetrated by domestic companies necessarily trumps the interest of the victim's home state.”).

*18 Like the judges in the cases cited above, I find that New Jersey has the less significant relationship with Avram's consumer fraud claim. “[A]ccepting all of the facts as pleaded by Plaintiffs as true, the factors weigh in favor of applying the law” of Arizona. *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 709 (D.N.J.2011). Avram received and relied upon the Energy Star logo in Arizona, she purchased the refrigerator there, the refrigerator is located there, and performance of the contract occurred there. These factors outweigh the single fact that Samsung is located in New Jersey. See, e.g., *Maniscalco v. Brother Int'l Corp.*, 793 F.Supp.2d 696, 707 (D.N.J.2011) (“Moreover, even if I were to find that BIC had made a decision to conceal in New Jersey, such a finding would not alter my determination that California and South Carolina have the most significant relationship to Plaintiffs' fraud claims; indeed, as discussed above, a majority of the courts in this district have determined that unlawful conduct emanating from New Jersey does not necessarily supersede the numerous contacts a plaintiff had with his home state.”); *Arlandson*, 792 F.Supp.2d at 709 (“The factual record is complete enough at this time to show that, accepting all of the facts as pleaded by Plaintiffs as true, the factors weigh in favor of applying the law of Plaintiffs' home states. Plaintiffs received and relied upon the alleged misrepresentations in their home states, the product is located in the Plaintiffs' home states, and the performance of the contract was rendered in Plaintiffs' home states. Balancing all these factors in favor of Plaintiffs' home states against the fact that Defendants' headquarters are located in New Jersey, the Court finds that the law of each Plaintiff's home state has the “most significant relationship” to Plaintiffs' consumer fraud action.”); *Cooper v. Samsung Elecs. Am., Inc.*, 374

[Fed. App'x 250, 255 \(3d Cir.2010\)](#) (noting at the motion to dismiss stage that a consumer fraud claim bears the most significant relationship with the state in which the product was “marketed, purchased, and used”); [Nikolin v. Samsung Elecs. Am., Inc.](#), Civ. No. 10–1456, 2010 WL 4116997, at *3 (D.N.J. Oct.18, 2010) (finding at the motion to dismiss stage that the law of each plaintiffs home state has the most significant relationship, as “mere allegations that the unlawful conduct emanated from New Jersey did not outweigh the substantial ties to plaintiffs' home states”); [In re Philips/Magnavox TV Litig.](#), Civ. No. 09–3072, 2010 WL 3522787, at *9–10 (D.N.J. Sept. 1, 2010) (analyzing the [Section 148\(2\)](#) factors at the motion to dismiss stage and finding that the law of each plaintiff's home state applies); [Warma Witter Kreisler, Inc. v. Samsung Elecs. Am., Inc.](#), Civ. No. 08–5380, 2010 WL 1424014, at *1–2 (D.N.J. Apr. 8, 2010) (finding at motion to dismiss stage that allegation that product was designed in New Jersey “does not outweigh other, more significant, ties” to plaintiffs home state).

*19 Accordingly, the applicable law is that of Arizona. Of necessity, then, Avram's claim under the New Jersey Consumer Fraud Act is dismissed.

b. Lark's MCPA Claim

Samsung and Lowe's argue that Lark's MCPA cause of action must be dismissed because she does not allege reliance on any misrepresentation or actual loss.

i. Choice of Law

The parties agree that Maryland law applies to Lark's claim. I concur. There is a conflict between the NJCFA and the MCPA:

New Jersey's CFA does not require scienter as an element of proof with respect to affirmative acts by defendants, whereas the Maryland Consumer Protection Act (CPA) requires scienter. Further, actual conflicts exist regarding remedies. New Jersey's CFA entitles a successful claimant to treble damages plus attorney's fees and costs, whereas Maryland's CPA does not provide for treble damages and does not provide for mandatory attorney's fees, but allows for their award in the

court's discretion. It is thus abundantly clear that actual conflicts exist, thus requiring an analysis of the second prong.

[Margulies v. Chase Manhattan Mortgage Corp.](#), A–4087–03T3, 2005 WL 2923580 (N.J.Super.Ct.App.Div. Nov.7, 2005) (internal citations omitted).

Under that second prong, I must determine which state has the more significant relationship to the consumer fraud issue by examining the Restatement (Second) of Conflict of Laws factors that apply to fraud actions, found in [Section 148](#). [Maniscalco v. Brother Int'l Corp. \(USA\)](#), 793 F.Supp.2d 696, 704 (D.N.J.2011) *aff'd sub nom. Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202 (3d Cir.2013) (quoting [P.V. v. Camp Jaycee](#), 197 N.J. 132, 136, 962 A.2d 453 (2008)); [Agostino v. Quest Diagnostics Inc.](#), 256 F.R.D. 437, 463–64 (D.N.J.2009). As with Avram, [Section 148\(1\)](#) does not apply because Lark's purchase and use of the refrigerator took place in Maryland, and the alleged false representations were made in New Jersey. Instead, I must look at the factors in [Section 148\(2\)](#).

On balance, these factors point to Maryland as having the most significant relationship to the claim at issue. The first two factors favor Maryland because Lark received and acted in reliance on the representation—the Energy Star logo—in Maryland. The last two factors also support Maryland because Lark purchased and used the refrigerator in Maryland. The third factor, the location where the representation was made, points to New Jersey. The fourth factor, the residence and place of incorporation and business of the parties, is balanced.

In these circumstances, ample case law establishes that the factors, both in number and weight, favor Maryland. See [Maniscalco](#), 793 F.Supp.2d at 708 (“A majority of courts in this District have held that the mere fact that a company is headquartered in New Jersey will “not supersede the numerous contacts with the consumer's home state” for purposes of determining which state has the most significant relationship under Restatement § 148(2).”); [Cooper v. Samsung Electronics America, Inc.](#), 374 Fed. App'x 250, 255 (3d Cir.2010) (upholding a District Court's refusal to apply the NJCFA where plaintiff, an Arizona resident, learned of, purchased and used a Samsung television in Arizona and where New Jersey's only connection to the matter was the fact that Samsung's headquarters were located

in New Jersey); *Nikolin v. Samsung Electronics America, Inc.*, Civ. No. 10–1456, 2010 WL 4116997, at *4 (D.N.J. Oct.18, 2010) (collecting cases and holding that even where a plaintiff has alleged that “unlawful conduct emanated from New Jersey,” such contact does not “outweigh the substantial ties to plaintiffs home states based on other factors under § 148(2).”); *Warma Witter Kreisler, Inc. v. Samsung Elecs. Am., Inc.*, Civ. No. 08–5380, 2010 WL 1424014, at *4 (D.N.J. Apr.8, 2010) (holding that an “allegation that [S]amsung designed the product's operation in New Jersey does not outweigh the other, more significant, ties to Illinois.”); *Knox v. Samsung Electronics America, Inc.*, Civ. No. 08–4308, 2009 WL 1810728, at *4 (D.N.J. June 25, 2009) (applying Georgia's consumer fraud law where “the consumer contacts ... all occurred in Georgia” and noting that despite Samsung's headquarters and the alleged wrongdoing occurring in New Jersey, “it is not clear ... that New Jersey intended out-of-state consumers to engage in end runs around local law in order to avail themselves of collective and class remedies that those states deny.”). I will apply the law of Maryland, the state with the more significant contacts.

ii. Analysis

*20 I therefore analyze Lark's claim against Lowe's under the Maryland Consumer Protection Act. The MCPA prohibits any “unfair or deceptive trade practice” in “[t]he sale ... of any consumer goods.” Md.Code Ann., Com. Law § 13–303(1). The MCPA defines “unfair or deceptive” trade practices to include “false ... or misleading oral or written statement[s] ... or other representations ... [that have] the capacity, tendency, or effect of deceiving or misleading consumers.” *Id.* § 13–301. Consumers “may bring an action to recover for injury or loss sustained ... as the result of” such a misrepresentation. *Id.* § 13–408(a).

A consumer bringing a private action under MCPA, § 13–408, must allege (1) an unfair or deceptive practice or misrepresentation that (2) was relied upon, and (3) caused actual injury. See *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 143, 916 A.2d 257, 277 (2007); *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 752 A.2d 200, 235 (2000). “A consumer relies on a misrepresentation when the misrepresentation substantially induces the consumer's choice.” *Stewart v. Bierman*, 859 F.Supp.2d 754, 768–69 (D.Md.2012) (quoting *Bank of America v. Jill P. Mitchell Living Trust*, 822 F.Supp.2d 505, 532 (D.Md.2011)).

Lark's Complaint does not sufficiently allege that the Energy Star logo substantially induced her to purchase the

refrigerator. It does not say, for instance, that she decided to purchase the refrigerator because of its Energy Star qualification. Nor does it allege more generally that she had limited her search to Energy Star-qualified refrigerators. She asserts that, absent the Energy Star logo, she would not have purchased the refrigerator “on the same terms.” Because Lark's allegations of reliance are somewhat vague and conclusory, they “are not entitled to the assumption of truth.” *Bistran v. Levi*, 696 F.3d 352, 365 (3d Cir.2012). I find that Lark's MCPA claim is inadequately pleaded and I will dismiss it.¹³

13

On the other hand, I reject Samsung and Lowe's argument that Lark failed to allege actual loss. “A complaint adequately pleads loss, for instance, when it points to some amount that it would ‘take to remedy the loss [the plaintiff] incurred as a result of the respondents' alleged deceptive trade practices.’ ” *Jones v. Koons Auto., Inc.*, 752 F.Supp.2d 670, 684 (D.Md.2010) (quoting *Lloyd*, 397 Md. at 150, 916 A.2d 257). Here, Lark has alleged that she paid a premium for the refrigerator and paid higher electricity bills because the refrigerator was not Energy Star-compliant. This suffices to survive a motion to dismiss. See *Dwoskin v. Bank of Am., N.A.*, 850 F.Supp.2d 557, 570 (D.Md.2012) (holding that actual loss prong of MCPA claim was properly alleged by plaintiffs' claim that they “suffered damages from paying a higher interest rate than they otherwise would have been charged.”).

F. Unjust Enrichment

Samsung and Lowe's have moved to dismiss Avram's and Lark's unjust enrichment claims because (1) unjust enrichment is superfluous based on the presence of other tort claims; (2) neither Avram nor Lark can allege that they expected to receive remuneration from Samsung or Lowe's; and (3) because Avram and Lark purchased the refrigerators from Lowe's, neither Plaintiff conferred a benefit directly on Samsung.

Unjust enrichment is a shared feature of many states' common law. For unjust enrichment claims, many courts have found that there is no actual conflict between different states' laws. See *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J.2009) (finding that any differences under the laws of the various states are “not material and do not create actual conflict”); *Agostino v. Quest Diagnostics*

Inc., 256 F.R.D. 437, 464 (D.N.J.2009) (concluding that “there are no actual conflicts among the laws of unjust enrichment”); *Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D.Pa.2007) (examining the unjust enrichment laws of the 50 states and concluding that, “[a]lthough there are numerous permutations of the elements of the cause of action in the various states, there are few real differences”). I see no significant conflicts between the unjust enrichment law of New Jersey, Arizona, North Carolina, and Maryland.¹⁴ Therefore, I will apply New Jersey law.

14 “[T]o claim unjust enrichment” under New Jersey law, “a plaintiff must allege that (1) at plaintiffs expense (2) defendant received benefit (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it.” *Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 723–24 (D.N.J.2011).

“A claim of unjust enrichment under Arizona law has five elements: ‘(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law.’ ” *R. Prasad Indus. v. Flat Irons Envtl. Solutions Corp.*, Civ. No. 12–8261, 2013 WL 2217831, at *12 (D.Ariz. May 20, 2013) (quoting *Freeman v. Sorchych*, 226 Ariz. 242, 251, 245 P.3d 927, 936 (Ct.App.2011)); see also *Cooper v. Samsung Electronics Am., Inc.*, Civ. No. 07–3853, 2008 WL 4513924, at *9 (D.N.J. Sept. 30, 2008) (applying New Jersey law after finding no conflict between unjust enrichment law of Arizona and New Jersey).

“The Court of Appeals of Maryland has defined unjust enrichment as constituting three elements:

- ‘1. A benefit conferred upon the defendant by the plaintiff;
2. An appreciation or knowledge by the defendant of the benefit; and
- ‘3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.’ ”

Sensormatic Sec. Corp. v. Sensormatic Electronics Corp., 249 F.Supp.2d 703, 708 (D.Md.2003) (quoting *County Comm'rs v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 95 n. 7, 747 A.2d 600, 607 n. 7 (2000)).

North Carolina law provides that “[i]n order to state a claim for unjust enrichment, the plaintiffs allegations must set forth that a benefit was conferred on the defendant, that the defendant accepted the benefit, and that the benefit was not gratuitous.” *Jackson v. Carolina Hardwood Co.*, 120 N.C.App. 870, 872, 463 S.E.2d 571, 573 (1995) (citing *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988)).

*21 Avram and Lark allege that they each conferred an benefit on Samsung and Lowe's by purchasing refrigerators that were not in fact Energy Star-compliant. (Avram Compl. ¶ 57; Lark Compl. ¶ 56). Samsung and Lowe's collected these revenues for what was advertised as an Energy Star-qualified refrigerator, when, in fact, the refrigerators did not meet Energy Star requirements. (Avram Compl. ¶ 58; Lark Compl. ¶ 57). As a result, Plaintiffs paid a price premium for a product that did not deliver promised energy savings. (Avram Compl. ¶ 58; Lark Compl. ¶ 57). I believe the Complaints adequately allege each element of an unjust enrichment claim, with one exception.

The requirement that a plaintiff must confer a benefit on the defendant “has been interpreted by New Jersey courts as a requirement that ‘the plaintiff allege a sufficiently direct relationship with the defendant to support the claim.’ ” *Snyder v. Farnam Companies, Inc.*, 792 F.Supp.2d 712, 724 (D.N.J.2011) (quoting *Nelson v. Xacta 3000 Inc.*, Civ. No. 08–5426, 2009 WL 4119176, at *3 (D.N.J. Nov.24, 2009) (citing *Maniscalco v. Brother Int'l Corp.*, 627 F.Supp.2d 494, 505–06 (D.N.J.2009))); see also *Cooper v. Samsung Elec.*, Civ. No. 07–3853, 2008 WL 4513924, at *10 (D.N.J. Sept. 29, 2008) (dismissing an unjust enrichment claim where consumer's purchase was through a retailer, as there was no relationship conferring any direct benefit on the manufacturer). “When consumers purchase a product from a third party, they confer a benefit on that third party, not on the manufacturer.” *Snyder*, 792 F.Supp.2d at 724 (citing cases).

Avram and Lark purchased the refrigerators from Lowe's, not Samsung. Therefore, they did not confer a sufficiently direct benefit on Samsung. Accordingly, their unjust enrichment claims against Samsung must be dismissed.¹⁵

15 Avram and Lark note that a similar unjust enrichment claim in *Palmeri v. LG Electronics USA, Inc.*, another consumer products suit, was not dismissed. Civ. No. 07–5706, 2008 WL 2945985

2013 WL 3654090, 81 UCC Rep.Serv.2d 48

(D.N.J. July 30, 2008). In that case, the defendants did not make, nor did the court address, the argument that the plaintiff-purchaser did not confer a benefit on the manufacturer, as opposed to the retailer, giving it little force here.

The claims against Lowe's, however, will remain. It is true that unjust enrichment often turns out to be superfluous in light of other causes of action-*i.e.*, that it is only a contractual breach or the commission of a tort that makes the enrichment "unjust." Nevertheless, to dismiss the claim on that basis would be premature at this point.¹⁶ Lowe's motion to dismiss this count is denied.

¹⁶ I say "at this point" because a motion to dismiss is directed to plaintiffs pleading, and the unjust enrichment claim is pleaded in the alternative, as the federal rules permit. Fed.R.Civ.P. 8(d)(2) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."). See *Palmieri*, 2008 WL 2945985 at *7 ("unjust enrichment is, by its nature, an alternative remedy to contract and tort remedies....It is inherent

in a claim for unjust enrichment that it is pled in the alternative to a claim for recovery on the contract.").

IV. CONCLUSION

For the reasons stated above, Samsung and Lowe's Motions to Dismiss are **GRANTED IN PART** and **DENIED IN PART**. Specifically the Motions to Dismiss are

1. **GRANTED** as to (1) Avram's cause of action against Samsung for breach of the implied warranty of merchantability; (2) Avram's and Lark's claims under the NJCFA and MCPA, respectively; and (3) Avram's and Lark's unjust enrichment claims against Samsung only.
2. **DENIED** as to all remaining claims in both Complaints.

An appropriate order follows.

All Citations

Not Reported in F.Supp.2d, 2013 WL 3654090, 81 UCC Rep.Serv.2d 48

TAB 5

2015 WL 268857

2015 WL 268857

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Deborah A. BECKER and
Raymond Becker, Plaintiffs,

v.

SMITH & NEPHEW, INC., ABC Corp. I–X,
John Doe I–X, and Jane Doe I–X (said names
being fictitious and unknown), Defendants.

Civ. No. 14–5452 (WHW)(CLW).

Signed Jan. 20, 2015.

Attorneys and Law Firms

John S. Voynick, Jr., Renda & Voynick, Cedar Grove, NJ, for
Plaintiffs.

Glenn S. Kerner, Goodwin Procter, LLP, New York, NY, for
Defendants.

OPINION

WALLS, Senior District Judge.

*1 Plaintiffs Deborah Becker and Raymond Becker bring this products liability case, involving a [hip implant](#), against Defendant Smith & Nephew, Inc. Defendant removed the case from New Jersey Superior Court and now moves to dismiss. Defendant argues that the complaint's allegations are too vague to meet federal pleading standards, and that New Jersey law bars several causes of action. Decided without oral argument under [Fed.R.Civ.P. 78](#), Defendant's motion is granted. Plaintiffs are granted leave to file an amended complaint within 90 days from the date of this Opinion.

BACKGROUND

Plaintiffs filed a complaint in New Jersey Superior Court on May 20, 2014. ECF No. 1–1. The factual allegations of the complaint are that “Defendants, Smith & Nephew, Inc. and/or ABC Corp. I–X ... owned, designed, manufactured, assembled, packaged, repaired, modified, marketed, sold and/or distributed or otherwise placed in the stream of commerce

a certain product more particularly known as a [hip implant](#).” Compl. ¶ 1. “On or about June 1, 2012, the Smith & Nephew, Inc. [hip implant](#) was voluntarily recalled.” *Id.* ¶ 3. “Plaintiff, Deborah A. Becker, only received notification of the voluntary recall on or about April 2013.” *Id.* ¶ 4. “On or about August 16, 2007, plaintiff, Deborah A. Becker, underwent [hip surgery](#) at which time a Nephew & Smith, Inc. [*sic*] [hip implant](#) was implanted.” *Id.* ¶ 5. “On or about September 6, 2013, plaintiff, Deborah A. Becker, was caused to undergo surgery to remove and replace the defective Smith & Nephew, Inc. [hip implant](#) as blood work results revealed high levels of cobalt toxicity in her system ...” *Id.* ¶ 6. The [hip implant](#) caused Deborah Becker to suffer injuries. *Id.* ¶ 7.

The complaint lists six counts. Though none of the headings is expressly labeled with a cause of action, the Court interprets the complaint as sounding in negligence (First Count), loss of consortium (Second Count), strict liability under the New Jersey Products Liability Act (Third Count), breach of express and/or implied warranties (Fourth Count), failure to warn (Fifth Count), and punitive damages (Sixth Count).

Defendant removed the action to this Court on August 29, 2014, ECF No. 1, and now moves to dismiss. ECF No. 4. Defendant argues that the complaint does not allege facts sufficient to support the products liability and breach of express warranty claims; that the New Jersey Products Liability Act bars the claims for negligence, breach of implied warranty, and common law failure to warn; and that the claims for loss of consortium and punitive damages are derivative and must be dismissed along with the others.

Plaintiffs did not timely respond to the motion. On December 3, 2014, after their response to the motion was due, Plaintiffs mailed the Court a short letter asking the Court to deny the motion. Citing no case or other authority, the letter attached what it alleged were medical records of Deborah Becker and an earlier letter from Plaintiffs' counsel to Defendant's counsel describing those records. Plaintiffs later filed the letter and attachments on ECF. ECF No. 9.

STANDARD OF REVIEW

*2 Under [Federal Rule of Civil Procedure 8\(a\)\(2\)](#), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” [Fed.R.Civ.P. 8\(a\)\(2\)](#). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state

2015 WL 268857

a claim to relief that is plausible on its face.’ “ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.” *Id.* (internal quotations and alterations omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘shown’—that the pleader is entitled to relief.” *Id.* at 679.

DISCUSSION

The New Jersey Products Liability Act Does Not Permit Plaintiffs’ Causes of Action for Negligence and Breach of Implied Warranty

The New Jersey Product Liability Act, N.J.S.A. 2A:58C–1 to –11 (“PLA”) is the exclusive remedy for personal injury claims arising out of product use. *See, e.g., Koruba v. American Honda Motor Co., Inc.*, 396 N.J.Super. 517, 935 A.2d 787, 795 (N.J.App.Div.2007). The PLA “governs any claim or action for harm caused by a product, irrespective of the theory underlying the claim, except actions for breach of an express warranty.” *Id.* (citing N.J.S.A. 2A:58C–1(b) (3) and cases). The PLA “no longer recognizes negligence or breach of warranty (with the exception of an express warranty) as a viable separate claim for harm, including personal injury, caused by a defective product or an inadequate warning.” *Id.*; *see also Fidelity and Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.*, 936 F.Supp.2d 441, 447 (D.N.J.2013). Plaintiffs’ causes of action for negligence and breach of implied warranty must be dismissed.

The Complaint Does Not State Sufficient Facts to Support a Claim under the PLA

The PLA adopts a strict liability standard that focuses on “the actual condition of the product” rather than on the reasonableness of the manufacturer’s conduct. *Coffman v. Keene Corp.*, 133 N.J. 581, 628 A.2d 710 (N.J.1993). In order to state a claim for strict liability under the PLA, a plaintiff must demonstrate that “the product was not reasonably fit, suitable or safe for its intended purpose because it either

contained a manufacturing defect, failed to contain adequate warnings or instructions, or was designed in a defective manner.” *Koruba*, 935 A.2d at 795, citing N.J.S.A. 2A:58C–2; *see also Cornett v. Johnson & Johnson*, 414 N.J.Super. 365, 998 A.2d 543, 561–62 (N.J.App.Div.2010) *aff’d as modified*, 211 N.J. 362, 48 A.3d 1041 (N.J.2012). A product liability claim requires proof that (1) the product was defective, (2) the defect existed when the product left the manufacturer’s control, (3) the defect proximately caused injuries to the plaintiff, and (4) the plaintiff was a reasonably foreseeable or intended user. *Sinclair v. Merck & Co.*, 195 N.J. 51, 948 A.2d 587, 595 (N.J.2008) (citing *Myrlak v. Port Auth. of N.Y. & N.J.*, 157 N.J. 84, 723 A.2d 45 (N.J.1999)). “The mere occurrence of an accident and the mere fact that someone was injured are not sufficient to demonstrate the existence of a defect.” *Myrlak*, 723 A.2d at 52 (citation omitted).

*3 The barebones factual allegations of the present complaint are insufficient to support any theory under the PLA.

Manufacturing Defect

A manufacturing defect is a deviation “from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae.” N.J.S.A. 2A:58C–2a; *see also Myrlak*, 723 A.2d at 51.

Plaintiffs do not allege facts to indicate that this particular implant deviated from the manufacturer’s specifications or otherwise identical units. The complaint does not allege that a defect existed when the product left the manufacturer’s control, specify how the defect proximately caused injuries to Deborah Becker, or identify her as a reasonably foreseeable end user of this particular device. The specific name of the implant does not appear in the complaint, nor does the medical condition which it was intended to treat. Though alleging “high levels of cobalt toxicity in [Deborah Becker’s] system,” the complaint does not allege that the product was the proximate cause of this condition, or that the high levels caused a specific injury. Compl. ¶ 6. Apart from labeling the product a “Smith & Nephew hip implant,” Plaintiffs do not expressly identify Defendant’s relationship to the product or role in the chain of commerce, vaguely stating that either Smith & Nephew or a fictitious defendant did one of a number of activities, including and potentially limited to “own[ing]” or “packag[ing]” the product. *Id.* ¶¶ 1–2.

2015 WL 268857

Design Defect

A design defect is something that renders a product not reasonably fit, suitable or safe for its intended purpose. *N.J.S.A. 2A:58C-2*; see *Paredes v. Ford Motor Co.*, 2008 WL 5156473, at *4 (N.J.App.Div.2008). The PLA further defines a design defect as a danger inherent in a product that has been manufactured as intended, when that danger, as a public policy matter, is greater than can be justified by the product's utility. *Id.* To evaluate whether the design was defective, New Jersey courts perform a risk-utility analysis that considers seven factors:

1. The usefulness and desirability of the product—its utility to the user and to the public as a whole.
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
3. The availability of a substitute product that would meet the need and not be as unsafe.
4. The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
5. The user's ability to avoid danger by the exercise of care in the use of the product.
6. The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product or of the existence of suitable warnings or instructions.
- *4 7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

See *Sampson v. Glock, Inc.*, 2014 WL 1225581, at *2–3 (D.N.J.2014) (citing *Johansen v. Makita U.S.A., Inc.*, 128 N.J. 86, 607 A.2d 637, 642–43 (N.J.1992)).

The complaint contains no factual allegations that would satisfy these elements. It neither addresses the seven factors above nor specifies a defect in the product's design. As with a manufacturing defect theory, a design defect theory cannot be maintained without allegations that the defect existed when the product left the manufacturer's control, the particular defect was the proximate cause of injuries to Deborah Becker, and Deborah Becker was a reasonably foreseeable or intended user.

Failure to Warn¹

¹ The Court interprets Plaintiffs' Fifth Count for failure to warn as arising under the PLA, rather than common law. Absent a “contractual obligation to warn” that is “materially more rigorous than the duty imposed by statute or when a person other than the manufacturer or seller of the product assumes a duty to warn,” the PLA subsumes common law claims for failure to warn. See *Repola v. Morbark Industries, Inc.*, 934 F.2d 483, 489–94 (3d Cir.1991) (interpreting N.J.S.A. § 2A:58C-1(b) (2)).

“A plaintiff asserting a cause of action based on failure to warn must establish all the same elements required for an action based on a defective product.” *London v. Lederle Labs.*, 290 N.J.Super. 318, 675 A.2d 1133 (App.Div.1996), *aff'd as modified by Batson v. Lederle Labs.*, 152 N.J. 14, 702 A.2d 471 (N.J.1997). In a failure to warn claim, “the defect is the absence of a warning to unsuspecting users that the product can potentially cause injury.” *Toms v. J.C. Penney Co.*, 304 F. App'x 121, 126 (3d Cir.2008) (citing *Coffman v. Keene Corp.*, 133 N.J. 581, 628 A.2d 710, 716 (N.J.1993)). The manufacturer has a duty to warn of “dangers” that it knew, or that it “should have known on the basis of reasonably obtainable or available knowledge.” *Feldman v. Lederle Labs.*, 97 N.J. 429, 479 A.2d 374 (N.J.1984). It satisfies that duty by giving “an adequate warning or instruction.” N.J.S.A. 2A:58C-4; see *Cornett*, 414 N.J.Super. 365, 998 A.2d 543 at 563. The adequacy of the warning is determined in part by “taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used.” N.J.S.A. § 2A:58C-4; *Port Auth. of N.Y. and N.J. v. Arcadian Corp.*, 189 F.3d 305, 319 (3d Cir.1999).

“[B]efore reaching the question of whether the product contained an adequate warning, plaintiff must first establish that there was a latent danger of which the manufacturer had a duty to warn.” *Toms*, 304 F. App'x at 127 (citing *Mathews v. University Loft Co.*, 387 N.J.Super. 349, 903 A.2d 1120, 1125 (N.J.2006)). A manufacturer must have “sufficient knowledge to trigger the duty to provide a warning of the harmful effects of its product.” *Toms*, 304 F. App'x at 127 (citing *James v. Bessemer Processing Co., Inc.*, 155 N.J. 279, 714 A.2d 898, 908 (N.J.1998)). There is no duty to warn if the danger is obvious. *Mathews*, 903 A.2d at 1128–29.

The complaint does not state specific facts regarding the alleged inadequate warning. There is no identification of

2015 WL 268857

the latent danger, assertion that the danger is not obvious, or allegation that Defendant knew or should have known about it at a particular time. The complaint is silent as to whether Defendant gave a warning that did not reveal a particular danger, gave a warning that was untimely, or gave no warning at all. Plaintiffs do not assert that the inadequacy of the warning was the proximate cause of Deborah Becker's injuries. The complaint does not identify Deborah Becker as an intended user of the product, or state how the warning was inadequate in light of the ordinary knowledge common to intended users.

*5 As Plaintiffs do not plead facts sufficient to support a reasonable inference that Defendant is liable under any theory set forth in the PLA, the Third and Fifth Counts are dismissed.

Breach of Express Warranty

New Jersey law establishes three ways to create an express warranty:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise;
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description;
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

N.J.S.A. § 12A:2–313; *see also* [Kuzian v. Electro lux Home Products, Inc.](#), 937 F.Supp.2d 599, 612 (D.N.J.2013). Courts have dismissed claims for breach of an express warranty where plaintiffs fail to specify any factual support as to the specific language or source of the alleged warranty. *See, e.g.,* [Schraeder v. Demilec \(USA\) LLC](#), 2013 WL 3654093, at *6 (D.N.J.2013). “To prevail on a claim of breach of express warranty, a plaintiff must [also] show ... that the warranty was relied upon.” *See* [Kuzian v. Electrolux Home Products, Inc.](#), 937 F.Supp.2d 599, 617 (D.N.J.2013) (citations omitted).

Here the complaint contains no factual allegations regarding an express warranty. It mentions neither an affirmation of fact by the Defendant, nor a description of the goods, nor a sample or model which was the basis of a bargain. The complaint does not specify how the device did not function as warranted or how Plaintiffs relied on the warranty. This cause of action must be dismissed.

Loss of Consortium and Punitive Damages Are Derivative Claims

“Loss of consortium is a derivative claim which depends for its sustenance upon a viable tort claim of the spouse.” [Finley v. NCR Corp.](#), 964 F.Supp. 882, 889 (D.N.J.1996); *see also* [Banks v. International Rental and Leasing Corp.](#), 680 F.3d 296, 300 n. 8 (3d Cir.2012). Likewise, there can be no claim for punitive damages in a products liability case where there is no viable underlying cause of action. *See* [Oliver v. Raymark Industries, Inc.](#), 799 F.2d 95, 97–98 (3d Cir.1986) (citing [Restatement \(Second\) of Torts § 908](#), comment c (1979) (in awarding punitive damages “[i]t is essential ... that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action.”)). Because all other causes of action are dismissed, Plaintiffs' claims for loss of consortium and punitive damages are dismissed as well.

Plaintiffs' Submissions in Response to this Motion Are Unavailing

Regarding the attachments Plaintiffs submitted with their letter of December 3, 2014, the Court first reminds Plaintiffs' counsel of Local Rule 7.1(b)(2), which requires that all papers in support or opposition to a motion be filed electronically. The Court not only rejects these materials as untimely and improperly submitted, but need not consider them in response to this motion. A court is generally confined to the four corners of the complaint when evaluating its sufficiency. *See* [Tri3 Enterprises, LLC v. Aetna, Inc.](#), 535 F. App'x 192, 195 (3d Cir.2013). A trial court does have discretion to accept materials beyond the pleadings. *See* [In re Kiwi Intern. Air Lines, Inc.](#), 344 F.3d 311, 315 n. 3 (3d Cir.2003). If a court accepts such materials, it must convert the motion into one for summary judgment. [Fed.R.Civ.P. 12\(d\)](#). With too much discovery required to properly evaluate a claim such as this one, the Court declines to convert the motion into one for summary judgment and declines to accept Plaintiffs' supplemental materials.

2015 WL 268857

Plaintiffs Are Granted Leave to Amend

*6 Leave to amend a pleading “shall be freely given when justice so requires.” [Fed.R.Civ.P. 15\(a\)](#); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). There has been no prior dismissal of the complaint, Plaintiffs have not previously amended their pleadings, and Defendant has not demonstrated that it would be prejudicial, futile, or otherwise unfair for Plaintiffs to be given leave to amend. Because the complaint was drafted as part of a state court filing, but is now subject to the higher pleading standards applicable in federal court,² it is consistent with principles of fairness and justice to afford Plaintiffs an opportunity to file an amended complaint within 90 days of the date of this Opinion.

² Compare New Jersey's pleading standard: “In considering a motion to dismiss under Rule 4:6–2(e), courts search the allegations of the pleading

in depth and with liberality to determine whether a cause of action is ‘suggested’ by the facts. They must ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” *Printing Mart–Morris town v. Sharp Electronics Corp.*, 116 N.J. 739, 563 A.2d 31, 34 (N.J.1989) (citations omitted).

CONCLUSION

Defendant's motion is granted. The complaint is dismissed without prejudice. Plaintiffs may file an amended complaint within 90 days of the date of this Opinion.

All Citations

Not Reported in F.Supp.3d, 2015 WL 268857

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 6

2018 WL 928237

2018 WL 928237

Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

William L. BELL, Jr., Plaintiff,

v.

BOEHRINGER INGELHEIM
PHARMACEUTICALS, INC., Boehringer
Ingelheim Pharma GmbH & Co. KG,
Boehringer Ingelheim International GmbH,
and; and Eli Lilly & Company, Defendants.

CIVIL ACTION NO. 17-1153

Signed 02/15/2018

Attorneys and Law Firms

Justin J. Hawal, The DiCello Law Firm, Mentor, OH, for Plaintiff.

Elizabeth C. Curtin, Sidley Austin LLP, Chicago, IL, Heidi Levine, Sidley Austin LLP, New York, NY, Wendy West Feinstein, Morgan, Lewis & Bockius LLP, John C. Hansberry, Pepper Hamilton, Pittsburgh, PA, Barry H. Boise, Pepper Hamilton, Philadelphia, PA, for Defendants.

MEMORANDUM OPINION

Joy Flowers Conti, Chief United States District Judge

I. Introduction

*1 Plaintiff William L. Bell, Jr. ("Bell") alleges that he developed an acute kidney injury as a direct result of taking the prescription drug Jardiance. Bell alleges numerous claims under Pennsylvania law. This court has subject-matter jurisdiction based on diversity of citizenship.

Defendants Boehringer Ingelheim Pharmaceuticals, Inc. ("BIPI")¹ and Eli Lilly & Company ("Lilly") filed a motion to dismiss all but counts 4 and 9 (ECF No. 10), arguing that Pennsylvania law broadly bars all non-negligence claims asserted against prescription drug manufacturers. Defendants also argue that the entire complaint should be dismissed for failing to comply with federal pleading standards. Lilly filed a separate motion to dismiss all claims against it (ECF No. 7), arguing that because BIPI is the sole holder of the Jardiance New Drug Application ("NDA") filed with the Food and Drug

Administration ("FDA") Lilly never had authority to change Jardiance's labeling or design. The motions are fully briefed and ripe for disposition. The parties agreed to stay the case pending the court's resolution of these motions. (ECF No. 15).

¹ Two other Boehringer entities named as defendants have not yet been served.

II. Factual Background

As set forth in the complaint, in July 2014, defendants submitted an NDA to the FDA for Jardiance. Complaint ¶ 20 (ECF No. 1). In August 2014, the FDA approved Jardiance for the treatment of Type II diabetes. *Id.* ¶ 21. Jardiance is the tradename for the drug empagliflozin, which is a member of the gliflozin class of sodium-glucose cotransporter 2 ("SGLT2") inhibitors. *Id.* ¶ 22. SGLT2 inhibitors are designed to inhibit renal glucose reabsorption with the goal of lowering blood glucose. *Id.* ¶ 24. Excess glucose is not metabolized. Instead, it is excreted through the kidneys. *Id.* ¶ 24. Jardiance is indicated for only improved glycemic control in type 2 adult diabetics, but defendants market it for off label purposes, including weight loss, reduced blood pressure and improved glycemic control in type 1 diabetes. *Id.* ¶ 25. Since the release of Jardiance, the FDA has received a significant number of reports of diabetic ketoacidosis. *Id.* ¶ 26. Bell alleges that defendants knew about the significant risk of diabetic ketoacidosis but did not adequately warn consumers or the medical community about the severity of such risks. *Id.* ¶ 30.

On June 13, 2015, Bell began taking Jardiance per his doctor's instructions, primarily to treat diabetes. *Id.* ¶ 32. Bell relied on defendants' claims that Jardiance was safe and effective for the treatment of diabetes. *Id.* ¶ 35. On August 31, 2015, Bell suffered acute renal failure. *Id.* ¶ 37. Bell does not plead any other facts about his medical condition.²

² The complaint appears to be copied from another case with a female plaintiff, as there are multiple references to "her" and "she." *See, e.g.*, Complaint Introduction and ¶ 46.

The complaint asserts the following causes of action: (1) products liability—design defect (strict liability); (2) products liability—failure to warn (strict liability); (3) willful and wanton misconduct or gross negligence; (4) negligence; (5) breach of express warranty; (6) breach of implied warranty; (7) fraudulent misrepresentation; (8) negligent misrepresentation; (9) negligent design; (10) fraudulent concealment; and (11) fraud.

III. Standard of Review

*2 A motion to dismiss tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). In deciding a motion to dismiss, the court is not opining on whether the plaintiff will be likely to prevail on the merits; rather, when considering a motion to dismiss, the court accepts as true all well-pled factual allegations in the complaint and views them in a light most favorable to the plaintiff. *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). While a complaint does not need detailed factual allegations to survive a Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) motion to dismiss, a complaint must provide more than labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A “formulaic recitation of the elements of a cause of action will not do.” *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). “Factual allegations must be enough to raise a right to relief above the speculative level” and “sufficient to state a claim for relief that is plausible on its face.” *Id.* “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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.... Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ”

Id. (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955) (internal citations omitted).

Two working principles underlie *Twombly*. *Id.* First, with respect to mere conclusory statements, a court need not accept as true all of the allegations contained in a complaint. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.) Second, to survive a motion to dismiss, a claim must state a plausible claim for relief. *Id.* at 679, 129 S.Ct. 1937. “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* (citing 490 F.3d at 157-58). “But where the well-pleaded

facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]—that the pleader is entitled to relief.’ ” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). A court considering a motion to dismiss may begin by identifying pleadings that are not entitled to the assumption of truth because they are mere conclusions.

While legal conclusions can provide the framework of the complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id.

IV. Legal Analysis

A. Pennsylvania Law Regarding Claims Against Manufacturers of Prescription Drugs

This case is governed by Pennsylvania law. Defendants argue that under Pennsylvania law, product liability claims against pharmaceutical manufacturers can only be brought under a negligence theory.

1. Strict liability claims

In *Hahn v. Richter*, 543 Pa. 558, 673 A.2d 888, 889-90 (Pa. 1996), the Pennsylvania Supreme Court held that “where the adequacy of warnings associated with prescription drugs is at issue, the failure of the manufacturer to exercise reasonable care to warn of dangers, i.e., the manufacturer’s negligence, is the **only** recognized basis of liability.” *Id.* at 890 (emphasis added). The Pennsylvania Supreme Court explained in *Hahn* that the Restatement (Second) of Torts § 402A, comment k “denies application of strict liability to products such as prescription drugs, which, although dangerous in that they are not without medical risks, are not deemed defective and unreasonably dangerous when marketed with proper warnings.” *Id.* For example, the rabies vaccine commonly leads to serious consequences when injected, but because the

2018 WL 928237

disease itself leads to death, the marketing and use of the vaccine is fully justified. *Id.* at 890 n.2. That kind of product, properly prepared and accompanied by proper directions and warning, is not defective and is not unreasonably dangerous. *Id.*

*3 Bell argues that *Hahn* is “antiquated” and this court should instead follow the principles set forth in *Tincher v. Omega Flex, Inc.*, 628 Pa. 296, 104 A.3d 328 (Pa. 2014), a case involving stainless steel tubing. *Tincher* did not address pharmaceutical drugs and did not overrule *Hahn*. See *id.* at 382 (recognizing that under *Hahn*, a manufacturer is immune from strict liability defective design claims premised upon sale of prescription drugs without adequate warnings). In addition, Bell argues that this court should follow *Lance v. Wyeth*, 624 Pa. 231, 85 A.3d 434 (Pa. 2014), which recognized a negligent design defect claim against a prescription drug manufacturer. *Lance* described *Hahn* as having a “truncated analysis” that offered a “poor foundation for extrapolation.” *Id.* at 452 n.21. The court emphasized in *Lance*, though, “that we are not revisiting *Hahn*.” *Id.* The court reiterated that “for policy reasons this Court has declined to extend strict liability into the prescription drug arena....” *Id.* at 264.

With respect to state law claims, this court is bound by the law as set forth by the Pennsylvania Supreme Court. *Hahn* is still good law and is controlling on cases involving prescription drugs. In *Hahn*, the supreme court rejected strict liability theories in the prescription drug context. Bell’s strict liability claims in counts 1 and 2 of the complaint must be dismissed.

2. Breach of warranty claims

In *Hahn*, the Pennsylvania Supreme Court did not specifically address breach of warranty claims. Its holding that negligence is the “only” recognized basis of liability, *id.* at 890, similarly precludes a claim against a prescription drug manufacturer based on an alleged breach of warranty. In *Salvio v. Amgen, Inc.*, 810 F.Supp.2d 745 (W.D. Pa. 2011), the court explained:

Pennsylvania state and federal courts have interpreted *Hahn* broadly to bar all non-negligence based claims asserted against a manufacturer of prescription drugs. *Leonard v. Taro Pharmaceuticals USA, Inc.*, No. 10-1241, 2010 WL 4961647, at *5,

2010 U.S. Dist. LEXIS 127892 (W.D. Pa. Dec. 2, 2010) (citing *Aaron v. Wyeth*, No. 07-927, 2010 WL 653984, at *11, 2010 U.S. Dist. LEXIS 14581, *30–1 (W.D. Pa. Feb. 19, 2010) (dismissing breach of express and implied warranty claims under *Hahn*); *Kline v. Pfizer, Inc.*, No. 08-3238, 2008 WL 4787577, at *3, 2008 U.S. Dist. LEXIS 101655, *7 (E.D. Pa. Oct. 31, 2008) (dismissing breach of express and implied warranty claims under *Hahn*); *Colacicco v. Apotex, Inc.*, 432 F.Supp.2d 514, 548 (E.D. Pa. 2006) (dismissing breach of implied warranty claim under *Hahn*)).

Salvio, 810 F. Supp.2d at 755–56; accord *Rowland v. Novartis Pharmaceuticals Corp.*, 34 F.Supp.3d 556, 568-69 (W.D. Pa. 2014). Bell’s claims for breach of express and implied warranties in counts 5 and 6 of the complaint will be dismissed.

3. Fraud claims

Counts 7, 10 and 11 of Bell’s complaint allege that defendants knowingly represented that Jardiance was safer than alternative medications and failed to make truthful representations regarding the risks of taking Jardiance. The case law is split regarding claims for fraudulent misrepresentation, fraudulent concealment and fraud.

Some courts hold that *Hahn* broadly bars all non-negligence based claims asserted against a manufacturer of prescription drugs. In *Leonard v. Taro Pharm. USA, Inc.*, No. 10CV1341, 2010 WL 4961647 (W.D. Pa. Dec. 2, 2010), the court reasoned that a claim of intentional misrepresentation or fraud is “a non-negligence based claim akin to strict liability for failure to warn, and is barred by *Hahn* and its progeny.” *Id.* at *5. Other courts have recognized fraud-based claims. In *Tatum v. Takeda Pharm. N. Am., Inc.*, No. CIV.A. 12-1114, 2012 WL 5182895 (E.D. Pa. Oct. 19, 2012), the court pointed out that *Hahn* required a seller of prescription drugs to warn not only of risks of which he reasonably should have knowledge, but also warn of risks of which he did, in fact, have knowledge. *Id.* at *4; see *Hahn*, 673 A.2d at 890 (a seller must warn of risks of which he “has

2018 WL 928237

or reasonably should have knowledge”) (emphasis added). *Accord Cutruzzula v. Bayer Healthcare Pharm. Inc.*, No. CV 14-1474, 2015 WL 8488670, at *5 (W.D. Pa. Nov. 17, 2015), report and recommendation adopted, No. CV 14-1474, 2015 WL 8492767 (W.D. Pa. Dec. 10, 2015) (refusing to dismiss fraud claims if they contain allegations of affirmative misrepresentations that go beyond a mere failure to warn).

*4 The court is persuaded that Pennsylvania law recognizes a cause of action for fraudulent marketing of prescription drugs. *Hahn* does not preclude claims where the plaintiff alleges that the seller had actual knowledge of the risks of prescription drugs and intentionally concealed them. The fraud claims in counts 7, 10 and 11 of Bell’s complaint are not barred by *Hahn* as a matter of law.³

³ As will be discussed below, fraud claims are subject to rigorous pleading standards.

4. Negligent misrepresentation claim

Count 8 of Bell’s complaint alleges negligent misrepresentation. Although the court in *Leonard* dismissed a fraudulent misrepresentation claim, it held that a claim for negligent misrepresentation is not barred by *Hahn*. 2010 WL 4961647, at *5 (quoting *Colacicco*, 432 F.Supp.2d at 548). This court agrees with that analysis. Because count 8 of Bell’s complaint sounds in negligence, it is not barred by *Hahn*.

5. Gross negligence claim

In count 3 of the complaint, Bell alleges that defendants acted with willful and wanton conduct or gross negligence and seeks punitive damages. “[T]here is no separate cause of action under Pennsylvania law for gross negligence.” *Spence v. ESAB Group, Inc.*, 623 F.3d 212, 215 n. 2 (3d Cir. 2010) (citing *Hunter v. Squirrel Hill Assocs., LP*, 413 F.Supp.2d 517, 520 n. 2 (E.D. Pa. 2005) (“While Pennsylvania courts acknowledge differing standards of care, they do not recognize degrees of negligence as separate causes of action.”)). See also *Floyd v. Brown & Williamson Tobacco Corp.*, 159 F.Supp.2d 823, 828 (E.D. Pa. 2001) (dismissing plaintiff’s separately pleaded claim for gross negligence); *Salvio*, 810 F.Supp.2d at 756 (same); *Kline v. Pfizer, Inc.*, No. CIV.A.08-3238, 2008 WL 4787577, at *3 (E.D. Pa. Oct. 31, 2008) (same).

The dismissal of a stand-alone gross negligence claim does not preclude Bell from pursuing damages (including punitive damages) if he is able to demonstrate that defendants were grossly negligent. As explained in *Daly v. New Century Trans, Inc.*, No. 1:11-CV-2037, 2012 WL 4060687 (M.D. Pa. Sept. 14, 2012):

Although not recognized as a separate cause of action, gross negligence has been recognized by Pennsylvania and federal courts interpreting Pennsylvania law as “a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference.” Thus, Pennsylvania law acknowledges differing standards of care, but does not recognize degrees of negligence as separate causes of action.

Id. at *4 (citations omitted) (recognizing that allegations of gross negligence could support a claim for punitive damages). In count 4, Bell asserts a claim of negligence which is sufficient to encompass gross negligence. In accordance with these standards, Count 3 of Bell’s complaint will be dismissed as a separate cause of action because it is subsumed within the negligence claims.

In summary, counts 1, 2, 3, 5 and 6 of Bell’s complaint are not recognized by controlling Pennsylvania law. Counts 1, 2, 5 and 6 will be dismissed with prejudice, without leave to amend. *Salvio*, 810 F.Supp.2d at 757 (denying leave to amend non-negligence claims as futile). Count 3 is being dismissed but it is not dismissed on the merits; it is dismissed because it is not a separate claim.

B. Federal Pleading Standards

Defendants contend that even if some of the claims asserted by Bell are theoretically cognizable, the complaint in this case fails to allege sufficient facts to make any claim plausible. Defendants, therefore, seek dismissal of the entire complaint.

*5 Bell argues that the claims are sufficiently pled. For example, Bell points to allegations that Jardiance was more dangerous than other risks associated with treatment of diabetes (although factual details are not provided), the benefits of Jardiance were outweighed by the risks, there are other (unspecified) design alternatives that have a better safety profile (although what those designs are, and how the safety profile is better are not pled), and Jardiance was more dangerous than the expectations of ordinary consumers and physicians (again, with no factual details provided).

2018 WL 928237

Factual details are almost entirely lacking. The complaint appears to be copied from another source, because it refers to “her” and “she.” See *supra* note 2. There are no factual details about when Bell contracted diabetes, whether he has type I or type II diabetes, whether he has other medical conditions, who his treating physicians were, why he decided to take Jardiance, what alternatives to Jardiance were discussed, whether he read the warnings, how long he took Jardiance or at what dose or why he believes his acute renal failure was caused by Jardiance.

A close examination of the complaint reveals that the vast majority of its averments are bald legal conclusions or a formulaic repackaging of the elements of the claim. Bell did not plead the roles of each defendant. Bell did not plead how each defendant’s conduct in the design of Jardiance, how warnings about Jardiance fell below the required standard of care or how each defendant’s alleged breaches of duty caused Bell’s injury. Bell did not explain how and why the design or warnings were defective. In paragraphs 22-24 of the complaint, Bell describes how SGLT2 inhibitors like Jardiance work. The complaint does not plead any facts, however, about why this design is defective. Bell conclusorily alleged that “several alternative safer products” exist (Complaint ¶ 29) but did not identify those products or explain why they are safer.

In *House v. Bristol-Myers Squibb Co.*, No. 3:15-894, 2017 WL 55876 (W.D. Ky. Jan. 4, 2017), and *Fleming v. Janssen Pharmaceuticals, Inc.*, 186 F.Supp.3d 826, 835 (W.D. Tenn. 2016), the courts dismissed very similar complaints asserting products liability claims against manufacturers of similar drugs for failing to plead sufficient facts. In *Fleming*, the court explained:

The only assertion as to how the product design was defective is a description of how the class of products works. (See Compl. ¶ 24 (“SGLT2 inhibitors ... are designed to inhibit renal glucose reabsorption with the goal of lowering blood glucose. As a result, excess glucose is not metabolized, but instead is excreted through the kidneys of a population of consumers already at risk for kidney disease.”).) The Court cannot reasonably infer from the generic description of SGLT2 inhibitors’ mechanism of action that Invokana was defective or unreasonably dangerous. The facts are also insufficient as to the alleged defect as the cause of Plaintiff’s injuries. Plaintiff asserts, for example, that “[a]s a direct and proximate result of Defendants’ negligence, wrongful

conduct, and the unreasonably dangerous and defective characteristics of INVOKANA, Plaintiff suffered severe and permanent physical and emotional injuries.” (Compl. ¶ 48.) Under Rule 12(b)(6), such “unadorned, the-defendant-unlawfully-harmed-me accusation[s]” are insufficient to state a claim.

186 F.Supp.3d at 835-36. The court dismissed the failure to warn claim because the plaintiff failed to allege facts showing that the drug was unreasonably dangerous. *Id.* at 836.

*6 In *House*, the court similarly concluded that it could not infer defectiveness from a generic description of how SGLT2 inhibitors work. *House*, 2017 WL 55876 at *4. The court characterized the following allegations as formulaic legal conclusions that were insufficient to meet the *Twombly-Iqbal* standard: (a) the drugs “contained unreasonably dangerous design defects and were not reasonably safe as intended to be used”; (b) the drugs “were defective in design and formulation, making use of the drugs more dangerous than an ordinary consumer would expect and more dangerous than other risks associated with the treatment of diabetes”; (c) defendants “could have designed their respective [drugs] to make them less dangerous”; and (d) there “was a practical, technically feasible safer alternative design that would have prevented the harm Plaintiff suffered without substantially impairing” the function of the drugs. *Id.* at *3-4. The court dismissed the failure to warn claim as similarly based on only conclusory statements. *Id.* at *4.

The allegations in Bell’s complaint are substantially identical to those held to be insufficient in *Fleming* and *House*. See *Salvio*, 810 F. Supp.2d at 754 (describing complaint as “little more than a list of legal conclusions regarding Defendants’ failure to test, market, warn, design, and manufacture”). There are simply no actual facts pled about how each defendant was negligent in Jardiance’s design or warnings or how each defendant’s alleged breaches of the standard of care caused Bell’s injuries. Bell’s complaint will likewise be dismissed.

Fraud claims are subject to the more rigorous standards of Federal Rule of Civil Procedure 9(b) and must be pled with particularity. See *House*, 2017 WL 55876 at *8 (dismissing fraud-based claims described at a high level of generality). The fraud-based claims in counts 7, 10 and 11 of Bell’s complaint fall far short of the Rule 9 standard and must be dismissed.

In sum, the complaint fails to plead sufficient facts to make any claim “plausible,” as required by the Federal Rules of

2018 WL 928237

Civil Procedure. The complaint, therefore, will be dismissed in its entirety.

C. Federal Preemption

Lilly filed a separate motion to dismiss, arguing that because BIPI is the sole holder of the NDA, Lilly had no ability to change Jardiance's label or design. Lilly reasons that because federal law required it to follow the NDA, Bell's contrary state law claims are preempted.

Lilly cites *Warren v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 16-1326, 2017 WL 3970666 (S.D. Ind. Sept. 8, 2017) (involving Jardiance), and *Germain v. Teva Pharmaceuticals, USA, Inc.*, 756 F.3d 917 (6th Cir. 2014), which concluded that a manufacturer who does not hold the NDA has no ability to change the warning label or the design of the drug. In *Warren*, the court held that Lilly could not comply with any duty imposed by state law to change the design or labeling of Jardiance, and therefore, state law claims against Lilly were preempted. *Warren*, 2017 WL 3970666 at *16. Accord *Yates v. Ortho-McNeil-Janssen Pharm., Inc.*, 808 F.3d 281, 298 (6th Cir. 2015) (a "post-approval design defect claim is clearly preempted by federal law").

Bell, in response, explains that his "claims focus on the initial design of Jardiance **prior to** FDA approval." ECF No. 17 at 5 (emphasis added); see ECF No. 17 at 6 ("Plaintiff's claims are premised on Eli Lilly's duty to initially design a reasonably safe product."). Bell apparently recognizes that he cannot pursue post-FDA approval claims against Lilly.

The case law regarding preemption of pre-approval design claims is not fully developed. Impossibility preemption is a demanding defense on which defendants bear the burden of proof. *Wyeth v. Levine*, 555 U.S. 555, 573, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). The United States Court of Appeals for the Third Circuit has not addressed preemption in the prescription drug context. But see *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 702-03 (3d Cir. 2016) (holding at the summary judgment stage that federal law did not preempt a products liability claim in the aviation industry and discussing preemption principles in the "analogous preapproval scheme for pharmaceutical labeling"). In *Warren*, the court refused to dismiss a claim against BIPI based on the original design of Jardiance before FDA approval. *Warren*, 2017 WL 3970666 at *10, 15. Accord *Estate of Cassel v. Alza Corp.*, No. 12-771, 2014 WL 856023 (W.D. Wis. Mar.

5, 2014) (holding that a pre-FDA approval design defect claim survived summary judgment because defendants failed to meet their burden to establish the preemption defense as a matter of law). In *Yates*, the court held that a pre-FDA approval design claim was preempted, but did so at the summary judgment stage, not on a motion to dismiss. 808 F.3d at 289, 299-300 (holding that the plaintiff's argument regarding a pre-approval duty to design a safer drug was "too attenuated"). The court recognized in *Yates*, however, that "[a]s a general matter, plaintiffs injured by brand-name prescription drugs retain state-law tort remedies against the manufacturer of those drugs, provided it is not impossible for the drug manufacturer to comply with both state and federal law." *Id.* at 294.

*7 As explained above, the complaint contains no factual details about Lilly's actions or how the design of Jardiance was allegedly defective prior to FDA approval. Without knowing what Lilly's actions were, the court cannot evaluate whether those actions create a conflict between Pennsylvania law and federal law. Given the lack of factual allegations in Bell's complaint and the unsettled state of preemption law, the court reserves ruling on the preemption issue at this time. Lilly's motion will be denied without prejudice.

V. Leave to Amend

Bell affirmatively requested leave to amend the complaint in the event that the motions to dismiss were granted. Pursuant to Rule 15, leave to amend should be freely granted. When a complaint is subject to dismissal under Rule 12(b)(6), district courts should generally permit an opportunity to amend unless an amendment would be inequitable, or otherwise unjust by way of futility, bad faith, or undue delay. *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006). There has been no undue delay.

As explained above, it is clear that Bell will be unable to correct the shortcomings identified in this opinion as to counts 1, 2, 5 and 6 because those claims are not recognized by controlling Pennsylvania law and as to count 3 because it is subsumed into the negligence claims. Leave to amend those claims is denied because amendment would be futile. Amendment of the negligence and fraud-based claims asserted by Bell in counts 4, 7, 8, 9, 10 and 11 is not necessarily futile. Those claims are being dismissed for failure to comply with the required pleading standards.

Bell may file an amended complaint on or before March 8, 2018. The court cautions that if Bell chooses to file an

2018 WL 928237

amended complaint, it will be important for him to assure that the complaint contains all factual allegations needed to render the claims “plausible,” against each defendant, because the court is unlikely to permit a further “bite at the apple.” Bell must ensure that any fraud-based claims comply with the particularity standard in [Rule 9](#). It will also be important for Bell to plead how the design or warnings were faulty. *See* [Salvio](#), 810 F.Supp.2d at 750-51 (taking judicial notice of the package warning label); ECF No. 11 at 9 n.5 (purporting to quote from Jardiance’s warning label regarding [impaired renal function](#)).

VI. Conclusion

In accordance with the foregoing, Defendants' joint motion to dismiss (ECF No. 10) will be GRANTED, and Lilly’s separate motion to dismiss (ECF No. 7) will be DENIED WITHOUT PREJUDICE. Counts 1, 2, 3, 5 and 6 are dismissed without leave to amend. Counts 4, 7, 8, 9, 10 and 11 are dismissed with leave to amend. An appropriate order will be entered.

All Citations

Not Reported in Fed. Supp., 2018 WL 928237

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 7

2012 WL 1964452

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Edna Diane BOWMAN and

Amy McHenry, Plaintiffs,

v.

RAM MEDICAL, INC., Amerimed Corp.,

Henry Schein, Inc., Marathon Medical

Corp., Medline Industries, MMS–A Medical

Supply Co., and Q–Med Corp., Defendants.

Civil Action No. 10–cv–4403 (DMC)(MF).

|

May 31, 2012.

Attorneys and Law Firms

Philip A. Tortoreti, Victoria Hwang-Murphy, Daniel R. Lapinski, Wilentz, Goldman & Spitzer, Woodbridge, NJ, for Plaintiffs.

Kenneth N. Laptook, Wolff & Samson, PA, West Orange, NJ, Karen E. Clarke, Proskauer Rose, LLP, Newark, NJ, Scott L. Haworth, Nora Coleman, Haworth Coleman & Gerstman, LLC, New York, NY, Stuart Mark Feinblatt, Sills Cummis Epstein & Gross, P.C., Newark, NJ, John C. Whipple, Arseneault, Whipple, Fassett & Azzarello, LLP, Chatham, NJ, Thomas McKay, III, John Philip Johnson, Cozen & O'Conner, Esqs., Cherry Hill, NJ, for Defendants.

OPINION

DENNIS M. CAVANAUGH, District Judge.

*1 This matter comes before the Court upon the motion by Defendants RAM Medical, Inc., Henry Schein, Inc., Marathon Medical Corp., Medline Indus., MMS–A Medical Supply Co. and Q–Med Corp. (collectively, “Defendants”) (ECF No. 34) to dismiss Plaintiff’s complaint (ECF No. 1), filed on January 31, 2011. An amended motion to dismiss was filed by Defendants on September 30, 2011 (ECF No. 51). Defendant C.R. Bard, Inc. filed a motion to dismiss on April 23, 2012 (ECF No. 55). Pursuant to [FED.R.CIV.P. 78](#), which states that the court has the authority to provide for submitting and determining the motions on briefs without oral hearings, no oral argument was heard.

I. BACKGROUND**A. Factual Background**

Defendants are in the business of marketing, distributing, selling, manufacturing or causing to be manufactured the [surgical mesh](#) at issue in this litigation. (Pl.’s Compl. ¶ 35, Aug. 26, 2010, ECF No. 1). Defendants, at all relevant times, allegedly sold [surgical mesh](#) as sterile, Food and Drug Administration (“FDA”) approved, indicated for surgical use and Bard-manufactured. *Id.* at ¶ 36. Plaintiffs bring this action on behalf of themselves and putatively on behalf all other similarly situated persons “in the United States who had Defendants’ counterfeit [surgical mesh](#) surgically implanted from September 1, 2007 until the present.” (Pl.’s Compl. ¶ 26). The Complaint includes specific information about two Plaintiffs, Edna Diane Bowman and Amy McHenry. On December 1, 2009, Plaintiff Edna Diane Bowman underwent a surgical procedure at Lexington Medical Center in West Columbia, South Carolina (“LMC”), during which Defendants’ counterfeit mesh was implanted in her body. *Id.* at ¶ 40. On February 23, 2010, Plaintiff Amy McHenry underwent a laparoscopic [hernia](#) repair procedure at LMC, during which Defendants’ counterfeit mesh was implanted in her abdomen. *Id.* at ¶ 37. On July 19, 2010, Plaintiff Bowman received a letter from LMC informing her that the [surgical mesh](#) implanted during her surgery was “counterfeit [surgical mesh](#).” *Id.* at ¶ 51. On July 15, 2010, Plaintiff McHenry received a letter from LMC informing her of the same. *Id.* at ¶ 49.

Essentially, Plaintiffs claim that a counterfeit product was used during surgery without their consent or knowledge. However, Plaintiffs cite no physical injury or harm resulting. Plaintiffs state their claims in five counts including: (1) violation of the New Jersey Consumer Fraud Act (“NJCF”), (2) unjust enrichment and common law restitution, (3) breach of express warranty, (4) breach of implied warranty of merchantability and (5) breach of implied warranty of fitness for a particular purpose. Plaintiffs contend the nature of the action involves false, misleading, inaccurate, deceptive and unconscionable commercial practices. (Pl.’s Compl. ¶ 1).

Plaintiffs explain that their belief was that the [surgical mesh](#) implanted was: (1) Bard-manufactured, (2) sterile, (3) approved for use by the FDA, and (4) indicated for surgical use. (Pl.’s Compl. ¶ 47). Plaintiffs claim that in the condition in which Defendants sold their counterfeit mesh, the mesh had zero value. *Id.* at ¶ 48. Further, Plaintiffs state that had they

2012 WL 1964452

known that Defendants' [surgical mesh](#) was not as represented, they would not have purchased, or agreed to purchase of the [surgical mesh](#) for use during the surgical procedures. *Id.* at ¶ 54. The only ascertainable loss Plaintiffs allege is the purchase price of a product they believed to be something else. *Id.* at ¶ 55. Plaintiffs vaguely state they "will incur [future] costs to repair the damages caused by Defendants' unlawful activity," but omit to further explain such "repairs." *Id.*

*2 Plaintiffs seek relief that includes: class certification; declarations that Defendants' unlawful actions violate the NJCFA, breach express and implied warranties of merchantability and implied warranties of fitness, and unjustly enrich Defendants; orders directing disgorgement of profits derived from unlawful practices, compelling Defendants to reimburse Plaintiffs in an amount equal to their ascertainable loss, and treble damages pursuant to [N.J.S.A. 56:8-1 et seq.](#); restitution; and, attorney's fees. (Pl.'s Compl. ¶ 93).

B. Procedural Background

This matter comes before the Court upon the motion by Defendants RAM Medical, Inc., Henry Schein, Inc., Marathon Medical Corp., Medline Indus., MMS-A Medical Supply Co. and Q-Med Corp. (collectively, "Defendants") (ECF No. 34) to dismiss Plaintiff's complaint (ECF No. 1), filed on January 31, 2011. An amended motion to dismiss was filed by Defendants on September 30, 2011 (ECF No. 51). This Court *sua sponte* consolidated the *Calo Action* (Docket No. 11-cv-7381) with this matter on April 17, 2012.

Defendant C.R. Bard, Inc. filed a motion to dismiss on April 23, 2012 (ECF No. 55).¹ Plaintiff Irene Kirk Calo then filed a motion to voluntarily dismiss her action, without prejudice, on May 21, 2012 (ECF No. 58), which this Court **granted** (ECF No. 58) pursuant to [FED. R. CIV. P. 41\(a\)\(2\)](#).

¹ Thereafter, Plaintiff Calo and C.R. Bard, Inc. stipulated to dismissal of Plaintiff's claims against C.R. Bard, Inc. with prejudice on May 29, 2012. Since Calo's motion for voluntary dismissal was granted on this day, this point is moot.

II. STANDARD OF REVIEW

In deciding a motion to dismiss, the District Court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most

favorable to [the Plaintiff]." [Phillips v. Cnty. of Allegheny](#), 515 F.3d 224, 228 (3d Cir.2008V). The Plaintiffs' "obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "[A court is] not bound to accept as true a legal conclusion couched as a factual allegation." [Papasan v. Allain](#), 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). Instead, when their truth is assumed, those factual allegations "must be enough to raise a right to relief above a speculative level." [Twombly](#), 550 U.S. at 555. Plaintiff's obligation "requires more than labels and conclusions." *Id.* at 545. To survive a motion to dismiss, the complaint must state a plausible claim, not merely conclusory statements deriving from assumptions or inferences. [Ashcroft v. Iqbal](#), 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

In reviewing a motion to dismiss, it is well-established that a court should "consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." [M & M Stone Co. v. Pa.](#), 388 Fed.Appx. 156, 162 (3d Cir.2010).

III. DISCUSSION

A. STANDING

As an initial matter, this Court must discuss whether jurisdiction is founded in this case, given the requirements of Article III. Defendants say Plaintiffs lack standing because they state no injury in fact. (Def.'s Am. Mot. Dismiss 1, Sept. 30, 2011, ECF No. 51). Under Article III, federal judicial power is restricted to cases and controversies. [Sprint Commc'ns Co. v. APCC Servs., Inc.](#), 554 U.S. 269, 273, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008). The case-or-controversy requirement means that Plaintiff must establish standing. *Id.* Without standing, the federal court lacks subject matter jurisdiction and must dismiss the action. [Common Cause of Pa. v. Pa.](#), 558 F.3d 249, 257 (3d Cir.2009). Article III standing requires adequate establishment of: 1) an injury in fact, 2) causation, and 3) redressability. [Sprint Commc'ns](#), 554 U.S. at 273. An injury in fact involves a concrete and particularized and actual or imminent, as opposed to conjectural or hypothetical, invasion of a legally protected interest. *Id.* (citing [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560-1, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The causation element of standing requires a connection between the alleged injury in fact and the alleged conduct of the Defendant. *Id.* The redressable element means that it is likely,

2012 WL 1964452

and not merely speculative, that the injury in fact would be remedied by the relief sought. *Id.*

*3 Defendants, in their motion to dismiss, explain how Plaintiffs fail to adequately establish the injury in fact element of standing:

In the instant matter, [P]laintiffs summarily allege that they “will incur costs to repair the damages caused by [D]efendants' unlawful activity” [(Pl.'s Compl. ¶¶ 55 and 64) (emphasis omitted)] without any indication of when or why such costs might be incurred, and while explicitly excluding any allegations of personal injury, either present or future. [(Pl.'s Compl. ¶ 10)] ... Plaintiffs have not alleged present, manifest or even imminent damages, or any adverse consequences whatsoever. The allegations are purely subjective and hypothetical. (Def.'s Am. Mot. Dismiss 7).

Plaintiffs counter that the injury in fact is the cost of buying a product that they would not have bought, had facts that arose later been apparent at the time when they could have made a choice. (Pl.'s Opp'n 10, Mar. 28, 2011, ECF No. 37). In the same vein, Plaintiffs argue that they received something other than what was bargained for. *Id.*

Defendants supply strong argument showing that Plaintiffs fail to adequately establish that the instant scenario demonstrates injury in fact. On the spectrum of proof relevant to injury in fact, Plaintiffs' case presents more of an “abstract” notion of injury, rather than a harm that is “distinct and palpable.” See *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343; and *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Indeed, it can be assumed from the complaint that Plaintiffs might not have even discovered that “counterfeit mesh” was implanted without the letter from LMC describing the situation as such. Though Plaintiffs cleverly oscillate between contract and tort theories in an attempt to show that a harm amounts to “injury in fact” as envisioned under the standards for Article III standing, their arguments fall short of concrete proof.

Thus, this Court lacks subject matter jurisdiction over Plaintiffs claim and must dismiss. Though no further analysis is required due to the lack of subject matter jurisdiction, this Court will engage in a brief analysis of each Count of the Complaint.

B. Count I: Violation of the New Jersey Consumer Fraud Act (“NJCFA”)

Plaintiffs argue that their NJCFA claims are distinct and sustainable based on an economic injury theory, given they paid a premium for a product based on Defendants' misrepresentations. See *Id.* at 9; see also *Medley v. Johnson & Johnson Consumer Cos., Inc.*, No. 10–cv–2291, 2011 WL 159674, at *2 n. 2 (D.N.J. Jan.18, 2011) (DMC). Plaintiffs will not establish the elements required by the NJCFA based on the fact that their allegations are “founded in the principals of economic inequities, not tort ...” (Pl.'s Opp'n 5). A claim under the NJCFA requires proof of: 1) an unlawful practice as defined under the Act; 2) ascertainable loss of moneys or property; and 3) a causal relationship between Defendant's unlawful conduct and Plaintiff's ascertainable loss. *N.J.S.A. 56:8–19* (1998).

*4 Plaintiffs state that Defendants' business practice of marketing, advertising and promoting counterfeit **surgical mesh** is “false, misleading, inaccurate and deceptive.” (Pl.'s Compl. ¶ 58). However, Plaintiffs oppose Defendants' motion to dismiss with argument that focuses almost exclusively upon the heightened pleading requirement Defendants' suggest, and not at all upon the supplemental evidence that would buttress Plaintiff's otherwise conclusory claims. The NJCFA requires an unlawful practice such as an affirmative act, a knowing omission or a regulatory violation. *Parker v. Howmedica Osteonics Corp.*, 2008 WL 141628, *2 (D.N.J. Jan.14, 2008) (citation omitted). Plaintiffs did not specifically allege any conduct that tends to amount to an “unlawful practice” under the NJCFA.

Otherwise fatal to Plaintiffs' claim is the failure of proof problem with the contention that they never received the benefit of the bargain or “paid for a product that was of no value.” (Pl.'s Compl. ¶ 63). Such allegations do not satisfy the NJCFA's “ascertainable loss” requirement, without more. Though the “counterfeit **surgical mesh**” has a price tag, the “no value” concept of it, considering Plaintiffs do not assert any physical injury or otherwise, is abstract. Plaintiffs do not provide specific proofs of harm to support, or upon which this Court could infer a quantifiable loss. *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 252, 872 A.2d 783 (2005); see also, *Parker v. Howmedica Osteonics Corp.*, 2008 WL 141628, at *3 (D.N.J. Jan.14, 2008). Stating the expectation of a future loss, similarly fails to meet the requirement of the CFA, because it is too speculative. *Id.* This insurmountable problem is the same as that which precluded

2012 WL 1964452

Plaintiff from establishing injury in fact for standing purposes. Plaintiffs fail to state a claim under the NJCFA.

C. Count II: Unjust Enrichment and Common Law Restitution

Plaintiffs may not sidestep Article III standing requirements by basing their claim in contract theory. Plaintiffs allege that they would not have purchased the product if it was not sterile, Bard-manufactured, FDA approved or indicated for surgical use. As such, Plaintiffs contend Defendants were unjustly enriched by their purchase and that they are therefore entitled to restitution. The parties point to a matter previously before this Court, *Koronthaly v. L'Oreal USA, Inc.*, No. 07-cv-5588, 2008 WL 2938045 (D.N.J. July 29, 2008), *aff'd*, 374 Fed.Appx. 257 (3d Cir.2010) (Plaintiff asserted lipstick products contained lead in far greater amounts than permitted in candy by the FDA). The Third Circuit reviewed a similar issue of whether a consumer could recover on the basis that she did not know what she was getting or would not have purchased the product had she known certain details about it. *Koronthaly*, 374 Fed.Appx. at 258. In a short opinion, the Court held that the purchases were not made pursuant to a contract and therefore Plaintiff had failed to prove that that which would have precluded her from buying the product had formed part of the basis of any bargain. *Id.* at 259. Plaintiff's claim failed because she did not demonstrate a concrete injury in fact, and it could not otherwise be sustained by artful pleading dependent upon contract theory. *Id.* Despite Plaintiffs' contentions that this case is distinguishable from *Koronthaly*, the fact that Plaintiffs did not actually received the product they intended to purchase and paid for, does not affect Plaintiffs' failing contract claims. Rather, the Third Circuit guides that the focus is upon the harm, or in this case, the lack thereof, rather than the buyer's expectation.

D. Count III: Breach of Express Warranty

*5 Plaintiffs fail to demonstrate specifically that they relied upon labeling or other expressions of promise that could have formed the "basis of the bargain." Plaintiffs frame their breach of express warranty claim almost identically to their breach of implied warranty claims. In other words, Plaintiffs submit no specific proof of promises that were expressed, whether they amounted to, as Plaintiffs suggest, assertions that the product was (1) Bard-manufactured, (2) sterile, (3) FDA

approved, (4) indicated for surgical use or otherwise. Rather, Plaintiffs frame their claims upon assumptions of promise and information that the [surgical mesh](#) used was counterfeit. Establishing an express warranty requires more substantial proof. Indeed, the Third Circuit held that breach of an express warranty sounds in breach of contract and, as such, Plaintiffs' claim foils for reasons similar to those described in the prior section. *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 484 (3d Cir.1965). This Court will not assume, even considering LMC's concession that the mesh was counterfeit, that these four expressions were specifically made and relied upon. Such a lack of specificity does not comport with the nature of the theories supporting consumer reliance upon an express warranty.

E. Counts IV and V: Breach of Implied Warranty of Merchantability and Fitness for a Particular Purpose

Defendants convince this Court that, standing alone, the counterfeit nature of the [surgical mesh](#) "does not demonstrate that [Plaintiffs] or others could not use the product safely." (Pl.'s Opp'n 27). Plaintiffs do not supply any supporting facts, other than the counterfeit designation of the mesh, rendering the product valueless or unfit. Finally, Plaintiffs fail to assert any injury, and in fact disclaim any physical harm, resulting from the product. Plaintiffs again rely on the abstract concept of the mesh's "zero value" without proving specifically how the product failed. Plaintiffs further fail to show that the product is generally or otherwise unfit for the ordinary purpose which it was used. Rather, Plaintiffs declare that the [surgical mesh](#) continues to work for the purpose for which it was designed, to this day, despite any misrepresentations or omissions regarding the brand or otherwise. Plaintiffs can sustain neither a claim of breach of implied warranty of merchantability nor fitness for a particular purpose.

IV. CONCLUSION

For the foregoing reasons, this Court hereby **grants** Defendants' motion to dismiss Plaintiff's complaint. An appropriate order, filed on this day, follows this opinion.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1964452

TAB 8

2010 WL 2265317



KeyCite Red Flag - Severe Negative Treatment

On Reconsideration [Boyd v. Johnson & Johnson Consumer Companies, Inc.](#),
D.N.J., August 2, 2010

2010 WL 2265317

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Jaimee BOYD and Jessica Pollock, individually and
on behalf of all others similarly situated, Plaintiffs,

v.

JOHNSON & JOHNSON CONSUMER
COMPANIES, INC., Defendant.

Civil Action No. 09–CV–3135 (DMC–MF).

|

May 31, 2010.

West KeySummary

1 Sales **Nature of Good or Product**

Consumer of baby wash and shampoo lacked standing and therefore failed to state a breach of implied warranty claim against the manufacturer. Consumer argued that she suffered economic injury in purchasing the allegedly contaminated product, sufficient to confer standing. However, the products consumer purchased did not contain chemicals explicitly banned by the Food and Drug Administration (FDA) for use in cosmetics. [Fed.Rules Civ.Proc.Rule 12\(b\)\(1\)](#), 28 U.S.C.A.

[1 Cases that cite this headnote](#)**Attorneys and Law Firms**

[Scott M. Lempert](#), Sandals & Associates, P.C., Philadelphia, PA, for Plaintiffs.

[Daniel B. Carroll](#), Drinker, Biddle & Reath, LLP, Florham Park, NJ, for Defendant.

OPINION

DENNIS M. CAVANAUGH, District Judge.

*1 This matter comes before the Court upon motion by Johnson & Johnson Consumer Companies, Inc. (“Defendant”) to dismiss the Amended Class Action Complaint (“Complaint”) of Jaimee Boyd and Jessica Pollock, individually and on behalf of all others similarly situated, (“Plaintiffs”) for failure to state a claim pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) and for lack of subject matter jurisdiction pursuant to Fed. R. Civ. 12(b)(1). Pursuant to [Fed.R.Civ.P. 78](#), no oral argument was heard. After considering the submissions of all parties, it is the decision of this Court for the reasons herein expressed that Defendant's motion to dismiss is **granted in part** and **denied in part**.

I BACKGROUND

The Amended Complaint is brought individually and on behalf of all class purchasers (“Class Members”) of J & J's Baby Shampoo and/or Aveeno Baby Wash and Shampoo (“products”). (Plaintiffs' Complaint (“Pl.Compl.”), ¶ 1). Plaintiffs allege that “although Defendant represented that the products it made, marketed, distributed, promoted and sold were safe for children, its Children's Personal Care Products were actually contaminated with toxic chemicals linked to increased [cancer](#) risk, adverse skin reactions, and other serious health problems.” (Pl.Compl., ¶ 2). Plaintiffs further allege that despite representations made by Defendant that their products are safe and gentle, these products contain contaminants that are not disclosed on the label and that could otherwise have been removed, or at least reduced, pursuant to a process called vacuum stripping. (Pl.Compl., ¶¶ 2, 5).

Plaintiffs assert that independent lab tests, conducted in accordance with regulations promulgated by the Environmental Protection Agency (“EPA”), reveal that J & J's Baby Shampoo contains methylene chloride in levels as high as 1.1 ppm, 1,4 dioxane levels as high as 38 ppm, and formaldehyde levels as high as 210 ppm. (Pl.Compl., ¶¶ 3, 44). “After testing, [J & J's] Aveeno Baby Wash and Shampoo was found to be contaminated with 1,4–dioxane. Independent Lab Tests found 1,4–dioxane levels of 13 ppm.” (Pl.Compl., ¶ 54). Plaintiffs also assert that each of the foregoing qualifies as a cosmetic pursuant to the Food Drug and Cosmetic Act because each is “intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance” and is not “soap.” [21 U.S.C. § 321\(i\) \(2008\)](#). (Pl.Compl., ¶¶ 48, 58).

2010 WL 2265317

Count I of the Complaint asserts a claim for breach of implied warranty pursuant to the [Uniform Commercial Code \(“UCC”\) § 2–314](#). (Pl.Compl.¶ 83). Count II of the Complaint asserts a claim for breach of implied warranties of merchantability and fitness for a particular use. (Pl.Compl., ¶ 90). Count III of the Complaint asserts a claim for unfair and deceptive trade practices. (Pl. Compl., ¶ 95). Count IV of the Complaint asserts a claim for unjust enrichment. (Pl.Compl., ¶ 103).

II. STANDARD OF REVIEW

*2 “There is a fundamental difference of review under [Rule 12\(b\) \(1\)](#), where the existence of disputed facts will not preclude the court from evaluating the merits of the jurisdictional claim, and [Rule 12\(b\)\(6\)](#) where the court is required to accept as true all the allegations of the complaint and all inferences arising from them.” [Anjelino v. New York](#), 200 F.3d 73, 87 (3d Cir.1999). “[T]he threshold to withstand a motion to dismiss under [\[Rule\] 12\(b\)\(1\)](#) is thus lower than that required to withstand a [Rule 12\(b\)\(6\)](#) motion.” [Kehr Packages Inc. v. Fidelcor, Inc.](#), 926 F.2d 1406, 1409 (3d Cir.1991)).

A. Fed.R.Civ.P. 12(b)(6)

“The [d]istrict [c]ourt, in deciding a motion under [Fed.R.Civ.P. 12\(b\)\(6\)](#), [is] required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [Plaintiff].” [Phillips v. County of Allegheny](#), 515 F.3d 224, 228 (3d Cir.2008). “While a complaint attacked by a [Rule 12\(b\)\(6\)](#) motion to dismiss does not need detailed factual allegations, [] a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “[A court is] not bound to accept as true a legal conclusion couched as a factual allegation.” [Papasan v. Allain](#), 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). “Factual allegations must be enough to raise a right to relief above a speculative level, [] on the assumption that all factual allegations in the complaint are true (even if doubtful in fact).” [Bell](#), 550 U.S. at 555–56.

B. Fed.R.Civ.P. 12(b)(1)

“On a [Rule 12\(b\)\(1\)](#) motion, no presumption of truthfulness attaches to the allegations of the plaintiff.” [CNA v. United](#)

[States](#), 535 F.3d 132, 139 (3d Cir.2008). A facial attack “concerns ‘an alleged pleading deficiency’ whereas a factual attack concerns the actual failure of [a plaintiff’s] claims to comport [factually] with the jurisdictional prerequisites.” *Id.* (citing [U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.](#), 473 F.3d 506, 514 (3d Cir.2007)).

III. DISCUSSION

A. Standing

To bring a suit in a federal court, Plaintiffs must have standing pursuant to Article III of the United States Constitution. To establish standing under Article III, Plaintiffs must show: (1) injury in fact; (2) causation; and (3) redressability. [Horvath v. Keystone Health Plan E., Inc.](#), 333 F.3d 450, 455 (3d Cir.2003); [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*3 *Id.* (citing [AT & T Communications of N.J., Inc. v. Verizon N.J., Inc.](#), 270 F.3d 162, 170 (3d Cir.2001)). “The injury must affect the plaintiff in a personal and individual way.” [Pitt News v. Fisher](#), 215 F.3d 354 (3d Cir.2000); [Alston v. Countrywide Fin. Corp.](#), 585 F.3d 753, 763 (3d Cir.2009).

“[O]rdinarily, one may not claim standing to vindicate the constitutional rights of some third party.” [Pitt](#), 215 at 362. “We apply this prudential rule against third party standing even when the requirements of Article III have been met, to ‘avoid deciding questions of broad social import ... [and]

to limit access to the federal courts to those litigants best suited to assert a particular claim.’ “ *Id.* (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99–100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). “[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” *Berg v. Obama*, 586 F.3d 234, 239 (2009) (citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Furthermore, “[t]he standing inquiry does not change in the context of a putative class action.... [S]tanding cannot be predicated on an injury which the plaintiff has not suffered, nor can it be acquired through the back door of a class action.” *Koronthaly v. L’Oreal*, 2008 U.S. Dist. LEXIS 59024, * 12 (D.N.J. July 25, 2008).

Defendant contends that “Plaintiff[s]’ failure to plead any manifest, present, non-speculative injury, and failure to allege that [the products] did not provide cleansing benefits” requires the Court to conclude that Plaintiffs lack standing in the instant matter. In reliance upon this Court’s decision in *Koronthaly*, Defendant asserts that Plaintiffs’ demand for a refund of the purchase price as a consequence of exposure to Defendant’s products fails to establish an injury-in-fact and therefore, is not sufficient to confer standing where the alleged harm is no more than conjectural or hypothetical. As a result, Defendant claims that the absence of a cognizable injury and thereby standing in this matter requires dismissal pursuant to Fed.R.Civ.P. 12(b)(1).

In response, Plaintiffs contend that economic injury is sufficient to confer standing in this matter, relying upon *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) and *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286 (3d Cir.2005). Plaintiffs contend that where the product contains undisclosed toxins and an ingredient banned by the FDA, the injury arises at the time of purchase. In distinguishing the *Koronthaly v. L’Oreal* case, citing to this Court’s disposition on a motion for reconsideration, Plaintiffs assert that unlike *Koronthaly* where this Court determined that plaintiff “provided no authoritative evidence that the lead levels in defendants’ lipstick products constitute[d] a dangerous amount or [were] in some way prohibited[,]” the present action involves methylene chloride, a substance banned by the FDA for use in cosmetics. 2008 U.S. Dist. LEXIS 86419, *11 (D.N.J. Oct. 24, 2008). Further, Plaintiffs contend that the EPA classifies the other chemicals at issue as probable carcinogens. Lastly, Plaintiffs assert that their claims should stand because Plaintiffs have at least raised an issue

of fact with respect to whether the chemicals contained in Defendant’s products are dangerous in amount.

*4 The *Koronthaly* case involved the purchase of a lipstick containing lead, the content of which was not subject to FDA regulation. *Id.* at *2–3. However, the lead content of the lipstick appeared dangerous when compared to the lead content regulation imposed by the FDA on candy. *Id.* In the absence of an FDA regulation concerning lead content in lipstick, or other legal prohibition, the plaintiff could not “seek a remedy for a harm that she ha[d] not actually or allegedly suffered.” Moreover, this Court accorded great weight to the decision in *Williams v. Purdue Pharma Co.*, 297 F.Supp.2d 171 (D.D.C.2003), concluding that the “plaintiffs’ allegation of an economic injury in a products liability action was insufficient to establish injury-in-fact” because “without alleging that a product failed to perform as advertised, a plaintiff has received the benefit of his bargain and has no basis to recover purchase costs.” *Id.* at *13–14. Therefore, the *Williams* Court “remarked that benefit of the bargain injury could not sustain a claim of injury in fact.” *Id.*

While the Court agrees that the assertion of an economic injury is not an automatic bar to standing, *Koronthaly* demonstrates that an exception has been recognized in the context of claims concerning defective products, absent a specific legal prohibition precluding particular ingredients or usages. Insofar as Plaintiffs’ claims pertain to allegedly toxic chemicals that have not been banned by the FDA for use in cosmetics, including 1,4-dioxane and formaldehyde, in accordance with *Koronthaly*, this Court concludes that any potential injury is too remote, hypothetical and/or conjectural to establish standing in this matter. However, insofar as Plaintiffs’ claims pertain to methylene chloride, a chemical explicitly banned for use by the FDA in any cosmetic, this Court declines to dismiss Plaintiffs’ claims pursuant to Fed.R.Civ.P. 12(b)(1) for lack of standing. As alleged, Plaintiff Boyd only purchased J & J’s Baby Shampoo, which contains methylene chloride, (Pl.Compl., ¶¶ 8, 44) and Plaintiff Pollack only purchased Aveeno Baby Wash and Shampoo, which does not contain methylene chloride. (Pl.Compl., ¶¶ 9, 54) At this stage, only Plaintiff Boyd is permitted to proceed with respect to her claims concerning J & J’s Baby Shampoo. Any claims pertaining to Plaintiff Pollack’s use of Aveeno Baby Wash and Shampoo are dismissed in their entirety.

B. Choice of Law

2010 WL 2265317

As a federal district court sitting in diversity, this Court must apply the choice of law rules of New Jersey, the forum state. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). New Jersey's choice of law rules mandate that the determinative law is that of the state with the greatest interest in governing the particular issue. The first step is to determine whether a conflict exists between the law of interested states, and then any conflict shall be determined on an issue-by-issue basis. “Under general conflict of laws principles, where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a ‘false conflict,’ and the court should avoid the choice-of-law question.” *Williams v. Stone*, 109 F.3d 890, 894 (3d Cir.1997). If there is a conflict, then the court must identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation. If the state's law is not related to its contacts with the litigation, then the state does not have an interest in having its law applied to the underlying issue. *See Vezey v. Doremus*, 103 N.J. 244, 510 A.2d 1187, 1189 (N.J.1986). That is, if there is an actual conflict between the two states' laws, the court then determines “which state has the most meaningful connections with and interests in the transaction and the parties.” *Spence–Parker v. Del. Riv. & Bay Authority*, 2009 U.S. Dist. LEXIS 75187, *20 (D.N.J. Aug. 21, 2009). Where no actual conflict of law exists, no choice of law need be made. *See Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 333 (D.N.J.2005). “If there is no actual conflict, the court must apply the law of New Jersey.” *LNT Merck Co. v. Dyson, Inc.*, 2009 U.S. Dist. LEXIS 62308, *6 (D.N.J. July 21, 2009) (citing *Lebegern v. Forman*, 471 F.3d 424, 428 (3d Cir.2006)). In that instance, a motion to dismiss under Fed.R.Civ.P. 12(b) (6) should be decided under New Jersey law. *See Gallerstein v. Berkshire Life Ins. Co. of America*, 2006 U.S. Dist. LEXIS 64487, *3 (D.N.J. Sept. 11, 2006).

*5 The parties' moving papers recognize that the outcome is the same regardless of whether New Jersey State Law, Colorado State Law, or Pennsylvania State Law is applied to this diversity action. Therefore, the parties assert that no conflict of laws issue is present in the instant matter.

1. New Jersey State Law Breach of Warranty, Consumer Fraud and Unjust Enrichment Claims

Defendant asserts that dismissal is required with respect to all Plaintiffs' claims because the claims are based on alleged harm caused by a product and as a consequence, are subsumed by the New Jersey Product Liability Act

(“PLA”). Plaintiffs argue that the PLA does not subsume Plaintiffs' UCC or consumer protection claims because Plaintiffs neither assert themselves as “claimants” nor allege present or future physical injuries as a consequence of Defendant's products. Plaintiffs further allege that the heart of the present matter is the economic harm caused by Defendant's misrepresentations, omissions and breaches of warranty. Additionally, Plaintiffs contend that the instant matter does not present a risk of double recovery, and that the claims asserted do not constitute a failure to warn cause of action pursuant to the PLA.

The New Jersey Supreme Court decision in *Sinclair v. Merck & Co.* is instructive. In *Sinclair v. Merck & Co.*, the Plaintiffs “alleged that as a result of their direct and prolonged consumption of *Vioxx*, they are at enhanced risk of serious undiagnosed and unrecognized *myocardial infarction*, commonly referred to as ‘silent *heart attack*,’ and other latent and unrecognized injuries.” 195 N.J. 51, 55, 948 A.2d 587 (2008). In that case, the plaintiffs asserted claims for negligence, violation of the Product Liability Act, violation of the Consumer Fraud Act, breach of express and implied warranties and unjust enrichment. *Id.* In dismissing the complaint in its entirety, New Jersey Supreme Court determined the following,

[p]laintiffs seek to avoid the requirements of the PLA by asserting their claims as CFA claims. However, the Legislature expressly provided in the PLA that claims for “harm caused by a product” are governed by the PLA “irrespective of the theory underlying the claim.” N.J.S.A. 2A:58C–1b(3). We explained in *Lead Paint*, *supra*, that “[t]he language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action in relating to harms caused by consumer and other products.” 191 N.J. at 436–37, 924 A.2d 484. As a result, we declared that “[i]n light of the clear intention of our Legislature to include all [product liability] claims within the scope of the PLA, we find no ground on which to conclude that the claims being raised by plaintiffs, regarding an ordinary household product used by consumers, were excluded from the scope of” the PLA. We reach the same conclusion here.

The language of the PLA represents a clear legislative intent that, despite the broad reach we give to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product. The heart of plaintiffs' case is the potential for harm caused by Merck's drug. It is obviously a product liability claim. Plaintiffs' CFA claim does not

2010 WL 2265317

fall within an exception to the PLA, but rather clearly falls within its scope. Consequently, plaintiffs may not maintain a CFA claim.

*6 *Id.*^{1 2}

¹ Although this Court permitted the CFA claims to proceed in *Nafar v. Hollywood Tanning Sys., Inc.*, in that case, the Plaintiff's claims and basis for distinction of the CFA from the PLA was the purchase of services, rather than the purchase of a defective product. 2007 U.S. Dist. LEXIS 26312, *12–14 (D.N.J. Apr. 5, 2007). CFA claims rooted in services are clearly distinguishable from claims grounded in products. The present action does not involve a claim for defective services.

² Further, *In re Ford Motor Co. E-350 Van Products*, 2008 U.S. Dist. LEXIS 73690, *48 n. 9 (D.N.J. Sept. 3, 2008), where the Court found the Sinclair case “inapposite” “because, by design, the PLA ‘except[s] actions for harm caused by breach of an express warranty[.]’ which plaintiffs expressly allege [d.]” On the basis of an express warranty, the Court concluded that *Sinclair* decision “does not mandate dismissal of unjust enrichment and state consumer fraud claims where a party does not plead a PLA claim.” *Id.* (internal citations omitted). Plaintiffs do not assert a claim for breach of an express warranty in the present action.

Similarly, at the heart of this matter is the potential for harm caused by the defective products, J & J Baby Shampoo and/ or Aveeno Baby Shampoo and Wash, containing allegedly “toxic chemicals linked to increased cancer risk, adverse skin reactions, and other serious health problems.” (Compl., ¶ 2). Further, Plaintiffs allege that the products were rendered useless “because they were contaminated with dangerous and potentially cancer-causing chemicals and continued use of the products would require Plaintiffs and Class Members to knowingly continue and even increase the exposure of their vulnerable infants and children to the harmful contaminants.” (Compl., ¶ 2).

Consistent with the *Sinclair* decision, this Court concludes that the PLA subsumes all of Plaintiffs' claims, effectively precluding Plaintiffs' claims with respect to the CFA, and otherwise, in the absence of “harm” as defined by the PLA. The Court does not agree that articulating a claim in terms of pure economic harm where the core issue is the potential

injury arising as a consequence of the products' allegedly harmful chemicals converts the underlying defective product claim into an independent and unrelated consumer fraud issue. Indeed, Plaintiffs' original Complaint contains a cause of action for products liability strategically omitted from the amended Complaint. Limiting a claim to economic injury and the remedy sought to economic loss cannot be used to obviate the PLA.

The assertion of a claim pursuant to the PLA is premised upon a requisite level of harm, including:

(a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

N.J.S.A. 2A:58C–1b(2). Harm, for purposes of the PLA, does not include pure economic loss. Insofar as Plaintiffs concede that their injury is purely economic, Plaintiffs' claims cannot survive. Therefore, with respect to New Jersey law, in accordance with *Sinclair*, Plaintiffs' Complaint is dismissed in its entirety.

2. Colorado State Law Breach of Warranty, Consumer Fraud and Unjust Enrichment

Despite the parties' respective beliefs that there is no conflict of law issue present in the instant matter, it is not clear to the Court that product liability laws of Colorado subsume related claims in the same manner as the New Jersey PLA³. Therefore, upon dismissal of all New Jersey State Law claims and for purposes of inclusion, the Court will proceed by addressing the viability of Plaintiffs' claims under Colorado State Law. If Plaintiff Boyd has asserted viable claims pursuant to Colorado State Law, then a conflict of law exists and the Court will undertake to ascertain which state has the superior interest in the litigation.

³ The Court will not address the viability of Plaintiffs' claims pursuant to Pennsylvania law since Plaintiff

2010 WL 2265317

Pollack's portion of the Complaint was dismissed for lack of standing.

i. Consumer Fraud

*7 Defendant contends that Plaintiffs have no viable claims pursuant to Colorado State Laws because Plaintiffs fail to allege any non-speculative, ascertainable loss and fail to plead their claims with particularity in accordance with [Fed.R.Civ.P. 9\(b\)](#). Plaintiff Boyd claims that “ascertainable loss is not a distinct element under [the Colorado Consumer Protection Act (“CCPA”)], and [pursuant to Colorado State Law], the Court may look to its analysis of other states' laws.” (Pl. Br. at 33). Plaintiff also alleges that she suffered “ascertainable loss to the extent [she] paid for a product and got something less than what was promised.” (Pl. Br. at 28).

“[A] CCPA claim arises when a party knowingly makes a misrepresentation or makes a false representation that has the capacity to deceive.” [Rhino Listings USA, Inc. v. Rocky Mountain Rhino Listings, Inc.](#), 62 P.2d 142, 148 (Colo.2003). The CCPA “deters and punishes businesses which commit deceptive practices in their dealings with the public by providing prompt, economical, and readily available remedies against consumer fraud.” *Id.* at 146. To prove a private cause of action under COLO. STAT. ANN. § 6–1–113, a plaintiff must show: (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury.” [Hall v. Walter](#), 969 P.2d 224, 234 (Colo.1998). “The CCPA is silent as to specific injuries for which it intends to provide a remedy.” *Id.* at 236. See also [Crowne v. Tull](#), 126 P.3d 196, 209 (Colo.2006). “[The CCPA's] focus lies with defining prohibited actions that are likely to injure the public and specifying civil penalties and private remedies available for these violations.” [Hall](#), 969 P.2d at 224. “[I]n determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct ... because of the strong and sweeping remedial purposes of the CCPA.” [Showpiece Homes Corp. v. Assurance Co. of Am.](#), 38 P.3d 47, 51 (Colo.2001). Given the CCPA's policy of providing a private action where a defendant's conduct has a significant impact on the public, Plaintiff Boyd's claims pertaining to J & J Baby Shampoo may proceed under Colorado State Law.

Although foreclosed by application of the PLA in the instant case, the CFA was enacted to “protect the consumer against imposition and loss as a result of fraud and fraudulent practices by persons engaged in the sale of goods and services.” [Smith v. Alza](#), 400 N.J.Super. 529, 552, 948 A.2d 686 (2008). “The CCPA was enacted to regulate commercial activities and practices which, because of their nature, may prove injurious, offensive, or dangerous to the public.” [Rhino Listings](#), 62 P.2d at 146 (citing [People ex rel. Dunbar v. Gym of America, Inc.](#), 177 Colo. 97, 493 P.2d 660, 667 (Colo.1972)). Beyond the underlying governmental purpose of the CCPA, Plaintiff Boyd in this action resides in Colorado and presumably, the purchase of the allegedly defective product occurred in Colorado. J & J is a New Jersey corporation engaged in business throughout the United States, including Colorado. Therefore, Colorado State contacts in the instant matter seem to outweigh New Jersey State contacts. Colorado State Law prevails with respect to this issue.

ii. Breach of Implied Warranty

*8 Defendant asserts that Plaintiffs' breach of implied warranty claims should be dismissed because Plaintiffs' Complaint fails to allege that the products were not merchantable or failed to perform the function for which they were sold, and because the complaint fails to allege any purpose that is separate and apart from the ordinary purpose. (Def. Br. at 33–34). Plaintiffs' Complaint asserts a claim for breach of implied warranties because the goods were allegedly not fit for their ordinary purpose or particular use on children and further, because the products fail to conform to the promises and representations made on the labels. Specifically, Plaintiffs allege that the products are not merchantable because they are contaminated with methylene chloride. (Pl. Br. at 35–36).

“Colorado case law recognizes that [warranties of merchantability and fitness for a particular purpose] may coexist when there is sufficient evidence to support the creation of each warranty.” [Palmer v. A.H. Robins Co., Inc.](#), 684 P.2d 187, 209 (Colo.1984). “Under Colorado [State] [L]aw, a warranty of fitness for a particular purpose does not arise when a product is purchased for the ordinary purpose for which the device or product is to be used.” [Hauck v. Michelin North Am., Inc.](#), 343 F.Supp.2d 976 (D.Colo.2004) (citing [Weir v. Federal Insurance Co.](#), 811 F.2d 1387, 1393 (10th Cir.1987)). “To establish a prima facie case for breach of implied warranty for fitness for a particular purpose, the plaintiff must show that: (1) the

2010 WL 2265317

defendant sold and impliedly warranted the product to be fit for a particular purpose; (2) the plaintiff was reasonably expected to use the product; (3) the product was not suitable for the purpose warranted; and (4) the breach was a cause of the plaintiff's injuries." *Simon v. Coppola*, 876 P.2d 10 (Colo.Ct.App.1993). "[W]arranties of merchantability, if all other statutory prerequisites have been met, arise in every contract for sale, unless properly excluded." *Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.*, 797 P.2d 835, 838 (Colo.Ct.App.1990).

In order for goods to be merchantable, they must be at least as such as:

- (a) pass without objection in trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

COLO. STAT. ANN. § 4-2-314. Assuming, without concluding, that the descriptive messages on the alleged defective products constitute promises or affirmations, then, in accordance with the foregoing limitations, Plaintiff's claims for breach of implied warranties pursuant to Colorado State Law are permitted to proceed.

*9 Although foreclosed by application of the PLA in the instant matter, the underlying purpose of the UCC as recognized by the New Jersey Supreme Court, is "to simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and to make uniform the law among various jurisdictions." N.J. S.A. 12A:1-102(1); *Alloway v. General Marine Indus., L.P.*, 149 N.J. 620, 630, 695 A.2d 264 (1997). Codified under title 4 of Colorado State Law, Colorado State Law adheres to the same underlying purposes

as New Jersey. See *Proactive Tech., Inc. v. Denver Place Assoc. Ltd. P'ship*, 141 P.3d 959, 961 (Colo.Ct.App.2006). Similar to the foregoing analysis, Colorado's contacts with the representative Plaintiff and the transactions that are the source of Plaintiff Boyd's claims favor the application of Colorado law over New Jersey with respect to this issue.

iii. Unjust Enrichment

Defendant asserts that unjust enrichment is not a proper remedy available in this case because Plaintiffs fail to assert that the products failed to perform. By contrast, Plaintiffs assert that they purchased the products conferring a monetary benefit upon the Defendant for useless products that they would not otherwise have purchase, but for the representations that the products were safe, gentle and/or mild. To sustain a claim for unjust enrichment under Colorado law, a plaintiff "must prove that: (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo.2008). "Actions seeking monetary damages are considered legal while actions seeking to invoke the coercive power of the court, such as those seeking injunctions or specific performance, are deemed equitable." *American Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 324 (Colo.2009) (citing *Paterson v. McMahon*, 99 P.3d 594, 597-98 (Colo.2004)); see also *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (explaining restitution is an equitable remedy). Generally, equitable remedies are not available, however, when there is a "plain, speedy, [and] adequate remedy at law." *Szaloczi v. John R. Behrmann Revocable Trust*, 90 P.3d 835, 842 (Colo.2004). "When plaintiffs have an adequate remedy at law for damages, [equitable remedies] will not lie." *Mahoney Marketing Corp. v. Sentry Builders of Colorado, Inc.*, 697 P.2d 1139, 1140 (Colo.Ct.App.1985). Plaintiff explicitly and exclusively alleges economic injury. Therefore, there is no indication that a remedy at law would be inadequate. To the extent that Plaintiff Boyd asserts a claim for unjust enrichment pursuant to Colorado State Law, Plaintiff's Complaint is dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion is **granted in part and denied in part**. Plaintiff's Complaint is **partially dismissed without prejudice** pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6). An appropriate Order accompanies this Opinion.

2010 WL 2265317

All Citations

Not Reported in F.Supp.2d, 2010 WL 2265317

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 9

548 Fed.Appx. 761

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7) United States Court of Appeals, Third Circuit.

James S. CALENDER; Diane Calender, H/W, Appellants
v.

NVR INC, trading as Ryan Homes; John Does # 1–10, (fictitious names); ABC Companies # 1–10 (fictitious names).

No. 12–4132.

|
Submitted under Third Circuit LAR 34.1(a) on Nov. 7, 2013.

|
Opinion filed: Dec. 13, 2013.

Synopsis

Background: Homeowner brought state-court action against company that designed, manufactured, built, and sold his home, asserting claims for negligence, products liability, breach of contract, and breach of warranties. After action was removed, the United States District Court for the District of New Jersey, [Noel L. Hillman, J., 2011 WL 4593759](#), dismissed homeowner's design defect claim, and thereafter, [2012 WL 4482009](#), granted summary judgment for company on remaining claims. Homeowner appealed.

Holdings: The Court of Appeals, [Roth](#), Circuit Judge, held that:

[1] New Jersey affidavit of merit statute applied to homeowner's design defect claim;

[2] homeowner's common-law claims of negligence and implied breach of warranty were subsumed by New Jersey Products Liability Act (PLA); and

[3] company had no duty to warn of danger of falling through home's attic access panel, precluding its liability under PLA.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Summary Judgment.

West Headnotes (3)

[1] **Negligence** ➡ Affidavit or certification of expert

Products Liability ➡ Buildings and building components and materials

Products Liability ➡ Affidavit or certification of expert

New Jersey affidavit of merit statute applied to homeowner's design defect claim against company that designed, manufactured, built, and sold his home, which sought damages for personal injuries resulting from alleged negligence of company's architect in designing home's attic access panel/opening, through which homeowner fell and was injured, and therefore homeowner's failure to timely provide required affidavit of merit required dismissal of claim; pleading or demonstrating claim would require expert testimony from architect, engineer, or comparable licensed person. [N.J.S.A. 2A:53A–26, 2A:53A–27, 2A:53A–29](#).

1 Cases that cite this headnote

[2] **Contracts** ➡ Nature and Form of Remedy

Products Liability ➡ Buildings and building components and materials

Products Liability ➡ Nature and form of remedy

Homeowner's common-law claims of negligence and implied breach of warranty against company that designed, manufactured, built, and sold his home were subsumed by New Jersey Products Liability Act (PLA), which governed all claims for harm caused by product under New Jersey law, except for claims alleging breach of express warranty. [N.J.S.A. 2A:58C1\(b\)\(3\)](#).

2 Cases that cite this headnote

[3] **Products Liability** 🔑 Obvious danger
Products Liability 🔑 Buildings and building components and materials

Danger that one could fall while attempting to enter or exit home's attic through open access panel in ceiling was open and obvious to an ordinary person, and therefore company that designed, manufactured, built, and sold home to homeowner had no duty to warn, precluding its liability under New Jersey Products Liability Act (PLA) for injuries that homeowner sustained when he fell while exiting attic through access panel. N.J.S.A. 2A:58C-2, 2A:58C-3(a)(2).

3 Cases that cite this headnote

*762 On Appeal from the United States District Court for the District of New Jersey, (D.C. No. 1-10-cv-04277) District Judge: Honorable Noel L. Hillman.

Attorneys and Law Firms

Gary F. Piserchia, Esq., Mount Laurel, NJ, for Appellants.

David A. Haworth, Esq., Ballard Spahr, Cherry Hill, NJ, Joseph Kernen, Esq., Brian M. Robinson, Esq., Dla Piper, Philadelphia, PA, for NVR Inc, trading as Ryan Homes.

Before: GREENAWAY, Jr., VANASKIE and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge:

James S. Calender and Diane Calender appeal the District Court's September 30, 2011, order granting defendant NVR, Inc.'s, Motion to Dismiss and the court's September 26, 2012, order granting summary judgment in favor of NV R. For the following reasons, we will affirm the District Court's orders.

I. Background

Calender¹ purchased a newly constructed home from NVR on March 28, 2008. NVR designed, manufactured, built, and sold the home. On October 21, 2008, Calender went up into the home's attic to change the air filter on an air conditioning unit. While exiting the attic through the access panel/opening, Calender fell and was injured.

¹ Although both James and Diane Calender were named plaintiffs in this suit, we refer to only James Calender, except where noted, for convenience and because the facts of the case pertain to him.

Calender filed suit on June 30, 2010, in the Superior Court of New Jersey, Law *763 Division, Camden County, alleging that NVR (1) negligently designed, manufactured, constructed, and/or sold the home; (2) is subject to product liability because the attic access panel/opening was unreasonably dangerous and defective; (3) breached its contract to provide a safe, suitable home; and (4) breached its express and implied warranties. The complaint also included a claim for loss of consortium.

NVR removed the suit to the U.S. District Court for the District of New Jersey.² The District Court dismissed the design defect claim for failure to comply with the New Jersey Affidavit of Merit Statute, N.J. Stat. Ann. § 2A:53A-26 *et seq.* A year later, the District Court granted summary judgment in favor of NVR on the remaining claims.

² The District Court had jurisdiction under 28 U.S.C. § 1332 because the Calenders are citizens of New Jersey and NVR is incorporated and has its principal place of business in Virginia and the amount in controversy exceeds the jurisdictional amount. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. Analysis

A. Motion to Dismiss the Design Defect Claim

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). We exercise plenary review over the District Court's granting of a motion to dismiss. *Institutional Inv. Grp. v. Avaya, Inc.*, 564 F.3d 242, 251 (3d Cir.2009).

The Affidavit of Merit Statute requires a plaintiff in a personal injury action, alleging negligence or malpractice by a licensed person, to provide an affidavit from a different licensed person that states that there is a reasonable likelihood that the alleged conduct fell outside acceptable professional or occupational standards. *N.J. Stat. Ann. § 2A:53A–27*. Failure to provide the affidavit is deemed a failure to state a cause of action, *id. § 2A:53A–29*, and a dismissal under the statute is with prejudice. *Cornblatt v. Barow*, 153 N.J. 218, 708 A.2d 401, 413 (1998). Architects are included in the statute's list of “licensed persons.” *Id. § 2A:53A–26*.

[1] In determining whether an affidavit of merit is required, courts must consider (1) whether the action is for damages for personal injuries, (2) whether the action is for malpractice or negligence, and (3) whether the care, skill, or knowledge exercised or exhibited that is the subject of the complaint fell outside acceptable professional or occupational standards. *Couri v. Gardner*, 173 N.J. 328, 801 A.2d 1134, 1137 (2002) (internal citations and quotation marks omitted). Here, the first two elements are met because Calender's action is for damages for personal injuries as a result of malpractice or negligence. The third element is also met because the action alleges negligence on the part of NVR's architect in designing the attic access panel/opening. As the District Court found, the claim is essentially one for professional malpractice or negligence in the field of architecture. Pleading or demonstrating this claim would require expert testimony from an architect, engineer, or comparable licensed person. Whether Calender's claim is characterized as one for professional negligence or malpractice, or one for strict product liability, we agree with the District Court that Calender is necessarily challenging architectural designs and plans—plans that only a licensed architect would be able to produce.

*764 We conclude that Calender's design defect claim meets all three Couri factors and, accordingly, the Affidavit of Merit statute applies. We will therefore affirm the District Court's dismissal of the design defect claim for plaintiff's failure to timely provide the required affidavit of merit.

B. Summary Judgment on Other Claims

A court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Fed.R.Civ.P. 56(a)*. We exercise plenary review over a district court's grant of summary judgment, and view the facts in the light most favorable to the non-moving party. *Nat'l*

Amusements Inc. v. Borough of Palmyra, 716 F.3d 57, 62 (3d Cir.2013).

Except for claims for breach of an express warranty, all claims for harm caused by a product under New Jersey law, regardless of the theory underlying the claim, are governed by the New Jersey Products Liability Act (PLA). *N.J. Stat. Ann. § 2A:58C1(b)(3)*. The PLA encompasses “virtually all possible causes of action relating to harm caused by consumer and other products.” *In re Lead Paint Litig.*, 191 N.J. 405, 924 A.2d 484, 503 (2007). The PLA does not recognize negligence or implied breach of warranty as separate claims for harm caused by a product. *See Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 313 (3d Cir.1999). Rather, the PLA is the exclusive remedy for such actions and other claims are subsumed within the statutory cause of action. *See id.*

[2] Calender properly brought this action under the PLA. The District Court was correct that Calender may not proceed with his common-law claims of negligence and implied breach of warranty because those claims are subsumed by the PLA. We will therefore affirm the grant of summary judgment for NVR on those claims.

The PLA provides that a seller or manufacturer may be liable if a product does not contain adequate warnings or instructions. *N.J. Stat. Ann. § 2A:58C–2*. However, no duty to warn exists where the danger presented by a product is “open and obvious.” *McWilliams v. Yamaha Motor Corp., U.S.A.*, 987 F.2d 200, 202–03 (3d Cir.1993); *Mathews v. Univ. Loft Co.*, 387 N.J.Super. 349, 903 A.2d 1120, 1124–25 (Ct.App.Div.2006); *see also N.J. Stat. Ann. § 2A:58C–3(a)(2)* (stating that seller or manufacturer is not liable if the unsafe aspect of the product is an “inherent characteristic of the product ... that would be recognized by the ordinary person”).

[3] We agree with the District Court's conclusion that the danger that one might fall while attempting to enter or exit the attic through the open access panel in the ceiling is open and obvious to an ordinary person. *Cf. Mathews*, 903 A.2d at 1124 (danger of falling from six-foot-high loft bed was open and obvious). We will affirm the District Court's grant of summary judgment in favor of NVR on this claim because there was no duty to warn.

Finally, the District Court was correct that Diane Calender's loss of consortium claim was derivative of James Calender's personal injury claims and is therefore not viable without

Prod.Liab.Rep. (CCH) P 19,301

those claims. We will therefore affirm the District Court's grant of summary judgment on the loss of consortium claim.

For the foregoing reasons, we will affirm the orders of the District Court.

III. Conclusion

All Citations

548 Fed.Appx. 761, Prod.Liab.Rep. (CCH) P 19,301

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 10

2015 WL 2414740
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

Kimberly COLE, Alan Cole, James Monica, Linda Boyd, Michael McMahon, Ray Sminkey, James Medders, Judy Medders, Robert Peperno, Sarah Peperno, and [Kelly McCoy](#), on behalf of themselves and all others similarly situated, Plaintiffs,

v.

NIBCO, INC., Defendant.

Civ. No. 3:13-cv-07871 (FLW)(TJB).

Signed May 20, 2015.

Attorneys and Law Firms

[Benjamin F. Johns](#), [Joseph G. Sauder](#), [Matthew D. Schelkopf](#), [Chimicles & Tikellis, LLP](#), Haverford, PA, [Bruce Daniel Greenberg](#), [Lite Depalma Greenberg, LLC](#), Newark, NJ, [Daniel Hogan](#), [Michael J. Hopkins](#), [Law Offices of Robert A. Stutman, PC](#), Fort Washington, PA, for Plaintiffs.

[John McGahren](#), [Morgan Lewis & Bockius, LLP](#), Princeton, NJ, [Robert T. Connor](#), [Kelley Jasons McGowan Spinelli Hanna & Reber LLP](#), [Stephanie A. Blair](#), Morgan, [Franco A. Corrado](#), [Lewis & Bockius LLP](#), Philadelphia, PA, for Defendant.

OPINION

[WOLFSON](#), District Judge.

*1 Plaintiffs Kimberly Cole, Alan Cole, James Monica (“Monica”), Linda Boyd (“Boyd”), Michael McMahon (“McMahon”), Ray Sminkey (“Sminkey”), James Medders, Judy Medders, Robert Peperno, Sarah Peperno, and Kelly McCoy (“McCoy”) (collectively, “Plaintiffs”), who are nine homeowners from seven states, bring this putative class action on behalf of themselves and a nationwide class, or alternatively, putative New Jersey, Pennsylvania, Alabama, Georgia, Texas, Oklahoma, and Tennessee state subclasses. Presently before the Court is a partial motion to dismiss Plaintiffs’ Complaint filed by Defendant NIBCO, Inc.’s (“NIBCO” or “Defendant”), for failure to state a claim.

Plaintiffs’ claims stem from the alleged failures of various plumbing system products manufactured by NIBCO and installed in Plaintiffs’ homes. Plaintiffs allege that NIBCO breached an express warranty (Count I); breached the implied warranty of merchantability (Count II); breached the implied warranty of fitness for a particular purpose (Count III); was negligent in the design, testing, and manufacture of its products (Count IV); violated the New Jersey Consumer Fraud Act, [N.J. Stat. Ann. § 56:8–1 et seq.](#) (“NJCFA”) (Count V); violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons.Stat. Ann § 201–1, *et seq.* (“UTPCPL”) (Count VI); violated the Texas Deceptive Trade Practices Act, [Tex. Bus. & Com.Code Ann. § 17.41, et seq.](#) (“TDTPA”) (Count VII); violated the Oklahoma Deceptive Trade Practices Act, [Okla. Stat. Ann. tit. 78 § 51–55, et seq.](#) (“ODTPA”); and was unjustly enriched (Count IX). In Count X, Plaintiffs request declaratory relief and an injunction.

For the foregoing reasons, Defendant’s motion is GRANTED IN PART and DENIED IN PART. Counts II, III, and IV are dismissed as asserted by Monica, and Counts I, II, III, and IV are dismissed as asserted by the Coles; both sets of plaintiffs are granted leave to file claims under the NJPLA and the TPLA, respectively. Count I is dismissed without prejudice as asserted by McCoy. Counts I and II are dismissed without prejudice as asserted by McMahon. As asserted by all Plaintiffs, Counts III, IV, VI, VII, and VIII are dismissed without prejudice, and Counts V, IX, and X are dismissed. Count II as asserted by McCoy, however, may proceed.

I. FACTUAL BACKGROUND

The following factual allegations are taken from Plaintiffs’ Complaint and are accepted as true for the purposes of this motion to dismiss. *See Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir.2003); *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir.1996). The Court need not recount all facts, and instead recounts only those relevant to the grounds asserted by Defendant in their motion.

This case concerns a putative class action by seven plaintiffs from six states, all of whom plead various causes of action proximately caused by defective plumbing system products manufactured by NIBCO, Inc., an Indiana corporation. FAC ¶¶ 9–13, 104. The three products at issue (collectively, “the PEX Products”) are: (1) cross-linked polyethylene plumbing tubes (“PEX Tubing”), (2) the brass fittings that connect PEX tubes together (“PEX Fittings”), (3) and stainless steel clamps (“PEX Clamps”) that join the PEX Tubes with the PEX

Fittings. *Id.* ¶¶ 1, 104. Plaintiffs allege that the PEX Products all suffer from design and/or manufacturing defects that allow water to escape their homes' plumbing systems and cause damage to both the PEX Products and the homes in which they are installed. *Id.* ¶¶ 9–12. Specifically, Plaintiffs allege that (1) the PEX Tubing “is prone to premature oxidative failure and creep rupture,” (2) the PEX Fittings “are prone to dezincification corrosion,” and (3) the PEX Clamps “are prone to failure b chloride-induced stress corrosion cracking.” *Id.* 2–4.

*2 Plaintiffs allege that “NIBCO manufactures, warrants, advertises, and sells the PEX Products at issue and, further, that NIBCO's sales catalog advertised that, *inter alia*, its PEX tubing was the highest quality PEX tubing available, and that its cross chemical bonding process gave it ‘superior characteristics.’ “ *Id.* ¶¶ 7–8. Plaintiffs further allege that NIBCO warrants that its PEX Tubing will be free from any defects in materials and workmanship ten years from the date of purchase when a licensed professional contractor installs the PEX Tubing. *Id.* ¶ 123. According to Plaintiffs, the warranty period for the PEX Tubing increases to twenty-five years when PEX Fittings and PEX Clamps are used in conjunction with the PEX Tubing. *Id.* at ¶ 121. However, “[c]ontrary to these affirmative statements, the PEX Products suffer from design and/or manufacturing defects.” *Id.* ¶ 9. Plaintiffs allege that “NIBCO has systematically breached its warranty by failing to fully or adequately compensate property owners who have been injured as a result of the PEX Product Defects. NIBCO also failed to disclose this material information to Plaintiffs and Class Members.” *Id.* ¶ 10. Further, Plaintiffs allege that “[b]efore manufacturing, warranting, advertising and/or selling the PEX Products, NIBCO failed to take appropriate steps to ensure that its products were safe for their intended use. [NIBCO] knew or should have known that the PEX Products were not suitable for use within water-carrying plumbing systems and that the PEX Products suffered from the PEX Product Defects.” *Id.* ¶ 11.

Each Plaintiff's alleged injuries are detailed below.

a. The Coles, Tennessee Plaintiffs

In 2008, a licensed professional contractor installed a residential plumbing system in the new home of Kimberley Cole and Alan Cole (collectively, “the Coles”), Tennessee residents. FAC ¶¶ 14–15, 18. This system utilized all relevant PEX Products. *Id.* at ¶ 17. The Coles claim that failure of PEX Tubing caused several water leaks in their basement

between November 2010 and August 2014. *Id.* at ¶ 20–22. Upon discovery of the leaks, the Coles allegedly notified NIBCO of the PEX Tubing's failure, pursuant to the terms of NIBCO's express warranty for the PEX Products. *Id.* at ¶ 24. However, despite notice, Plaintiffs allege that NIBCO failed to honor the warranty by providing replacement products or other compensation. *Id.*

b. James Monica, New Jersey Plaintiff

In December 2010, a licensed professional contractor installed a residential plumbing system in the new home of James Monica, a New Jersey resident. FAC ¶¶ 28–29, 31. This system utilized all relevant PEX Products. *Id.* at ¶ 30. Monica claims that on three occasions, beginning in November 2012, PEX Fittings used in his home's plumbing system failed, causing “water saturation” on his basement's ceiling and walls and leaks in his first floor plumbing. *Id.* at ¶ 33–38. Upon discovery of the leaks, Monica allegedly notified NIBCO of the failure of the PEX Fittings, pursuant to the terms of NIBCO's express warranty of the PEX Products. *Id.* at ¶ 39. Plaintiffs allege that NIBCO failed to honor this express warranty, because replacement products or other compensation were never provided. *Id.* The FAC alleges that Monica's losses include not only the damaged PEX Fittings, but other “out-of-pocket loss associated with catastrophic plumbing failures and attempted repairs of such within his home.” *Id.* at ¶ 42.

c. Linda Boyd, Alabama Plaintiff

*3 In June 2008, a licensed professional contractor installed a residential plumbing system in the new home of Linda Boyd, an Alabama resident. FAC ¶¶ 43–45, 47. This system utilized all relevant PEX Products. *Id.* at ¶ 46. Boyd claims that between March 26, 2013 and October 31, 2013, failure of PEX Tubing used in his home's plumbing system caused several water leaks. *Id.* at ¶ 49–51. Upon discovery of the leaks, Boyd allegedly notified NIBCO of the PEX Tubing's failure, pursuant to the terms of NIBCO's express warranty for the PEX Products. *Id.* at ¶ 53. As with the other Plaintiffs, Plaintiffs allege that NIBCO provided no relief to Boyd. *Id.*

d. Michael McMahon, Texas Plaintiff

Michael McMahon (“McMahon”), a Texas resident, moved into a home on January 1, 2013, that was constructed in 2007. FAC at ¶¶ 57–58, 61. When the home was constructed, licensed professional contractors installed a residential plumbing system that used all relevant PEX

Products. *Id.* at ¶ 59. Since 2013, McMahon has discovered six leaks in his home, all allegedly resulting from defects in PEX Tubing. *Id.* at ¶¶ 62–63. McMahon claims to have suffered “significant damages due to the PEX Product Defects,” including water saturation, flooding, and damage to his walls. *Id.* ¶ 64.

e. Ray Sminkey, Oklahoma Plaintiff

In spring 2008, a licensed professional contractor installed a residential plumbing system in the new home of Ray Sminkey (“Sminkey”), an Oklahoma resident. FAC 66–68, 70. This system utilized, in relevant part, only PEX Tubing. *Id.* at ¶ 69. Sminkey claims that beginning on November 5, 2013, the PEX Tubing used in his home’s plumbing system began to leak and had to be replaced by a plumber. *Id.* at ¶ 72–74. Sminkey claims to have suffered “significant damages on three separate occasions due to PEX Product Defects.” *Id.* ¶ 75.

f. The Medders, Texas Plaintiffs

In 2011, a licensed professional contractor installed a residential plumbing system in the new home of James and Judy Medders (collectively, “the Medders”), Texas residents. FAC ¶¶ 77, 79, 81. This system utilized all relevant PEX Products. *Id.* at ¶ 80. The Medders claim that the failures of various PEX Fittings caused leaks in various locations in their home between December 2013 and June 2014. *Id.* at ¶ 84–85. Upon discovery of the leaks, the Medders notified NIBCO of the problem, but allege that NIBCO failed to act under their express warranty and provide replacement PEX Fittings. *Id.* at ¶ 86.

g. The Pepernos, Pennsylvania Plaintiffs

In 2007, a licensed professional contractor installed a residential plumbing system in the new home of Robert and Sara Peperno (collectively, “the Pepernos”), Pennsylvania residents. FAC 90, 92, 94. This system utilized all relevant PEX Products. *Id.* at ¶ 93. The Pepernos claim that failure of the PEX Tubing caused three leaks in their basement between December 15, 2013 and June 7, 2014. *Id.* at ¶ 96–98. Upon discovery of the leaks, the Pepernos allegedly notified NIBCO of the failure of the PEX Tubing. However, NIBCO failed to act under their express warranty and provide replacement products or other compensation. *Id.* ¶ 100.

Kelly McCoy, Georgia Plaintiff

*4 In 2010, a licensed professional contractor installed a residential plumbing system in the new home of Kelly McCoy (“McCoy”), a Georgia resident. FAC ¶¶ 18:103–104, 19:106.¹ This system utilized all relevant PEX Products. *Id.* at ¶ 18:105. McCoy claims that the PEX Tubing used in his plumbing system failed repeatedly and caused leaks, which necessitated six separate repairs. *Id.* at ¶ 107. As a result of the leaks, the broken PEX Tubing had to be released and a bathroom wall needed to be repaired.

¹ The Court notes that the paragraph numbering convention used by Plaintiff in the FAC is erroneous on pages 18–20. *See e.g.*, FAC at 18 (duplicate paragraph 103); *id.* at 19 (shift in numbering from 109 to 104). For clarity when citing to this portion of the record, a page number is provided along with the paragraph number.

Plaintiffs filed their Complaint in the District Court of New Jersey on December 27, 2013 and filed their First Amended Complaint (“FAC”) on October 6, 2014. Thereafter, Defendant filed the instant partial motion to dismiss. Defendant contends that nearly all of the causes of action asserted in the FAC fail to state a claim.

II. STANDARD OF REVIEW

When reviewing a motion to dismiss on the pleadings, courts “accept all factual allegations as true, construe the FAC in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the FAC, the plaintiff may be entitled to relief.” *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008) (citation and quotations omitted). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court clarified the Rule 12(b)(6) standard: the factual allegations set forth in a complaint “must be enough to raise a right to relief above the speculative level.” *Id.* at 555. As the Third Circuit has stated, “[t]he Supreme Court’s *Twombly* formulation of the pleading standard can be summed up thus: ‘stating ... [a] claim requires a complaint with enough factual matter (taken as true) to suggest’ the required element. This ‘does not impose a probability requirement at the pleading stage,’ but instead ‘simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.’” *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 127 U.S. at 555); *see also Covington v. Int’l Ass’n of Approved Basketball Officials*, 710 F.3d 114, 118 (3d Cir.2013) (“[A] claimant does not have to set out in detail the facts upon which he bases his claim. The pleading standard is

not akin to a probability requirement; to survive a motion to dismiss, a complaint merely has to state a plausible claim for relief.” (citations omitted)).

In affirming that *Twombly*’s standards apply to all motions to dismiss, the Supreme Court explained several principles. First, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Second, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679. Therefore, “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* Ultimately, “a complaint must do more than allege the plaintiffs entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir.2009). However, “a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings ... [although a] limited exception exists for documents that are integral to or explicitly relied upon in the FAC.” *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 97 n. 6 (3d Cir.2010) cert. denied, 132 S.Ct. 98 (2011) (citation and internal quotation marks omitted).

*5 The Third Circuit has reiterated that “judging the sufficiency of a pleading is a contextdependent exercise” and “[s]ome claims require more factual explication than others to state a plausible claim for relief.” *Id.* at 98. That said, the Rule 8 pleading standard is applied “with the same level of rigor in all civil actions.” *Id.* (quoting *Iqbal*, 556 U.S. at 684).

III. DISCUSSION

At the outset, the Court notes that Plaintiffs indicate under which state’s law they have brought suit in only four of their asserted ten Counts: Counts V, VI, VII, and VIII, alleging respective violations of the consumer fraud statutes of New Jersey, Pennsylvania, Texas, and Oklahoma. By contrast, Plaintiffs’ asserted claims for breach of express warranty (Count I), breach of implied warranties of fitness for a particular purpose and merchantability (Counts II and III), negligence (Count IV), and unjust enrichment (Count IX) are devoid of reference to any particular state’s laws. See FAC ¶¶ 144–73, 208–12. However, Defendant suggests, and Plaintiffs do not dispute, that the state law of each Plaintiff’s home state should apply to Plaintiffs’ claims. Def.’s Br. at 9 n. 5; Pls.’ Opp. Br. at 13 n. 7. Therefore, the Court will follow the lead of

the parties and will not engage in a choice of law analysis.² See, e.g., *UBI Telecom Inc. v. KDDI Am., Inc.*, No. CIV.A. 13–1643 KSH, 2014 WL 2965705, at *9 (D.N.J. June 30, 2014) (“When the parties agree upon which state’s law applies ... the Court need not conduct [a] choice-of-law inquiry.”); see also *MacDonald v. Unisys Corp.*, 951 F.Supp.2d 729, 737 & n. 5 (E.D.Pa.2013) (Brody, J.); *Sager v. Hoffman La Roche, Inc.*, 2012 WL 3166630, at *14 n. 9 (N.J.Sup.Ct., App.Div. Aug. 7, 2012) (per curiam).

2 The Court notes that, although Defendant does not raise the issue, the FAC’s failure to specify which state’s laws apply to their common law claims may not meet the Rule 8 pleading standard. See, e.g., *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 167 (E.D.Pa.2009) (“The plaintiffs fail to link their claim to the law of any particular state. As a result of this deficiency, the plaintiffs fail to state a cause of action”); see also *Nimley v. PTT Phone Cards Inc.*, No. CIV.A. 13–2216, 2014 WL 1464311, at *6 n. 7 (E.D.Pa. Apr.15, 2014). However, out of an abundance of caution, the Court will proceed by analyzing Defendant’s arguments on the merits of the FAC, particularly because the parties appear to be in agreement that each Plaintiff’s home state laws apply to each common law cause of action.

a. Subsumption of Tort, Warranty, and Consumer Fraud Claims for New Jersey and Tennessee Plaintiffs

Defendant argues that the tort, implied warranty, and consumer fraud claims asserted by Monica and the tort and warranty claims asserted by the Coles “unquestionably” constitute “product[s] liability action[s],” and, thus, are subsumed by the New Jersey Products Liability Act (“NJPLA”) and the Tennessee Products Liability Act (“TPLA”), respectively. Def.’s Br. at 9–10.

Plaintiffs counter that the NJPLA’s plain language is insufficient to determine if the NJPLA subsumes Monica’s claim and that the TPLA does not subsume claims for damages arising from products that are “merely ineffectual,” as opposed to dangerous. Pls.’ Opp. Br. at 17 (citing *Lincoln Gen. Ins. Co. v. Detroit Deisel Corp.*, 293 S.W.3d 487 (Tenn.2009)).

i. Monica (New Jersey)

The Court will begin by examining whether the NJPLA subsumes Monica’s claims. The NJPLA was enacted “to limit

the expansion of products-liability law” and “to limit the liability of manufacturers so as to balance[] the interests of the public and the individual with a view towards economic reality.” *Zaza v. Marquess & Nell, Inc.*, 144 N.J. 34, 47–48, 675 A.2d 620 (1996) (quotations and citations omitted). The NJPLA, therefore, “established the sole method to prosecute a product liability action[,]” and after its enactment, “only a single product liability action remains.” *Tirrell v. Navistar Int’l, Inc.*, 248 N.J.Super. 390, 398–99, 591 A.2d 643, (N.J.Super.Ct.App.Div.1991); see also *Repola v. Morbark Industries, Inc.*, 934 F.2d 483, 492 (3d Cir.1991) (explaining that the NJPLA “effectively creates an exclusive statutory cause of action for claims falling within its purview”). The NJPLA provides that “products liability actions” are “any claim[s] or action[s] brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim.” N.J. Stat. Ann. § 2A:58C–1(b) (3); see *U-Line Corp.*, No. 13–3203, 2013 WL 5503672, at *9. Therefore, if any of Plaintiff’s claims are subsumed under the NJPLA, they will be dismissed.³ See, e.g., *McDonough v. Bayer Healthcare, LLC*, No. CIV. 10–442, 2011 WL 2119107, at *3 (D.N.J. May 26, 2011).

³ Claims for breach of express warranty are specifically not subsumed by the NJPLA. N.J. STAT. ANN. 2A:58C–1(b)(3) (defining “products liability action” as “any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.”).

*6 Indeed, courts have dismissed breach of implied warranty, NJCFA consumer fraud, unjust enrichment, and negligence claims—the claims asserted by Monica in Counts II, III, IV, V, and IX the FAC—based on NJPLA subsumption. See *Certain Underwriters at Lloyd’s, London v. U-Line Corp.*, No. 13–3203, 2013 WL 5503672, at *4–5 (D.N.J. Oct.1, 2013) (dismissing negligence claims and implied warranty claims); *Smith v. Merial Ltd.*, No. 10–439, 2011 WL 2119100, at *5 (D.N.J. May 26, 2011) (dismissing NJCFA consumer fraud and unjust enrichment claims).

However, the NJPLA’s reach is limited in one significant respect: the statute excludes any causes of action arising out of a harm solely to the defective product. N.J. Stat. Ann. § 2A:58C–1b(2); see also *Estate of Knoster v. Ford Motor Co.*, No. 01–3168, 2008 U.S. Dist. LEXIS 103342, at *14 n. 4, 2008 WL 5416399 (D.N.J. Dec. 22, 2008) (holding that

“economic damages for destruction of the product are not recoverable under the NJPLA”). In order to ascertain whether the NJPLA subsumes a claim in which damage as a result of a defective product is alleged, the Court must determine the type of harm the Plaintiff is alleging: whether the harm includes property damage caused by the PEX Product or whether the harm was solely to the defective PEX Product itself.⁴ *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, 66, 948 A.2d 587 (N.J.2008) (“The language of the PLA represents a clear legislative intent that ... the PLA is paramount when the underlying claim is one for harm caused by a product.”); see also *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 703 (D.N.J.2011) (“[R]egardless of how a claim is pleaded, where the core issue is the harmfulness of the product’s chemicals, the claim must be pleaded as an NJPLA claim.”).

⁴ I note that Plaintiffs rely on a case in this district which found that the NJPLA does not subsume claims for damages consequentially caused by a defective product. See *Kuzian v. Electrolux Home Prods.*, 937 F.Supp.2d 599, 607–08 (D.N.J.2013). The facts of this case are very similar to the instant case: both concern an allegedly defective product that malfunctioned, broke, and caused water damage. *Id.* at 604–05. The plaintiff in *Kuzian* asserted various breaches of warranty and fraud claims, and those claims were determined to not have been subsumed by the NJPLA. *Id.* at 607–08. Plaintiffs analogize the instant case to the *Kuzian* case and argue that the NJPLA should similarly decline to subsume Plaintiffs’ claims. Plaintiffs assert that, like the plaintiff in *Kuzian*, they have alleged harm to the product itself and consequential damage to Plaintiffs’ property. However, the Court does not find this reasoning persuasive. *Kuzian* contradicts other cases in this district that have discussed this issue. *Montich v. Miele USA, Inc.*, 849 F.Supp.2d 439, 456–57 (D.N.J.2012) (a complaint alleging harm caused by a defective product would be subsumed by the NJPLA); *U-Line Corp.*, No. 13–3203, 2013 WL 5503672, at *4–5 (rejecting *Kuzian*). Further, tellingly, the *Kuzian* Court granted reconsideration of its decision on this very issue. *Kuzian v. Electrolux Home Prods.*, No. 12–3341(NLH), 2013 WL 6865083 at *1 (D.N.J. Dec.30, 2013) (“finding after review of the submissions that it should re-examine the issue of whether plaintiffs’ claims concerning the damages caused by the allegedly

faulty ice makers to property other than the product itself, e.g., food, floors and walls are consequential, economic losses, but rather sound in tort and are subsumed by the NJPLA”).

Here, it is clear from Plaintiffs' factual allegations that Monica's claims all sound in products liability and, moreover, that the harm alleged is not solely harm to the PEX Products themselves. Monica alleges that the PEX Fittings used in the construction of his home suffered from inherent design flaws. When the PEX Fittings failed, severe “water saturation” resulted. FAC at ¶ 33. The FAC specifically indicates that Monica's losses included both the destroyed PEX Fittings, as well as “loss associated with [the] catastrophic plumbing failure[].” *Id.* at ¶ 41. The FAC makes clear, then, that the physical replacement of the broken PEX Fittings or Monica's the inability to use the PEX Fittings is not the thrust of Monica's injury. Instead, the injury primarily consists of the “catastrophic plumbing failure” that caused damage and water saturation throughout his home. *Id.* at ¶¶ 33, 41. As Monica's true harm is not to the product itself, his claims fall within the ambit of the NJPLA. See *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 703 (D.N.J.2011). For this reason, Monica's tort and implied warranty claims, in Counts II, III, and IV, are subsumed by the NJPLA. Monica's claim under the New Jersey Consumer Fraud Act, (“NJCFA”), in Count V, is also subsumed by the NJPLA.⁵ Accordingly, Counts II, III, IV, and V as asserted by Monica, are dismissed. However, Monica is given leave to re-plead his claims as a single claim under the NJPLA.

⁵ Plaintiffs argue that Monica's NJCFA claim cannot be subsumed by the NJPLA. But Defendant is correct: “there is no exception for NJCFA claims where, as here, the gravamen of the claim is that the challenged statements or omissions led to harm that falls within the scope of the NJPLA.” Def.'s Reply Br. at 12; see *Sun Chem. Corp. v. Fike Corp.*, No. CIV. 13-4069 FSH, 2015 WL 881961, at *3 (D.N.J. Mar.2, 2015) (collecting cases); *Indian Brand Farms v. Novartis Crop Prot., Inc.*, 890 F.Supp.3d 524, 547–48; *McDarby v. Merk & Co.*, 401 N.J.Super. 10, 949 A.2d 223, 277–78 (N.J.Super.Ct.App.Div.2008).

ii. *The Coles (Tennessee)*

*7 Next, the Court examines whether the Coles' claims are subsumed by the TPLA. As the Sixth Circuit has noted,

[T]he TPLA governs products liability actions in Tennessee and defines “product liability actions” as “all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packing, or labeling of any product.” The TPLA also encompasses several different theories of products liability: “strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory in tort or contract whatsoever.

Strayhorn v. Wyeth Pharm., Inc., 737 F.3d 378, 392 (6th Cir.2013) (internal citation and quotation marks omitted). “The TPLA's definition of ‘product liability action’ has been interpreted broadly.” *Id.* at 402.

Here, just as with Monica's claims, the Coles' claims clearly sound in products liability by alleging property damage caused by or resulting from the manufacture, design, and marketing of the PEX Products. Plaintiffs' argument that the Coles merely assert “economic loss” is inapposite: the “economic loss” doctrine relates to the interplay between tort and contract law and has no place in this analysis, which is solely focused on whether Plaintiffs' claims are subsumed by the TPLA. See *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 488 (Tenn.2009); the Coles clearly allege property damage in the form of “water saturation and damage throughout their home.” FAC ¶¶ 22. Therefore, Coles' claims in Counts I,⁶ II, III, and IV are dismissed. However, the Coles are given leave to re-plead their claims as a single claim under the TPLA.

⁶ Unlike the NJPLA, the TPLA subsumes claims for breach of an express warranty. *Strayhorn*, 737 F.3d at 392. Therefore, unlike for Monica, the Coles' claim of breach of express warranty in Count I is dismissed.

b. *Counts I and II—Express Warranty and Implied Warranty of Merchantability Claims—McMahon (Texas) and McCoy (Georgia)*

Defendants next argue that McMahon and McCoy fail to state claims for breach of an express warranty and breach of the implied warranty of merchantability because they “have not

fulfilled their contractual and legal duties to provide pre-suit notice of a failure and a demand for a replacement under the warranty.” Def.’s Br. at 13. Specifically, Defendants argue that Texas and Georgia, the home states of McMahon and McCoy, respectively, require pre-suit notice of the breach and a request for a remedy as conditions precedent to asserting express and implied warranty claims under those state’s laws.

NIBCO’s express warranty, attached to the FAC, states that “[i]n the event that any defect occurs which the owner believes is covered by this warranty, the owner should immediately contact NIBCO Technical Services, either in writing or by telephone ... The owner will then be instructed to return said [product], at the owner’s expense, to NIBCO.... In the event said inspection discloses to the satisfaction of NIBCO ... that said [product] is defective, a replacement shall be mailed free of charge to the owner.” NIBCO Warranty.

*8 Neither McMahon nor McCoy allege that they contacted NIBCO about any of the alleged defective PEX Products prior to filing this suit.⁷ Both Georgia and Texas laws regarding the breach of the implied warranty of merchantability are taken from the same UCC provision. That provision states that “[t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.” Ga.Code Ann. § 11–2–607; Tex. Bus. & Com.Code Ann. § 2.607.

⁷ Unlike McMahon, the Medders, the other Texas plaintiffs, alleged that “[w]ithin a reasonable amount of time following the losses, the Medders provided NIBCO with actual notice of the failures of its PEX Products and NIBCO failed to replace the PEX Products within the Medders’ home or otherwise fulfill its warranty obligations.” FAC ¶ 86.

1. McMahon (Texas)

“To recover on a breach of warranty claim in Texas, ‘the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.’ “ *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 705 (5th Cir.2014) (citing Tex. Bus. & Com.Code § 2.607(c)(1)). Texas law applies Tex. Bus. & Com.Code Ann. § 2.607 to breach of express warranty and breach of implied warranty claims, and “ ‘commencement of litigation’ does not satisfy the notice requirement” for either express or implied warranty claims. See *McKay*, 751 F.3d at 706.

“Although the Texas Supreme Court has not decided [the] issue of [whether notice must be given to a remote manufacturer or seller to satisfy § 2.607’s requirements], the weight of intermediate Texas authority interprets the applicable version of § 2.607 to require” such notice. *Id.* at 707. The Texas appellate case that Plaintiffs cite for the opposite proposition, *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888–89 (Tex.Civ.App.-El Paso 1979, no writ), interpreted a prior version of the statute at issue and goes against the clear majority of the Texas appellate courts that have considered the issue. See, e.g., *Bailey v. Smith*, No. 13–05–085–CV, 2006 WL 1360846, at *4–5 (Tex.App.-Corpus Christi May 18, 2006, no pet.); *U.S. Tire–Tech, Inc. v. Boeran, B. V.*, 110 S.W.3d 194, 199 (Tex.App.-Houston [1st Dist.] 2003, pet. denied); *Wilcox v. Hillcrest Memorial Park of Dall.*, 696 S.W.2d 423, 424 (Tex.App.-Dallas 1985, writ ref’d n.r.e.).

McMahon does not allege that he provided pre-suit notice to Defendant before bringing his breach of warranty claims, as required under Texas law. Thus, his breach of express warranty and breach of the implied warranty of merchantability claims, asserted in Counts I and II, are dismissed without prejudice. See, e.g., *Martin v. Home Depot U.S.A., Inc.*, 369 F.Supp.2d 887, 893 (W.D.Tex.2005).

2. McCoy (Georgia)

Georgia courts analyze breach of written, or express, warranty and breach of implied warranty claims differently; accordingly, the Court will do the same. “Georgia law imposes two conditions before a breach of a written warranty can exist: (1) notice of the defect and (2) a reasonable opportunity to repair the defect.” *Knight v. Am. Suzuki Motor Corp.*, 272 Ga.App. 319, 321–22, 612 S.E.2d 546 (2005). Accordingly, a warranty is not breached simply because a vehicle is found “on delivery or at some time thereafter within the warranty period to have a defective part or [an] operational deficiency.” *Id.* (citing *Olson v. Ford Motor Co.*, 258 Ga.App. 848, 575 S.E.2d 743 (Ga.App.2002) (citation and footnote omitted)). “Assuming the purchaser has maintained his vehicle in the manner specified, it is the *refusal to remedy* within a reasonable time, or a *lack of success* in the attempts to remedy [that] would constitute a breach of warranty.” *Id.* (citing *Olson*, 258 Ga.App. 848, 575 S.E.2d 743); *Culberson v. Mercedes–Benz USA, Ltd.*, 274 Ga.App. 89, 91, 616 S.E.2d 865 (2005) (“When a warrantee brings a breach of express warranty claim, the terms of the written warranty control. Thus, a warrantee can succeed on a breach of the warranty claim only if she has first satisfied the express

conditions precedent for enforcement “as prescribed” by the warranty”).

*9 Here, because McCoy has not pleaded that he provided notice or a reasonable opportunity to repair the allegedly defective PEX products to Defendant, pursuant to the terms of the warranty, his breach of an express warranty claim must fail. *See, e.g., id.* Accordingly, Count I as asserted by McCoy is dismissed without prejudice.

The Court now turns to McCoy's implied warranty of merchantability claim. The Georgia Court of Appeals has found that “delay alone [in providing reasonable notice to the seller] without prejudice caused by such delay is insufficient to bar relief to the plaintiff” under Georgia's statute pertaining to the breach of the implied warranty of merchantability. *Wal-Mart Stores, Inc. v. Wheeler*, 262 Ga.App. 607, 608, 586 S.E.2d 83 (2003) (analyzing a situation in which the plaintiff had only provided notice to Wal-Mart upon filing a lawsuit, two years after the breach allegedly took place). Thus, the reasonable notice inquiry under Georgia law turns on whether the defendant has demonstrated prejudice as a result in the delayed notice.

Here, the Court lacks the requisite facts at the motion to dismiss stage to determine whether filing this lawsuit constitutes reasonable notice of McCoy's breach of the implied warranty of merchantability claim. Accordingly, the Court declines to dismiss Count II as asserted by McCoy. *See, e.g., In re Ford Motor Co. E-350 Van Products Liab. Litig. (No. II)*, No. CIV. A. 03-4558, 2010 WL 2813788, at *34 (D.N.J. July 9, 2010) *amended*, No. CIV.A. 03-4558 GEB, 2011 WL 601279 (D.N.J. Feb.16, 2011) (applying Georgia law regarding reasonable notice of breach of warranty claims on a motion for summary judgment); *see also Terrill v. Electrolux Home Prods.*, 753 F.Supp.2d 1272, 1287, (S.D.Ga.2010).

c. Count III—Implied Warranty of Fitness

Next, Defendant argues that “[e]ach Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose (Count III) fails because Plaintiffs used the PEX products for their ordinary purpose in residential plumbing systems and have failed to plead the requirements of a particular purpose claim” Def.'s Reply Br. at 3. Plaintiffs, however, claim that a “particular” purpose and an “ordinary” purpose are not mutually exclusive. Pls.' Opp. Br. at 13.

While Plaintiffs assert breach of implied warranty of fitness claims under various states' laws, it does appear that all of the states mentioned require that the product at issue be used for a “particular” purpose in order for a plaintiff to raise such a claim.⁸ All of the relevant states utilize the following Uniform Sales Act provision to define a breach of the implied warranty of fitness:

⁸ *See Tex. Bus. & Com.Code Ann. § 2.315* cmt. 2; *Okla. Stat. Ann. Tit. 12A, § 2-315* cmt. 2; *Ga.Code Ann. § 11-2-315* cmt. 2; *Tenn.Code Ann. § 47-2-315* cmt. 2; *N.J.S.A. § 12A:2-315* cmt. 2; *Ala.Code § 7-2-315* cmt. 2; *13 Pa. Cons.Stat. Ann. § 2315* cmt. 2.

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

*10 *Tex. Bus. & Com.Code Ann. § 2.315*; *Okla. Stat. Ann. Tit. 12A, § 2-315*; *Ga.Code Ann. § 11-2-315*; *Tenn.Code Ann. § 47-2-315*; *N.J.S.A. § 12A:2-315*; *Ala.Code § 7-2-315*; *13 Pa. Cons.Stat. Ann. § 2315*.

In a comment regarding the most recent iteration of the provision, it is noted that

A “particular purpose” differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

Id. cmt. 2. The FAC merely alleges that the PEX products, which are ordinarily used in the course of installing a

plumbing system, were used as such by Plaintiffs, and Plaintiffs concede as much in their opposition brief. However, Plaintiffs argue that the ordinary purpose *was* a particular purpose in that NIBCO advertised its PEX products as containing “superior characteristics,” making them “the highest quality PEX tubing available today ... In other words, PEX products are not only good for getting around town, they will help you climb a mountain.” Pls.’ Br. at 14.

Plaintiffs’ argument is unconvincing. The cases to which Plaintiffs cite (to the extent they are relevant, as the cited cases regard laws of states that are not at issue here) do not support Plaintiffs’ position that “ordinary purpose” and “particular purpose” need not be mutually exclusive; they state that a product can be used for *both* an ordinary and a particular purpose, not that an ordinary purpose can be the same as a particular purpose. *See, e.g., Palmer v. A.H. Robins Co.*, 684 P.2d 187, 208–09 (Col. 1984); *Gregory Woods Prods. v. Advanced Sawmill Mach. Equip., Inc.*, 2007 U.S. Dist. LEXIS 46245, 2007 WL 1825179 (W.D.N.C.2007). Further, Plaintiffs do not plead any facts in their Amended Complaint to show that Defendant had any reason to know that the PEX products were to be used by Plaintiffs for a particular purpose. *See generally* FAC. Therefore, Plaintiffs’ implied warranty of particular fitness claim in Count III is dismissed without prejudice.

d. Count IV–Negligence

Next, Defendants argue that Plaintiffs’ negligence claims must be dismissed.⁹

⁹ The Court has already dismissed the negligence claims of Monica and the Coles as subsumed under those plaintiffs’ respective state products liability acts. *See supra* Section III.a.

The FAC states that “Defendant owed Plaintiffs ... a duty to exercise reasonable and ordinary care in the formulation, testing, design, manufacture, warranting and marketing of the PEX Products.” Further, “[t]he failure of the PEX Products ... was caused by poor and improper workmanship and manufacture, negligence, and lack of reasonable and ordinary care by NIBCO.... Defendant failed to properly test and/or evaluate the PEX Products to ensure they would not fail when they were used for their intended purpose.” Finally, “[a]fter being notified of the foregoing breaches, NIBCO took no action to cure its breaches of its duty ... As a direct and proximate result of NIBCO’s negligence ... Plaintiffs ... have

been caused to suffer losses and damages ...” FAC ¶¶ 169–172.

*¹¹ This laundry list of duties that Defendant allegedly breached does not suffice for asserting a negligence claim, particularly for asserting separate negligence claims under Plaintiffs’ respective home states. Each state’s negligence jurisprudence varies; for example, Texas courts appear to have found that where the gravamen of a plaintiff’s claim sounds in products liability, a plaintiff’s general negligence claim may not be permitted. *See Ford Motor Co. v. Miles*, 141 S.W.3d 309, 315 (Tex.App.2004). However, Pennsylvania law appears to allow for such claims, *see, e.g., Scilvio v. Amgen, Inc.*, 810 F.Supp.2d 745, 755 (W.D.Pa.2011). Plaintiffs do not adequately specify how their allegations meet the elements of each relevant state’s conception of negligence, and, as such, Count IV must be dismissed without prejudice for failure to state a claim.¹⁰ *See, e.g., In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 167 (E.D.Pa.2009); *see also Nimley v. PTT Phone Cards Inc.*, No. CIV. A. 13–2216, 2014 WL 1464311, at *6 (E.D.Pa. Apr.15, 2014).

¹⁰ Defendant argues that under the “gist of the action” doctrine, Plaintiffs’ negligence claims are really breach of warranty claims and, as such, should be dismissed. However, a review of Count IV reveals that Plaintiffs’ Count IV’s allegations go beyond the scope of breach of warranty. *See* FAC ¶¶ 169–172.

e. Counts V, VI, VII, and VIII–Statutory Consumer Fraud Claims

Next, Defendants argue that the New Jersey, Pennsylvania, Texas, and Oklahoma statutory consumer fraud claims, asserted in Counts V, VI, VII, and VIII, respectively,¹¹ should be dismissed for failure to state a claim.

¹¹ Specifically, Plaintiffs assert claims under the NJCFA, the Pennsylvania Unfair Trade Practices and Consumer Protection Law (the “UTPCPL”), the Texas Deceptive Trade Practices Act (“TDTPA”), and the Oklahoma Consumer Deceptive Trade Practices Act (“ODTPA”).

“Independent of the standard applicable to Rule 12(b)(6) motions,” Rule 9(b) of the Federal Rules of Civil Procedure requires a heightened pleading standard for claims sounding in fraud or mistake. *In re Rockefeller Ctr. Properties, Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir.2002); *see also Fed.R.Civ.P. 9(b)* (“In alleging fraud or mistake, a party

must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.”). All of the relevant consumer fraud claims are governed by Rule 9(b)'s heightened pleading requirements. *Crozier v. Johnson & Johnson Consumer Cos.*, 901 F.Supp.2d 494, 506 (D.N.J.2012) (analyzing the NJCFA); *Post v. Liberty Mut. Grp., Inc.*, Civ. No. 14–CV–238, 2014 WL 2777385, at *2–4 (E.D. Pa. June 18, 2014) (analyzing the UTPCPL); *Berry v. Indianapolis Ins. Co.*, 608 F.Supp.3d 785, 800 (N.D.Tex.2009) (analyzing the TDTA).

The Third Circuit has adopted a flexible approach for evaluating whether a plaintiff's fraud claim meets Rule 9(b)'s heightened pleading standard. *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.1984) (“Rule 9(b) requires plaintiffs to plead with particularity the ‘circumstances’ of the alleged fraud.... It is certainly true that allegations of ‘date, place or time’ [suffice], but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.”); see also *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir.2007) (“Pursuant to Rule 9(b), a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the ‘precise misconduct with which it is charged.’” (quoting *Lum v. Bank of America*, 361 F.3d 217, 223–24 (3d Cir.2004))).

i. Count V—Monica's NJCFA Claim

*12 The Court decided *supra* that Monica's NJCFA claim sounded in product liability, and, as such, dismissed Count V as being subsumed by the NJPLA. Accordingly, the Court need not engage in further analysis of Count V.

ii. Count VI—The Pepernos' UTPCPL Claim

“The UTPCPL generally prohibits unfair methods of competition and deceptive acts or practices in the conduct of trade or commerce.” *Slapikas v. First Am. Title Ins. Co.*, 298 F.R.D. 285, 292 (W.D.Pa.2014) (citing 73 Pa. Stat. § 201–3); see also *Gardner v. State Farm Fire & Casualty Co.*, 544 F.3d 553, 564 (3d Cir.2008). “The UTPCPL lists twenty specifically prohibited practices in § 201–2(4)(i)–(xx), and also contains a catch-all provision.” *Garczynski v. Countrywide Home Loans, Inc.*, 656 F.Supp.2d 505, 509 (E.D.Pa.2009). The catchall provision provides a “private right of action in persons upon whom unfair methods of competition and unfair or deceptive acts or practices are

employed and who, as a result, sustain an ascertainable loss.” 73 Pa. Stat. § 201–9.2; *Slapikas*, 298 F.R.D. at 292.

“To establish liability under the UTPCPL's catchall provision a plaintiff must present evidence showing: (1) a deceptive act that is likely to deceive a consumer acting reasonably under similar circumstances; (2) justifiable reliance; and (3) that the plaintiffs justifiable reliance caused ascertainable loss.” *Slapikas*, 298 F.R.D. at 292 (citing *Seldon v. Home Loan Servs.*, 647 F.Supp.2d 451, 470 (E.D.Pa.2009); *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 223 (3d Cir.2008), as amended (Nov. 6, 2008)).

Defendants argue that the Pepernos fail to state a claim under the UTPCPL because they (1) do not identify a deceptive act with requisite specificity and (2) do not allege justifiable reliance.

The FAC states that

Defendant has engaged in deceptive business practices prohibited by the UTPCPL, including (1) representing that the PEX Products have characteristics, use, benefits, and qualities which they do not have, (2) representing that PEX Products are of a particular standard, quality, and grade when they are not, (3) advertising the PEX Products with the intent not to sell them as advertised, and (4) engaging in acts and practices which are otherwise unfair, misleading, false, or deceptive to the consumer.

FAC ¶ 186. While the FAC further states that “NIBCO's unfair or deceptive practices were likely to and did in fact deceive reasonable consumers, including the Pepernos, about the true performance and characteristic of the PEX Products,” FAC 187, the Pepernos include no specific factual allegations stating that they chose to have PEX Products installed in their home because of Defendant's allegedly deceptive business practices, let alone factual allegations about when, where, and how they were exposed to Defendant's allegedly deceptive practices. See FAC ¶¶ 90–103. Therefore, regardless of whether Pepernos have adequately alleged that NIBCO

engaged in deceptive business practices, presumably by advertising their products were of high quality, their UTPCPL claim fails because they do not allege justifiable reliance on such practices. *See, e.g., Kee v. Zimmer, Inc.*, 871 F.Supp.2d 405, 412 (E.D.Pa.2012); *see also Militello v. Allstate Prop. & Cas. Ins. Co.*, 2014 WL 2892386, at *4 (M.D.Pa. June 26, 2014) (“Plaintiff’s UTPCPL claim ... lacks supporting factual allegations demonstrating that Plaintiff justifiably relied on Defendant’s representations or conduct”). Accordingly, Count VI is dismissed without prejudice.

i. Count VII—McMahon and the Medders’ TDTPA Claim

*13 The TDTPA “grants consumers a cause of action for false, misleading, or deceptive acts or practices.” *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex.1996); *see also Tex. Bus. & Com Code Ann. § 17.50(a)(1)* (2009). “The elements of a DTPA cause of action are: (1) the plaintiff is a consumer; (2) the defendant committed acts ‘in connection with the purchase or lease of any goods or services’; (3) the defendant’s acts were false, misleading or deceptive; and (4) the acts were a producing cause of plaintiff’s injuries.” *Cushman v. GC Servs., LP*, 657 F.Supp.2d 834, 842 (S.D.Tex.2009) *aff’d sub nom. Cushman v. GC Servs., L.P.*, 397 Fed. App’x 24 (5th Cir.2010) (quoting *Amstadt*, 919 S.W.2d at 649); *see also Washington v. U.S. HUD*, 953 F.Supp. 762, 777 (N.D.Tex.1996). “A producing cause is synonymous with natural result and has been defined as an efficient, exciting or contributing cause that, in a natural sequence, produced the complained of injuries or damages.” *McClung v. Wal-Mart*, 866 F.Supp. 306, 310 (N.D.Tex.1994).

Defendants argue that the Texas plaintiffs do not allege with requisite particularity (1) the allegedly unlawful acts in which Defendant engaged under the TDTPA, and (2) that any such acts caused their injuries.

In the FAC, Plaintiffs allege that “NIBCO’s actions as set forth above occurred in the conduct of trade or commerce, and constitute deceptive trade practices under the TDTPA” and that “[a]ll procedural requisites, including notice, have been met.” FAC ¶¶ 194, 196. Further, “[a] causal relationship exists between Defendant’s unlawful, false, deceptive, and misleading conduct and Plaintiffs’ and Texas Class members’ injuries.... Had Defendant not engaged in the aforementioned deceptive conduct, Plaintiffs and the Texas Class would not have purchased and installed Defendant’s PEX Products in their residential and commercial properties.” FAC ¶ 198.

However, similar to the Pepernos, the Texas Plaintiffs do not provide factual allegations in support of their conclusory statement that Defendant’s allegedly false, deceptive, or misleading conduct was a producing cause of Plaintiff’s injuries. The Medders and McMahon merely state that their residential plumbing system was installed using NIBCO PEX Products and conclusorily allege that “a causal relationship exists” between Defendant’s conduct and their damages—they provide no specificity about any false, misleading, or deceptive statements or actions by Defendants and how such behavior would constitute a “producing cause” of their decision to install PEX Products in their home. FAC ¶¶ 59, 80. Therefore, regardless of whether Plaintiffs have identified allegedly false, misleading, or deceptive behavior on the part of Defendant, their claim fails on the TDTPA’s causal element. *See, e.g., Robinson v. Match.com, L.L.C.*, No. 3:10–CV–2651–L, 2012 WL 5007777, at *10 (N.D.Tex. Oct.17, 2012) *aff’d sub nom. Malsom v. Match.com, L.L.C.*, 540 Fed. App’x 412 (5th Cir.2013). Accordingly, Count VI is dismissed without prejudice.

ii. Count VIII—Sminkey’s ODTPA Claim

*14 Regarding Plaintiff’s Sminkey’s fraud claim under the ODTPA, Sminkey acknowledges in Plaintiff’s opposition brief that the Oklahoma Deceptive Trade Practices Act does not create a private right of action for consumers, *see Thomas v. Metro. Life Ins. Co.*, 540 F.Supp.2d 1212, 1228 (W.D. Okla. Jan 10, 2008), and seeks leave to re-plead his claim under the Oklahoma Consumer Protection Act (“OCPA”). Pl.’s Opp. Br. at 27. As such, Count VIII is dismissed without prejudice.

f. Count IX—Unjust Enrichment

Defendants next argue that Plaintiffs’ unjust enrichment claims must fail for one of two reasons. First, the unjust enrichment claims asserted by McCoy, McMahon, the Medders, Boyd, and the Coles must fail, because “under the laws of their respective states, Plaintiff[s] ... cannot maintain their unjust enrichment claim ... because they allege the existence of an actual contract (the express warranty) governing their relationship” with Defendant. Def.’s Br. at 27. Second, Defendants argue that the unjust enrichment claims asserted by Boyd, Monica, and the Pepernos fail “because their home states do not recognize a claim for unjust enrichment against defendants from whom the plaintiff did not directly purchase the product.” Def.’s Br. at 28. The Court will address each state’s unjust enrichment laws in turn.

In Texas, Georgia, Tennessee, and Alabama, unjust enrichment actions may not succeed in the face of a governing contract, such as an express warranty. *In re Atlas Roofing Corp. Chalet Shingle Products Liab. Litig.*, No. 1:13-CV-2195-TWT, 2014 WL 3360233, at *3 (N.D.Ga. July 9, 2014) (“Under Georgia law, ‘unjust enrichment is available only when there is no legal contract.’”) (quoting *American Casual Dining, L.P. v. Moe's Sw. Grill, L.L.C.*, 426 F.Supp.2d 1356, 1372 (N.D.Ga.2006));¹² *Johnson v. Wells Fargo Bank, NA*, 999 F.Supp.2d 919, 929 (N.D.Tex.2014) (“Because a claim for unjust enrichment is ‘based on quasi-contract,’ it is ‘unavailable when a valid, express contract governing the subject matter of the dispute exists.’”); *Branch Banking & Trust Co. v. Howard*, No. CIV.A. 12-0175-WS-N, 2013 WL 951652, at *5 (S.D.Ala. Mar.8, 2013) (“Alabama law is clear that quasi-contractual, equitable remedies such as unjust enrichment are not cognizable in the presence of an express contract between the parties that governs the same subject matter.”). Because the parties here do not dispute the existence of a governing express warranty, Count IX as asserted by McCoy, McMahon, the Medders, Boyd, and the Coles must be dismissed.

¹² Plaintiffs points to *Clark v. Aaron's, Inc.*, 914 F.Supp.2d 1301, 1309 (N.D.Ga.2012), for the proposition that an unjust enrichment claim may be pled in the alternative under Georgia law. See also *WESI, LLC v. Compass Envtl., Inc.*, 509 F.Supp.2d 1353, 1363 & n. 12 (N.D.Ga.2007). While case law on this issue appears to be mixed, the Georgia Court of Appeals has found that an unjust enrichment claim, pled as an alternative to recovery under a contract claim, fails as a matter of law if a governing contractual provision is indisputably in place. *Tidikis v. Network for Med. Comm'n & Research LLC*, 274 Ga.App. 807, 619 S.E.2d 481, 486 (Ga.Ct.App.2005); see also *Huddle House, Inc. v. Two Views, Inc.*, No. 1:12-CV-03239-RWS, 2013 WL 1390611, at *4 (N.D.Ga. Apr.4, 2013). Because the parties do not dispute the validity or the applicability of the express warranty at issue here, the Court finds that an unjust enrichment claim cannot survive the Rule 12(b)(6) analysis even if pled in the alternative.

Meanwhile, in New Jersey, Pennsylvania, and Alabama, it is necessary to assert a “sufficiently direct relationship” between the plaintiff and the defendant to recover on an unjust enrichment claim. *Snyder v. Farnam Companies, Inc.*,

792 F.Supp.2d 712, 724 (D.N.J.2011) (“Since Plaintiffs have failed to allege that they purchased the Products directly from Defendants, they cannot rightfully expect any remuneration from Defendants, since they never directly conferred a benefit on Defendants.”). *Schmidt v. Ford Motor Co.*, 972 F.Supp.2d 712, 721 (E.D.Pa.2013) (“The ‘benefit’ must be conferred by the plaintiff directly-indirect benefits bestowed by third parties will not support a claim for unjust enrichment.”); *Danny Lynn Elec. & Plumbing, LLC v. Veolia ES Solid Waste Se., Inc.*, No. 2:09CV192-MHT, 2011 WL 2893629, at *6 (M.D.Ala. July 19, 2011) (“[T]he plaintiffs' unjust-enrichment claim should be dismissed as to the individual defendants because the plaintiffs did not confer a direct benefit on those individuals. In Alabama, ‘the essence of unjust enrichment is that a plaintiff can prove facts showing that defendant holds money which, in equity and good conscience, belongs to plaintiff or holds money which was improperly paid to defendant because of mistake or fraud.’” (quoting *Hancock-Hazlett General Const. Co., Inc. v. Trane Co.*, 499 So.2d 1385, 1387 (Ala.1986)). Here, a direct relationship between Plaintiffs and Defendants do not exist, because Plaintiffs did not directly purchase the PEX Products from Defendant. Therefore, Count IX, as asserted by Monica and the Pepernos,¹³ must be dismissed.

¹³ The Court already *supra* dismissed Boyd's unjust enrichment claim under Alabama law, on the basis of the existence of a governing express contract.

*15 Because each Plaintiffs state law bars a claim for unjust enrichment under the circumstances, Count IX is dismissed in its entirety.

g. Count X-Declaratory and Injunctive Relief

Finally, in Count X, Plaintiffs include a claim for “declaratory and injunctive relief.” FAC ¶¶ 213–214. However, declaratory relief and injunctive relief, as their names imply, are remedies, not causes of action. Accordingly, the Court dismisses Count X. See *Chrubby v. Kowaleski*, 534 Fed. App'x 156, 160 n. 2 (3d Cir.2013) (affirming dismissal of a claim that was solely for a remedy).

V. CONCLUSION

For the foregoing reasons, Defendants' Partial Motion to Dismiss is GRANTED IN PART. Counts II, III, and IV are dismissed as asserted by Monica, and Counts I, II, III, and IV are dismissed as asserted by the Coles; both sets of plaintiffs are granted leave to file claims under the NJPLA

and the TPLA, respectively. Count I is dismissed without prejudice as asserted by McCoy. Counts I and II are dismissed without prejudice as asserted by McMahon. As asserted by all Plaintiffs, Counts III, IV, VI, VII, and VIII are dismissed without prejudice, and Counts V, IX, and X are dismissed. Count II as asserted by McCoy, however, may proceed.

An appropriate order shall follow.

All Citations

Not Reported in F.Supp.3d, 2015 WL 2414740, 86 UCC Rep.Serv.2d 700

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 11

2019 WL 1370414

2019 WL 1370414

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Ruth Ann COOPER, D.P.M., individually
and as the representative of a class of
similarly-situated persons, Plaintiff,

v.

MEDIMETRIKS PHARMACEUTICALS,
INC., Defendant.

Civil Action No. 18-11987 (JLL)

|
Signed 03/25/2019

Attorneys and Law Firms

Matthew Nicholas Fiorovanti, Giordano Halleran & Ciesla
PC, Red Bank, NJ, for Plaintiff.

Seth Alan Rafkin, Rafkin Esq, PLLC, Randolph, NJ, for
Defendant.

OPINION

JOSE L. LINARES, Chief Judge

*1 The plaintiff, Ruth Ann Cooper, D.P.M., brings this putative class action on behalf of herself and all others who are similarly situated against the defendant, Medimetriks Pharmaceuticals, Inc. (hereinafter, “Medimetriks”). (ECF No. 8.) Cooper asserts the following claims for:

- violations of the Junk Fax Prevention Act (hereinafter, “the JFPA”), 47 U.S.C. § 227, concerning faxes that were sent by Medimetriks that failed to provide a notice to recipients of the right to opt out of receiving such faxes and a manner in which to do so, and that were received by those who: (a) had not expressly provided permission to Medimetriks to send such faxes (hereinafter, “the Unsolicited JFPA Claims”), and (b) had expressly provided permission to Medimetriks to send such faxes (hereinafter, “the Solicited JFPA Claims”);
- violations of the New Jersey Junk Fax Act (hereinafter, “the NJJFA”), N.J.S.A. 56:8-157, *et seq.*;

- violations of the New Jersey Consumer Fraud Act (hereinafter, “the NJCFA”); and
- attorney fees related to each of the aforementioned claims.

For the sake of clarity, the Court notes here that the JFPA sets forth opt-out notice requirements. *See* 47 U.S.C. § 227(b)(1) –(2). Among other things, the JFPA requires faxed advertisements to contain a notice on the first page that clearly and conspicuously advises that a recipient is legally entitled to opt out from any future faxed advertisements from the sender, and to provide a means to make an opt-out request to that sender. *Id.* Furthermore, the JFPA provides for a private cause of action. *See* 47 U.S.C. § 227(b)(3).

Currently pending before the Court is the motion by Medimetriks pursuant to Federal Rule of Civil Procedure (hereinafter, “Rule”) 12(b)(6) to dismiss the entire amended complaint. (ECF No. 13 through ECF No. 13-3; ECF No. 19.) In response, Cooper voluntarily withdraws the claims that were brought under the NJCFA, but she otherwise opposes the motion. (ECF No. 18 at 24 (Cooper’s withdrawal of the NJCFA claims); *id.* at 8–25 (Cooper’s arguments in opposition).)

The Court resolves the motion upon a review of the papers and without oral argument. *See* L. Civ. R. 78.1(b). For the following reasons, the motion is: (1) granted to the extent that it addresses the Solicited JFPA Claims, the NJJFA Claims, and the claims for attorney fees that are related to the Solicited JFPA Claims and the NJJFA Claims; (2) administratively terminated to the extent that it addresses claims brought under the NJCFA and the claims for attorney fees that are related thereto, because the NJCFA claims have been withdrawn; and (3) denied to the extent that it addresses the Unsolicited JFPA Claims and the claims for attorney fees that are related thereto.

I. BACKGROUND

Cooper is a podiatrist who practices in Cincinnati, Ohio. (ECF No. 8 at 3 (the amended complaint alleging that Cooper is a citizen of Ohio); *see also* ECF No. 8-1 at 2–8 (faxes sent by Medimetriks to Cooper that list her office as being located in Cincinnati, Ohio).) Cooper alleges that Medimetriks is a pharmaceutical company that is located in Fairfield, New Jersey, and that specializes in podiatry and dermatology medications. (ECF No. 8 at 3–4.) Cooper further alleges that Medimetriks “sent facsimile transmissions of unsolicited

2019 WL 1370414

advertisements ... describ[ing] the commercial availability or quality of [its] products, goods and services” to her office on seven separate occasions between May 2016 and July 2018 “without the required opt-out language.” (*Id.* at 1–2, 4.)

*2 The faxes contained offers made directly to Cooper for free samples of prescription medications sold by Medimetrix for Cooper to provide to patients. (*Id.* at 4.) The first two faxes that Cooper received from Medimetrix were in the following format:

From: 6/7/2016 12:55 AM To: 6/7/2016 12:55 AM Page: 1/1 Date: 5/6/2016 12:55:18 AM
5/6/2016 12:55 AM FROM: Medimetrix Pharm. TO: 513-943-6115 PAGE: 001 OF 001

MEDIMETRIX
PHARMACEUTICALS, INC.

SAMPLE REQUEST FORM

Rx Only
Ciclopirox Cream
(CICLOPIROX OLAMINE CREAM USP, 0.77%)
KII
with REHYLA® HAIR+BODY CLEANSER
Up to 3 tubes

Doctor: Ruth Cooper, DPM	Specialty: Podiatry
Address: 4415 B Altholz Road	Suite/Floor: Suite 200
City: Cincinnati	State: OH Zip: 45245
Phone: 513-943-0400	Fax: 513-943-6115
State License #: 36.002540	Contact (optional):
Email (optional):	

In compliance with the Prescription Drug Marketing Act (PDMA) regulations, please complete and verify all the information listed above. Incomplete requests cannot be processed. Please sign and date this form indicating your request for these samples and fax it to Medimetrix Pharmaceuticals, Inc. (973) 882-7502.

I certify that I am a licensed practitioner who can legally prescribe in my state. I am requesting product samples so that I may have the opportunity to evaluate the tolerability and effectiveness on appropriate patients. I will not sell, offer to sell, trade or barter samples, nor will I seek reimbursement from any payer for providing these samples to a patient. I further certify this is my personal, original signature.

Physician Signature: _____ Date: _____

Request Date: 5/5/2016
Request Expires: 6/4/2016

Keep your original, signed hard copy form in your office files to comply with federal law.

PLEASE RETURN VIA FAX TO:
Medimetrix Pharmaceuticals, Inc. (973) 882-7502
20160502CCFAX176327

If you have questions or concerns regarding any Medimetrix Pharmaceuticals brand, please call Medimetrix Customer Service at (973) 882-7512, ext. 234, Monday through Friday from 9 am to 5 pm ET.

383 Route 46 West • Fairfield, New Jersey 07004-2402 • Ph: (973) 882-7512 • Fax: (973) 882-7502 • www.medimetrix.com
This fax was received by GFI FaxMaker fax server. For more information, visit: http://www.gfi.com

(ECF No. 8-1 at 2.) The next five faxes that Cooper received were in this format:

From: 6/7/2016 12:55 AM To: 6/7/2016 12:55 AM Page: 1/1 Date: 5/6/2016 12:55:18 AM
5/6/2016 12:55 AM FROM: Medimetrix Pharm. TO: 513-943-6115 PAGE: 001 OF 001

MEDIMETRIX
PHARMACEUTICALS, INC.

SAMPLE REQUEST FORM

Rx Only
LOPROX® (ciclopirox)
Cream, 0.77%
Up to 6 blurs of 6 samples each

Doctor: Ruth Cooper, DPM	Specialty: Podiatry
Address: 4415 B Altholz Road	Suite/Floor: Suite 200
City: Cincinnati	State: OH Zip: 45245
Phone: 513-943-0400	Fax: 513-943-6115
State License #: 36.002540	Contact (optional):
Email (optional):	

In compliance with the Prescription Drug Marketing Act (PDMA) regulations, please complete and verify all the information listed above. Incomplete requests cannot be processed. Please sign and date this form indicating your request for these samples and fax it to Medimetrix Pharmaceuticals, Inc. (973) 882-7502.

I certify that I am a licensed practitioner who can legally prescribe in my state. I am requesting product samples so that I may have the opportunity to evaluate the tolerability and effectiveness on appropriate patients. I will not sell, offer to sell, trade or barter samples, nor will I seek reimbursement from any payer for providing these samples to a patient. I further certify this is my personal, original signature.

Physician Signature: _____ Date: _____

Request Date: 7/10/2018
Request Expires: 8/28/2018

Keep your original, signed hard copy form in your office files to comply with federal law.

PLEASE RETURN VIA FAX TO:
Medimetrix Pharmaceuticals, Inc. (973) 882-7502
POD20180730LCBC176327

If you have questions or concerns regarding any Medimetrix Pharmaceuticals brand, please call Medimetrix Customer Service at (973) 882-7512, ext. 234, Monday through Friday from 9 am to 5 pm ET.

383 Route 46 West • Fairfield, New Jersey 07004-2402 • Ph: (973) 882-7512 • Fax: (973) 882-7502 • www.medimetrix.com
This fax was received by GFI FaxMaker fax server. For more information, visit: http://www.gfi.com

(*Id.* at 8.)

Cooper alleges that neither she nor anyone on her behalf gave permission to Medimetrix to send her these faxes. (ECF No. 8 at 4.) Furthermore, Cooper alleges that these faxes constituted advertisements under the provisions of the JFPA and the NJJFA. (*Id.*) In addition, Cooper alleges that the faxes lacked the notice that is required pursuant to the JFPA and NJJFA informing her of the opportunity to opt out of receiving any further faxed advertisements from Medimetrix and providing a manner in which to opt out. (*Id.* at 12.) Cooper now purports to bring claims on behalf of those who received both solicited and unsolicited faxes from Medimetrix where said faxes lacked the opt-out notice.

II. DISCUSSION

A. Rule 12(b)(6) Standard

It is not necessary for this Court to restate the standard for resolving this motion to dismiss the amended complaint that has been made pursuant to Rule 12(b)(6), because that standard has already been enunciated. See *Palakovic v. Wetzel*, 854 F.3d 209, 219–20 (3d Cir. 2017) (setting forth the standard, and explaining the holdings in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); see also *Fowler v. UPMC Shodyside*, 578 F.3d

203, 209–12 (3d Cir. 2009) (setting forth the standard, and explaining the holdings in *Iqbal* and *Twombly*).

B. Solicited JFPA Claims and Related Claims For Attorney Fees

Cooper alleges that she did not: (1) give permission to Medimetriks to fax advertisements to her; or (2) solicit such faxed advertisements in any way. (ECF No. 8.) Cooper emphasizes these allegations in opposition to the motion to dismiss. (See ECF No. 18 at 17 (alleging that “Medimetriks repeatedly sent unsolicited facsimiles to Dr. Cooper offering her free samples of Medimetriks’ products”); *id.* at 22 (arguing that “[f]rom a factual standpoint, Dr. Cooper alleged the faxes she received from Medimetriks were unsolicited; *i.e.*, ‘without [her] prior express invitation or permission’ ”).)

As a result, Cooper is unable to proceed as a class representative for those who might have standing to bring the Solicited JFPA Claims, because Cooper is not — in contrast to the caption of the amended complaint — a “similarly-situated person[]” insofar as these particular claims are concerned. (ECF No. 8 at 1.) As correctly argued by Medimetriks, Cooper is unable to represent the interests of the recipients who either solicited or gave permission to Medimetriks to send them faxes, but who then received said faxes without the opt-out information, as Cooper’s alleged experiences as to the faxes from Medimetriks were different. (See ECF No. 13-1 at 22–23 (Medimetriks arguing same).) It is well-settled law in the class action context that “[r]epresentatives must be part of the class and possess the *same* interest and suffer the *same* injury as the class members.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594–95 (1997) (emphasis added); *see also Zimmerman v. HBO Affiliate Grp.*, 834 F.2d 1163, 1169–70 (3d Cir. 1987) (affirming the dismissal of a cause of action due to the named plaintiff’s failure to state a claim, because “to be a class representative on a particular claim, the plaintiff must himself have a cause of action on that claim”).

*3 Furthermore, a named plaintiff in a purported class action cannot conjure up standing by “alleg[ing] a bare procedural violation, divorced from any concrete harm” to him or her, even where “a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right,” unless that plaintiff has alleged an injury-in-fact that is “fairly traceable to the challenged conduct of the defendant.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 1549 (2016). Even though — as with the situation in the instant case — “a suit may be a class action ... [it] adds nothing to the question of standing, for even named plaintiffs who represent

a class must allege and show that they personally have been injured, not that [an] injury has been suffered by other, unidentified members of the class to which they belong.” *Id.* at 1547 n.6 (citations and internal quotes omitted); *see also Ehrheart v. Verizon Wireless*, 609 F.3d 590, 607 (3d Cir. 2010) (holding the same). The Court cannot allow Cooper to proceed as a representative on behalf of those covered by the Solicited JFPA Claims, as Cooper herself neither solicited nor gave permission to receive the faxes from Medimetriks. *See Frank v. Gaos*, No. 17-961, 2019 WL 1264582, at *3 (U.S. Mar. 20, 2019) (remanding a class action case for further proceedings, because the lower courts failed to determine whether the named plaintiffs had personally experienced the alleged violation at issue, and thus whether those plaintiffs had standing to bring those particular claims).

Therefore, the Solicited JFPA Claims and the claims for attorney fees that are related to the Solicited JFPA Claims are dismissed. However, those claims are dismissed without prejudice, and with leave to Cooper to move for joinder of an additional plaintiff who indeed provided such permission to Medimetriks and then received faxes lacking the required opt-out information pursuant to the JFPA. By granting such leave, the Court is offering no opinion as to whether the Solicited JFPA Claims would then be found to be plausible or meritorious.

C. Unsolicited JFPA Claims and Related Claims For Attorney Fees

Cooper alleges that she did not permit Medimetriks to send her the faxes, and that the faxes did not contain opt-out information. Thus, the Court finds that Cooper has standing to proceed with the Solicited JFPA Claims. *See Amchem Prods., Inc.*, 521 U.S. at 594–95.

Medimetriks does not deny that the faxes fail to set forth any opt-out language. However, Medimetriks argues that Cooper has not plausibly alleged that the faxes at issue were advertisements, and argues that the faxes offer nothing for sale and were sent to Cooper in her capacity as a podiatrist in order to assist her with patient care. (ECF No. 13-1 at 8, 12.) Medimetriks further argues that “the faxes did not propose any commercial transaction with” Cooper, and thus argues that the JFPA does not apply here. (*Id.* at 8.)

The JFPA defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or

permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5); *see also* 47 U.S.C. 227(b)(1) (providing that “[i]t shall be unlawful for any person ... to send, to a telephone facsimile machine, an unsolicited advertisement”). Thus, a fax can still set forth a commercial pretext that falls under the regulation of the JFPA if it is “an indirect commercial solicitation, or pretext for a commercial solicitation.” *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 225 (6th Cir. 2015). All that is required for an unsolicited fax to merit scrutiny under the JFPA is for that fax to “draw[] the relevant market’s attention to its product to promote its sale (albeit indirectly).” *Id.* at 222; *see also Physicians Healthsource, Inc. v. Janssen Pharms., Inc.*, No. 12-2132, 2013 WL 486207, at *6 (D.N.J. Feb. 6, 2013) (holding insofar as the JFPA is concerned that “publications may be part of an overall marketing campaign to promote the commercial availability and quality of a sender’s goods or services,” and thus “while the message is informational to the extent that it is notifying the recipient of free ... services, the message can also be construed as [an] advertisement because it contains statements promoting the availability and quality of certain goods or services”). Indeed, as another Federal District Court has held in denying a motion to dismiss by a pharmaceutical-company defendant in a similar case that concerned claims brought under the JFPA, it is certainly plausible in this case that Medimetriks sent the unsolicited faxes to Cooper in her capacity as a podiatrist as advertisements to “promote[] the sale of its products to [her] patients, albeit indirectly, by passing on free samples through [her],” and that “the offer of free products is a vehicle to advertise [the defendant’s] products and sell those products to [her] patients.” *Cooper v. NeilMed Pharms., Inc.*, No. 16-945, 2017 WL 4349085, at *4 (S.D. Ohio Sept. 29, 2017).

*4 As a result, the Unsolicited JFPA Claims will be permitted to go forward, because the Court finds that the faxes at issue may plausibly be considered to be unsolicited advertisements at this juncture. In addition, the claims for attorney fees that are related to the Unsolicited JFPA Claims will also proceed at this juncture, as the Court is utilizing the discretion to refrain from determining the merits of the claims for attorney fees until the Unsolicited JFPA Claims themselves have been resolved on the merits. *See Artemi Ltd. v. Safe-Strap Co., Inc.*, No. 03-3382, 2013 WL 6860734, at *6 n.7 (D.N.J. Dec. 30, 2013) (denying without prejudice a motion to dismiss claims for attorney fees where the underlying claims in a patent infringement case remained viable, because “decisions concerning entitlement

to attorney[] fees can abide the resolution of the merits of th[e] suit”).

D. NJJFA Claims

Medimetriks argues that Cooper may not proceed in this litigation as the class representative for the claims brought under the NJJFA because she received the faxes in Ohio, and because the NJJFA pertains only to the recipients of fax advertisements within New Jersey. (ECF No. 13-1 at 9.) The NJJFA protects New Jersey residents from being forced to receive unsolicited fax advertisements without being provided with an option to opt out of receiving such faxes. N.J.S.A. 56:8-157; N.J.S.A. 56:8-158(b). Specifically, the NJJFA provides that “[a] person within this State shall not ... send an unsolicited advertisement to a telephone facsimile machine *within this State*.” N.J.S.A. 56:8-158(a).

As discussed earlier by the Court as to the Solicited JFPA Claims, it is well-settled law in the class action context that “[r]epresentatives must be part of the class and possess the same interest and suffer the same injury as the class members.” *Amchem Prods., Inc.*, 521 U.S. at 594–95. Cooper is the only named plaintiff in this Action. Cooper is not a New Jersey resident (she is a resident of Ohio) and Cooper did not suffer any alleged injuries in New Jersey (she was allegedly injured in Ohio), and thus Cooper is barred from proceeding as a class representative for the NJJFA claims. *See McGuire v. BMW of N. Am., LLC*, No. 13-7356, 2014 WL 2566132, at *6 (D.N.J. June 6, 2014) (in addressing a motion to dismiss putative class action claims, holding that the plaintiff lacked standing to assert claims under the laws of the states in which he did not reside or in which he suffered no injury, because the named plaintiff in a proposed class action should not be permitted to engage in lengthy class discovery for injuries in relation to every state in the country). In fact, Cooper concedes that she does not possess an individual claim under the NJJFA in this action, and that she is uncertain whether anyone in New Jersey even received the subject faxes from Medimetriks. (ECF No. 18 at 23 (Cooper stating that her “faxes were not received in New Jersey,” and that she “is seeking to represent all persons who received the ... Faxes — some of whom *likely* received these faxes in New Jersey and *may* ... be entitled to additional remedies under New Jersey law”)(emphasis added).)

Therefore, the NJJFA Claims and the claims for attorney fees that are related to the NJJFA Claims are dismissed. However, those claims are dismissed without prejudice, and with leave to Cooper to move for joinder of an additional plaintiff who

2019 WL 1370414

was allegedly injured by receiving faxes from Medimetriks in violation of the NJJFA within New Jersey.

E. Argument Raised By Medimetriks In The Reply Brief

Medimetriks suggests in its reply brief that the Court might consider staying this case at this juncture. (ECF No. 19 at 15–16.) Medimetriks argues that the Court may await the resolution of a matter that is pending in the United States Supreme Court concerning the holding in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 466 (4th Cir. 2018), in which a divided panel of the Fourth Circuit Court of Appeals held that a separate federal statute, *i.e.*, the Hobbs Act, precluded the District Court from considering whether an offer for a free e-book constituted an advertisement under the JFPA. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 478 (2018) (granting a petition for a writ of certiorari).

*5 However, the Court will not rule upon an argument that has been raised in the first instance in a reply brief. *See Alston v. Forsyth*, 379 F. App'x 126, 129 (3d Cir. 2010) (vacating an order granting summary judgment wherein the District Court accepted an argument that was raised for the first time in a reply brief as being dispositive of claims, because there was

no meaningful opportunity to present arguments or evidence in opposition to the decisive issue); *see also Reap v. Cont'l Cas. Co.*, 199 F.R.D. 536, 550 n.10 (D.N.J. 2001) (holding that it is improper to raise arguments for the first time in reply papers). If Medimetriks desired the Court to hold this case in abeyance, then it should have sought to do so by a properly-noticed motion that permitted Cooper to either oppose or join in that request.

III. CONCLUSION

For the aforementioned reasons: (1) the Solicited JFPA Claims, the NJJFA Claims, and the claims for attorney fees that are related to the Solicited JFPA Claims and the NJJFA Claims are dismissed; (2) the NJCFA claims and the claims for attorney fees that are related thereto are deemed to be withdrawn; and (3) the Unsolicited JFPA Claims and the claims for attorney fees that are related thereto remain viable. An appropriate Order follows this Opinion.

All Citations

Slip Copy, 2019 WL 1370414

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 12

2010 WL 1530152



KeyCite Yellow Flag - Negative Treatment

On Reconsideration in Part [Crouch v. Johnson & Johnson Consumer Companies, Inc.](#), D.N.J., August 2, 2010

2010 WL 1530152

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Jennifer CROUCH, individually and on behalf
of all others similarly situated, Plaintiffs,

v.

JOHNSON & JOHNSON CONSUMER

COMPANIES, INC.; Kimberly Clark Corporation;
Wal-Mart Stores, Inc.; and John Doe, Defendants.

Civil Action No. 09-CV-2905 (DMC).

|
April 15, 2010.

West KeySummary

**1 Antitrust and Trade
Regulation** Exclusive and Concurrent
Remedies or Laws**Products Liability** Economic losses;
damage to product itself**Products Liability** Cosmetics, soaps, and
hair-care products**Products Liability** Nature and form of
remedy

A mother failed to state a New Jersey law consumer fraud claim against a baby shampoo manufacturer. The mother's claims were preempted by the New Jersey Product Liability Act, which barred claims based on pure economic loss. The mother alleged that she suffered an economic loss at the time of her shampoo purchase because the shampoo contained undisclosed toxins and an ingredient banned by the FDA. N.J.S.A. 2A:58C-1b(2).

[8 Cases that cite this headnote](#)**Attorneys and Law Firms**[Scott M. Lempert](#), Sandals & Associates, P.C., Philadelphia, PA, for Plaintiff.[Daniel B. Carroll](#), Drinker, Biddle & Reath, LLP, Florham Park, NJ, [Walter H. Swayze, III](#), Segal, McCambridge, Singer & Mahoney, Ltd., Jersey City, NJ, [John C. McGuire](#), [Joseph F. Falgiani](#), Sedgwick, Detert, Moran, & Arnold, LLP, Newark, NJ, for Defendants.**OPINION**[DENNIS M. CAVANAUGH](#), District Judge.

***1** This matter comes before the Court upon motion by Johnson & Johnson Consumer Companies, Inc. (“J & J”), Kimberly-Clark Corporation (“KC”) and Wal-Mart Stores, Inc. (“Wal-Mart”) (collectively, “Defendants”) to dismiss the Amended Class Action Complaint (“Complaint”) of Jennifer Crouch, individually and on behalf of all others similarly situated, (“Plaintiffs”) for failure to state a claim pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) and for lack of subject matter jurisdiction pursuant to Fed. R. Civ. 12(b)(1). Pursuant to [Fed.R.Civ.P. 78](#), no oral argument was heard. After considering the submissions of all parties, it is the decision of this Court for the reasons herein expressed that Defendants’ motion to dismiss is **granted in part** and **denied in part**.

I BACKGROUND

The Complaint is brought individually and on behalf of all class purchasers (“Class Members”) of J & J’s Baby Shampoo, J & J’s Moisture Care Baby Wash, Aveeno Baby Soothing Relief Creamy Wash, Equate Tearless Baby Wash and Huggies Soft Skin Shea Butter Baby Wipes (“products”). Plaintiffs allege that “although Defendants represented that the products they marketed, distributed, promoted, sold, and/or made were safe for children, the Children’s Personal Care Products were actually contaminated with toxic chemicals linked to increased [cancer](#) risk, adverse skin reactions, and other serious health problems.” (Plaintiffs’ Complaint (“Pl.Compl.”), ¶ 1). Plaintiffs further allege that despite representations made by these companies that their products are safe and gentle, these products contain contaminants that are not disclosed on the label and that could otherwise have been removed pursuant to a process called vacuum stripping. (Pl.Compl., ¶¶ 2, 5).

2010 WL 1530152

Plaintiffs assert that independent lab tests, conducted in accordance with regulations promulgated by the Environmental Protection Agency (“EPA”), reveal that J & J’s Baby Shampoo contains methylene chloride in levels as high as 1.1 ppm, 1,4 dioxane levels as high as 38 ppm, and formaldehyde levels as high as 210 ppm. (Pl.Compl., ¶¶ 3, 46). “After testing, [J & J’s] Moisture Care Baby Wash was found to be contaminated with 1,4–dioxane. Independent Lab Tests found 1,4–dioxane levels of 22 ppm.” (Pl.Compl., ¶ 56). “After testing, [J & J’s] Aveeno Baby Soothing Relief Creamy Wash was found to be contaminated with 1,4–dioxane. Independent Lab Tests found 1,4–dioxane levels of 4.0 ppm.” (Pl.Compl., ¶ 66). Plaintiffs also assert that each of the foregoing qualifies as a cosmetic pursuant to the Food Drug and Cosmetic Act because each is “intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance” and is not “soap.” 21 U.S.C. § 321(i) (2008). (Pl.Compl., ¶¶ 50, 60, 69).

Plaintiffs also contend that “[a]fter testing, [] Kimberly Clark’s Huggies Soft Skin Shea Butter Baby Wipes were found to be contaminated with 1,4–dioxane. Independent Lab Tests found 1,4–dioxane levels of .53 ppm.” (Pl.Compl., ¶ 74). Moreover, Plaintiffs assert that this product qualifies as a cosmetic pursuant to the Food Drug and Cosmetic Act because it is “intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance” and is not “soap.” 21 U.S.C. § 321(I) (2008). (Pl.Compl., ¶ 77).

*2 Additionally, Plaintiffs allege that “[a]fter testing, [Wal-Mart’s] Equate Tearless Baby Wash was found to be contaminated with methylene chloride, 1,4–dioxane, and formaldehyde. Independent Lab Tests found methylene chloride levels of 0.57 ppm, 1,4–dioxane levels of 39 ppm, and formaldehyde levels of 350 ppm.” (Pl.Compl., ¶ 83). Plaintiffs assert that this product qualifies as a cosmetic pursuant to the Food Drug and Cosmetic Act because it is “intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance” and is not “soap.” 21 U.S.C. § 321(I) (2008). (Pl.Compl., ¶ 86).

Count I of the Complaint asserts a claim for breach of implied warranty pursuant to the Uniform Commercial Code

(“UCC”) § 2–314. (Pl. Compl. at 102). Count II of the Complaint asserts a claim for breach of implied warranties of merchantability and fitness for a particular use. (Pl.Compl., ¶ 114). Count III of the Complaint asserts a claim for unfair and deceptive trade practices. (Pl.Compl., ¶ 121). Count IV of the Complaint asserts a claim for unjust enrichment. (Pl.Compl., ¶ 129).

II. STANDARD OF REVIEW

“There is a fundamental difference of review under Rule 12(b)(1), where the existence of disputed facts will not preclude the court from evaluating the merits of the jurisdictional claim, and Rule 12(b)(6) where the court is required to accept as true all the allegations of the complaint and all inferences arising from them.” *Anjelino v. New York*, 200 F.3d 73, 87 (3d Cir.1999). “[T]he threshold to withstand a motion to dismiss under [Rule] 12(b)(1) is thus lower than that required to withstand a Rule 12(b)(6) motion.” *Kehr Packages Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991)).

A. Fed.R.Civ.P. 12(b)(6)

“The [d]istrict [c]ourt, in deciding a motion under Fed.R.Civ.P. 12(b)(6), [is] required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff].” *Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir.2008). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [] a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “[A court is] not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). “Factual allegations must be enough to raise a right to relief above a speculative level, [] on the assumption that all factual allegations in the complaint are true (even if doubtful in fact).” *Bell*, 550 U.S. at 555–56.

B. Fed.R.Civ.P. 12(b)(1)

*3 “On a Rule 12(b)(1) motion, no presumption of truthfulness attaches to the allegations of the plaintiff.” *CNA v. United States*, 535 F.3d 132, 139 (3d Cir.2008). A facial attack “concerns ‘an alleged pleading deficiency’ whereas a factual attack concerns the actual failure of [a plaintiff’s] claims to

2010 WL 1530152

comport [factually] with the jurisdictional prerequisites.” *Id.* (citing *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir.2007)).

III. DISCUSSION

A. Standing

To bring a suit in a federal court, Plaintiffs must have standing pursuant to Article III of the United States Constitution. To establish standing under Article III, Plaintiffs must show: (1) injury in fact; (2) causation; and (3) redressability. *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455 (3d Cir.2003); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (citing *AT & T Communications of N.J., Inc. v. Verizon N.J., Inc.*, 270 F.3d 162, 170 (3d Cir.2001)). “The injury must affect the plaintiff in a personal and individual way.” *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir.2000); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir.2009).

“[O]rdinarily, one may not claim standing to vindicate the constitutional rights of some third party.” *Pitt*, 215 at 362. “We apply this prudential rule against third party standing even when the requirements of Article III have been met, to ‘avoid deciding questions of broad social import ... [and] to limit access to the federal courts to those litigants best suited to assert a particular claim.’” *Id.* (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99–100, 99 S.Ct.

1601, 60 L.Ed.2d 66 (1979)). “[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” *Berg v. Obama*, 586 F.3d 234, 239 (2009) (citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Furthermore, “[t]he standing inquiry does not change in the context of a putative class action.... [S]tanding cannot be predicated on an injury which the plaintiff has not suffered, nor can it be acquired through the back door of a class action.” *Koronthal v. L'Oreal*, 2008 U.S. Dist. LEXIS 59024, *12 (D.N.J. July 25, 2008).

*4 Defendants contend that “Plaintiff[s] failure to plead any manifest, present, non-speculative injury, and failure to allege that [the products] did not provide cleansing benefits” requires the Court to conclude that Plaintiffs lack standing in the instant matter. In reliance upon this Court’s decision in *Koronthal*, Defendants assert that Plaintiffs’ demand for a refund of the purchase price as a consequence of exposure to Defendants’ products fails to establish an injury-in-fact and therefore, is not sufficient to confer standing where the alleged harm is no more than conjectural or hypothetical. As a result, Defendants claim that the absence of a cognizable injury and thereby standing in this matter requires dismissal pursuant to *Fed.R.Civ.P. 12(b)(1)*.

In response, Plaintiffs contend that economic injury is sufficient to confer standing in this matter, relying upon *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) and *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286 (3d Cir.2005). Plaintiffs contend that where the product contains undisclosed toxins and an ingredient banned by the FDA, the injury arises at the time of purchase. In distinguishing the *Koronthal v. L'Oreal* case, citing to this Court’s disposition on a motion for reconsideration, Plaintiffs assert that unlike *Koronthal* where this Court determined that plaintiff “provided no authoritative evidence that the lead levels in defendants’ lipstick products constitute[d] a dangerous amount or [were] in some way prohibited[,]” the present action involves methylene chloride, a substance banned by the FDA for use in cosmetics. 2008 U.S. Dist. LEXIS 86419, *11, 2008 WL 4723862 (D.N.J. Oct. 24, 2008). Further, Plaintiffs contend that the EPA classifies the other chemicals at issue as probable carcinogens. Lastly, Plaintiffs assert that their claims should stand because Plaintiffs have at least raised an issue of fact with respect to whether the chemicals contained in Defendants’ products are dangerous in amount.

2010 WL 1530152

The *Koronthal* case involved the purchase of a lipstick containing lead, the content of which was not subject to FDA regulation. *Id.* at *2–3. However, the lead content of the lipstick appeared dangerous when compared to the lead content regulation imposed by the FDA on candy. *Id.* In the absence of an FDA regulation concerning lead content in lipstick, or other legal prohibition, the plaintiff could not “seek a remedy for a harm that she ha[d] not actually or allegedly suffered.” Moreover, this Court accorded great weight to the decision in *Williams v. Purdue Pharma Co.*, 297 F.Supp.2d 171 (D.D.C.2003), concluding that the “plaintiffs’ allegation of an economic injury in a products liability action was insufficient to establish injury-in-fact” because “without alleging that a product failed to perform as advertised, a plaintiff has received the benefit of his bargain and has no basis to recover purchase costs.” *Id.* at *13–14. Therefore, the *Williams* Court “remarked that benefit of the bargain injury could not sustain a claim of injury in fact.” *Id.*

*5 While the Court agrees that the assertion of an economic injury is not an automatic bar to standing, *Koronthal* demonstrates that an exception has been recognized in the context of claims concerning defective products, absent a specific legal prohibition precluding particular ingredients or usages. Insofar as Plaintiffs’ claims pertain to allegedly toxic chemicals that have not been banned by the FDA for use in cosmetics, including 1,4-dioxane and formaldehyde, in accordance with *Koronthal*, this Court concludes that any potential injury is too remote, hypothetical and/or conjectural to establish standing in this matter. However, insofar as Plaintiffs’ claims pertain to methylene chloride, a chemical explicitly banned for use by the FDA in any cosmetic, this Court declines to dismiss Plaintiffs’ claims pursuant to Fed.R.Civ.P. 12(b)(1) for lack of standing. At this stage, Plaintiffs are permitted to proceed only with respect to claims concerning J & J’s Baby Shampoo and Wal-Mart’s Equate Tearless Baby Wash. With respect to the other allegedly defective products and their manufacturers, Plaintiffs’ claims are dismissed.

B. Choice of Law

As a federal district court sitting in diversity, this Court must apply the choice of law rules of New Jersey, the forum state. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). New Jersey’s choice of law rules mandate that the determinative law is that of the state with the greatest interest in governing the particular issue. The first step is to determine whether a conflict

exists between the law of interested states, and then any conflict shall be determined on an issue-by-issue basis. “Under general conflict of laws principles, where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a ‘false conflict,’ and the court should avoid the choice-of-law question.” *Williams v. Stone*, 109 F.3d 890, 894 (3d Cir.1997). If there is a conflict, then the court must identify the governmental policies underlying the law of each state and how those policies are affected by each state’s contacts to the litigation. If the state’s law is not related to its contacts with the litigation, then the state does not have an interest in having its law applied to the underlying issue. See *Vezey v. Doremus*, 103 N.J. 244, 510 A.2d 1187, 1189 (N.J.1986). That is, if there is an actual conflict between the two states’ laws, the court then determines “which state has the most meaningful connections with and interests in the transaction and the parties.” *Spence-Parker v. Del. Riv. & Bay Authority*, 2009 U.S. Dist. LEXIS 75187, *20, 2009 WL 2602094 (D.N.J. Aug. 21, 2009). Where no actual conflict of law exists, no choice of law need be made. See *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 333 (D.N.J.2005). “If there is no actual conflict, the court must apply the law of New Jersey.” *LNT Merck Co. v. Dyson, Inc.*, 2009 U.S. Dist. LEXIS 62308, *6 (D.N.J. July 21, 2009) (citing *Lebegern v. Forman*, 471 F.3d 424, 428 (3d Cir.2006)). In that instance, a motion to dismiss under Fed.R.Civ.P. 12(b) (6) should be decided under New Jersey law. See *Gallerstein v. Berkshire Life Ins. Co. of America*, 2006 U.S. Dist. LEXIS 64487, *3, 2006 WL 2594862 (D.N.J. Sept. 11, 2006).

*6 The parties’ moving papers recognize that the outcome is the same regardless of whether New Jersey State Law or Kentucky State Law is applied to this diversity action. Therefore, the parties assert that no conflict of laws issue is present in the instant matter.

1. New Jersey State Law Breach of Warranty, Consumer Fraud and Unjust Enrichment Claims

Defendants assert that dismissal is required with respect to all Plaintiffs’ claims because the claims are based on alleged harm caused by a product and as a consequence, are subsumed by the New Jersey Product Liability Act (“PLA”). Plaintiffs argue that the PLA does not subsume Plaintiffs’ UCC or consumer protection claims because Plaintiffs neither assert themselves as “claimants” nor allege present or future physical injuries as a consequence of Defendants’ products. Plaintiffs further allege that the heart of the present matter is the economic harm caused by Defendants’ misrepresentations, omissions and breaches of

2010 WL 1530152

warranty. Additionally, Plaintiffs contend that the instant matter does not present a risk of double recovery, and that the claims asserted do not constitute a failure to warn cause of action pursuant to the PLA.

The New Jersey Supreme Court decision in *Sinclair v. Merck & Co.* is instructive. In *Sinclair v. Merck & Co.*, the Plaintiffs “alleged that as a result of their direct and prolonged consumption of *Vioxx*, they are at enhanced risk of serious undiagnosed and unrecognized *myocardial infarction*, commonly referred to as ‘silent *heart attack*,’ and other latent and unrecognized injuries.” 195 N.J. 51, 55, 948 A.2d 587 (2008). In that case, the plaintiffs asserted claims for negligence, violation of the Product Liability Act, violation of the Consumer Fraud Act, breach of express and implied warranties and unjust enrichment. *Id.* In dismissing the complaint in its entirety, New Jersey Supreme Court determined the following,

[p]laintiffs seek to avoid the requirements of the PLA by asserting their claims as CFA claims. However, the Legislature expressly provided in the PLA that claims for “harm caused by a product” are governed by the PLA “irrespective of the theory underlying the claim.” N.J.S.A. 2A:58C-1b(3). We explained in *Lead Paint*, supra, that “[t]he language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action in relating to harms caused by consumer and other products.” 191 N.J. at 436–37, 924 A.2d 484. As a result, we declared that “[i]n light of the clear intention of our Legislature to include all [product liability] claims within the scope of the PLA, we find no ground on which to conclude that the claims being raised by plaintiffs, regarding an ordinary household product used by consumers, were excluded from the scope of” the PLA. We reach the same conclusion here.

The language of the PLA represents a clear legislative intent that, despite the broad reach we give to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product. The heart of plaintiffs' case is the potential for harm caused by Merck's drug. It is obviously a product liability claim. Plaintiffs' CFA claim does not fall within an exception to the PLA, but rather clearly falls within its scope. Consequently, plaintiffs may not maintain a CFA claim.

*7 *Id.* ^{1 2}

1 Although this Court permitted the CFA claims to proceed in *Nafar v. Hollywood Tanning Sys., Inc.*, in that case, the Plaintiff's claims and basis for distinction of the CFA from the PLA was the purchase of services, rather than the purchase of a defective product. 2007 U.S. Dist. LEXIS 26312, *12–14 (D.N.J. Apr. 5, 2007). CFA claims rooted in services are clearly distinguishable from claims grounded in products. The present action does not involve a claim for defective services.

2 Further, *In re Ford Motor Co. E-350 Van Products*, 2008 U.S. Dist. LEXIS 73690, *48 n. 9 (D.N.J. Sept. 3, 2008), where the Court found the Sinclair case “inapposite” “because, by design, the PLA ‘except[s] actions for harm caused by breach of an express warranty[,]’ which plaintiffs expressly allege[d.]” On the basis of an express warranty, the Court concluded that *Sinclair* decision “does not mandate dismissal of unjust enrichment and state consumer fraud claims where a party does not plead a PLA claim.” *Id.* (internal citations omitted). Plaintiffs do not assert a claim for breach of an express warranty in the present action.

Similarly, at the heart of this matter is the potential for harm caused by the defective products, J & J Baby Shampoo, J & J Moisture Care Baby Wash, Aveeno Baby Soothing Relief Creamy Wash, Kimberly–Clark's Soft Skin Shea Butter Baby Wipes and John Doe and Wal–Mart Equate Tearless Baby Wash, containing allegedly “toxic chemicals linked to increased *cancer* risk, adverse skin reactions, and other serious health problems.” (Compl., ¶ 2). Further, Plaintiffs allege that the products were rendered useless “because they were contaminated with dangerous and potentially cancer-causing chemicals and continued use of the products would require Plaintiffs and Class Members to knowingly continue and even increase the exposure of their vulnerable infants and children to the harmful contaminants.” (Compl., ¶ 2).

Consistent with the *Sinclair* decision, this Court concludes that the PLA subsumes all of Plaintiffs' claims, effectively precluding Plaintiffs' claims with respect to the CFA, and otherwise, in the absence of “harm” as defined by the PLA. The Court does not agree that articulating a claim in terms of pure economic harm where the core issue is the potential injury arising as a consequence of the products' allegedly harmful chemicals converts the underlying defective product claim into an independent and unrelated consumer fraud issue. Indeed, Plaintiffs' original Complaint contains a cause

2010 WL 1530152

of action for products liability strategically omitted from the amended Complaint. Limiting a claim to economic injury and the remedy sought to economic loss cannot be used to obviate the PLA.

The assertion of a claim pursuant to the PLA is premised upon a requisite level of harm, including:

- (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

N.J.S.A. 2A:58C–1b(2). Harm, for purposes of the PLA, does not include pure economic loss. Insofar as Plaintiffs concede that their injury is purely economic, Plaintiffs' claims cannot survive. Therefore, with respect to New Jersey law, in accordance with *Sinclair*, Plaintiffs' Complaint is dismissed without prejudice in its entirety.

2. Kentucky State Law Breach of Warranty, Consumer Fraud and Unjust Enrichment

Despite the parties' respective beliefs that there is no conflict of law issue present in the instant matter, it is not clear to the Court that product liability laws of Kentucky subsume related claims in the same manner as the New Jersey PLA. Therefore, upon dismissal of all New Jersey State Law claims and for purposes of inclusion, the Court will proceed by addressing the viability of Plaintiffs' claims under Kentucky State Law. If Plaintiffs have asserted viable claims pursuant to Kentucky State Law, then a conflict of law exists and the Court will undertake to ascertain which state has the superior interest in the litigation.

i. Consumer Fraud

*8 Defendants contend that Plaintiffs have no viable claims pursuant to Kentucky Consumer Protection Act ("CPA") because the Kentucky Products Liability Act ("KPLA") subsumes the CPA, because Plaintiffs fail to allege any non-speculative, ascertainable loss and finally, because Plaintiffs

fail to plead their claims with particularity in accordance with [Fed.R.Civ.P. 9\(b\)](#). Plaintiffs assert that claims pursuant to the CPA are not subsumed by the KPLA because Plaintiffs do not allege physical injury and because Plaintiffs are not seeking to impose liability on Defendants for representations made regarding a product different from the product purchased.

"As used in [KRS \[§§ \] 411.310 to 411.340](#), a 'product liability action' shall include any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, advertising, packaging or labeling of any product." *Monsanto Co. v. Reed*, 950 S.W.2d 811, 814 (Ky.1997) (citing [KRS § 411.300\(1\)](#)). "The PLA applies to all damage claims arising from the use of products, regardless of the legal theory advanced. There is no language in the PLA which suggests that products liability actions mean only those actions based on strict liability in tort under Section 402A of the Restatement of Torts. As we read the Act, if a claim is brought against a seller or a manufacturer of a product which is alleged to have caused injury, then the PLA applies, regardless of whether the action is founded on strict liability in tort, negligence or breach of warranty. While each of these theories of recovery in products liability cases requires proof of different elements and has different implications, [] their central purpose is the same: recovery of damages for injury or property damage caused by a product." *Id.*

"Under the Kentucky Consumer Protection Act, all 'unfair' acts or practices in the conduct of any trade or commerce are declared to be unlawful." *Ford Motor Co. v. Mayes*, 575 S.W.2d 480, 385 (Ky.Ct.App.1978) (citing [KRS 367.170\(1\)](#)). "The term 'unfair' is defined to mean 'unconscionable.'" *Id.* (citing [KRS 367.170\(2\)](#)). "Any person who purchases goods primarily for 'personal, family or household purposes' and who thereafter suffers any ascertainable loss as a result of any act declared unlawful by [KRS 367.170](#) is authorized to bring a civil action to recover actual damages." *Id.* (citing [KRS 367.220\(1\)](#)).

Notably, the Kentucky Court of Appeals has rejected the argument that the "Consumer Protection Act, K.R.S. 367170, was not intended to create a cause of action for bodily injury: that its purpose was to protect consumers against economic loss resulting from unethical trade practices by sellers of goods and services." *AMC v. Addington*, 1984 Ky.App. LEXIS 480, *13, 1984 WL 588048 (Ky.Ct.App. Apr.

2010 WL 1530152

6, 1984). “It is generally true that if injury results from an activity declared to be statutorily unlawful, then a tort has been committed. This is so notwithstanding the fact that the primary purpose of the Kentucky Consumer Protection Act is to suppress unethical trade practices for the buying public. We consider the statute to create a degree of consumer expectation as to the safety and usability of products, encompassing some mishandling and haphazards within the definition of ordinary use of a [product].” *Id.* at *13–14. That Court elaborated,

*9 [i]t is our reasoning that if one is injured from a breach of a statutory duty, in this case the duty imposed by [K.R.S. 367.220](#)³, then that cause of action is preserved by [K.R.S. 446.070](#)⁴, which [pr]ovides that a person injured by a violation of *any* statute may recover damages. While it appears that we are letting in the back door a cause of action via [K.R.S. 446.070](#), it is only sensible that one who breaches or violates a duty imposed by law should be responsible for the consequences readily foreseeable by that failure to follow the law. The cases annotated under overwhelmingly permit recovery for personal injuries resulting from various and sundry statutory violations.

³ **[K.R.S. 367.220](#). Action for recovery of money or property—When action may be brought.**

(1) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by [K.R.S. 367.170](#), may bring an action under the Rules of Civil Procedure in the Circuit Court in which the seller or lessor resides or has his principal place of business or is doing business, or in the Circuit Court in which the purchaser or lessee of goods or services resides, or where the transaction in question occurred, to recover actual

damages. The court may, in its discretion, award actual damages and may provide such equitable relief as it deems necessary or proper. Nothing in this subsection shall be construed to limit a person's right to seek punitive damages where appropriate.

⁴ **[K.R.S. 446.070](#). Penalty no bar to civil recovery.**
“A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”

Id. The principle espoused by the Kentucky Court of Appeals appears to be the inverse of the approach adopted in New Jersey. That is, rather than the KPLA subsuming the Kentucky CPA, the expansive reach of the Kentucky CPA appears to encompass and allow for the assertion of products liability/personal injury tort claims. Therefore, with respect to Kentucky State Law, this Court will not dismiss Plaintiffs' claims on this ground.

Although foreclosed by application of the PLA in the instant case, the CFA was enacted to “protect the consumer against imposition and loss as a result of fraud and fraudulent practices by persons engaged in the sale of goods and services.” *Smith v. Alza*, 400 N.J.Super. 529, 552, 948 A.2d 686 (2008). As articulated above, the “primary purpose of the Kentucky Consumer Protection Act is to suppress unethical trade practices for the buying public.” *AMC*, 1984 Ky.App. LEXIS 480, at *13, 1984 WL 588048. The representative Plaintiff resides in Louisville, Kentucky and from 2006 to 2008 purchased Defendants' products. J & J is a New Jersey corporation engaged in business throughout the United States. Wal-Mart is an Arkansas corporation engaged in business throughout the United States. Therefore, the Kentucky State contacts in the instant matter seem to outweigh New Jersey State contacts. Kentucky State Law prevails with respect to this issue.

ii. Breach of Warranty

Defendants move to dismiss Plaintiffs' breach of implied warranty claims because the Complaint fails to allege that the products were not merchantable or failed to perform the function for which they were sold, because the Complaint only asserts a claim for a potential breach and finally, because the Complaint fails to allege a “particular purpose” separate and apart from the ordinary purpose. In contrast, Plaintiffs contend that the Complaint adequately asserts a claim of breach of implied warranty of merchantability because the

2010 WL 1530152

products are adulterated with methylene chloride and for breach of implied warranty of fitness because the goods are not fit for their ordinary and/or particular use on children.

“Contract liability for breach of warranty arises not from the common law, but from the terms of the contract and the statutory provisions of the U.C.C. The concept of implied warranty in particular is governed by two express sections of the U.C.C., KRS 355.2–314 and KRS 355.2–315.” *Compex Int’l Co. v. Taylor*, 209 S.W.3d 462, 465 (Ky.2006). Pursuant to KRS 355.2–315, “[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under KRS 355.2–316[, Exclusion or Modification of Warranties,] an implied warranty that the goods shall be fit for such purpose.” “Fit for ordinary purposes for which used” does not require perfection. *Bickett v. W.R. Grace & Co.*, 1972 U.S. Dist. LEXIS 14781, *22, 1972 WL 20845 (W.D.Ky.1972). “The standard is reasonable fitness for the purpose intended.” *Id.* (internal citations omitted).

*10 Pursuant to KRS 355.2–314, “Goods to be merchantable must be at least as such as”

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

Assuming, without concluding, that the descriptive messages on the alleged defective products constitute promises or affirmations, then, in accordance with the foregoing limitations, Plaintiffs’ claims for breach of implied warranties pursuant to Kentucky State Law are permitted to proceed.

Although foreclosed by application of the PLA in the instant matter, the underlying purpose of the UCC as recognized by the New Jersey Supreme Court, is “to simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and to make uniform the law among various jurisdictions.” N.J.S.A. 12A:1–102(1); *Alloway v. General Marine Indus., L.P.*, 149 N.J. 620, 630, 695 A.2d 264 (1997). Kentucky recognizes that “one of the purposes of the UCC is ‘to make uniform the law among the various jurisdictions.’” *Star Bank v. Parnell*, 992 S.W.2d 189, 192 (Ky.Ct.App.1998). Kentucky also recognizes that “[a] principal purpose of the UCC is to lower transaction costs by permitting covered parties to rely on certain objective standards of fair and reasonable dealing.” *A & A Mech. v. Thermal Equip. Sales*, 998 S.W.2d 505, 510 (Ky.Ct.App.1999). Similar to the foregoing analysis, Kentucky’s contacts with the representative Plaintiff and the transactions that are the source of the Plaintiffs’ claims favors the application of Kentucky State law over New Jersey with respect to this issue.

iii. Unjust Enrichment

Defendants assert that where an adequate remedy at law exists, a claim seeking equitable relief is not viable. Additionally, Defendants contend that the unjust enrichment claim cannot survive because instead of being pled in the alternative, it merely incorporates other deficient claims set forth in the Complaint. Finally, Defendants argue that because Plaintiffs fail to assert that the allegedly defective products failed to perform the function for which they were sold, a claim for unjust enrichment cannot survive. By contrast, Plaintiffs assert that non-gratuitous benefits were conferred upon Defendant, the retention of which would unjustly enrich the Defendants.

“A party may state as many separate claims or defenses as it has, regardless of consistency.” *Holley Performance Products v. Keystone Auto Operations, Inc.*, 2009 U.S. Dist. LEXIS 102709, *16, 2009 WL 3613735 (W.D.Ky. Oct. 29, 2009). In *Holley*, the Court concluded that “as this is a motion to dismiss, and not for summary judgment, the burden on the plaintiff is only to allege sufficient facts to show unjust enrichment is a plausible claim for relief.” *Id.* (“The Court need not at this time determine whether or not there is in fact a viable contract claim which destroys any claims for equitable relief; the Court need only determine if all claims are sufficiently plead.”). “Under Kentucky law, to succeed on a claim of unjust enrichment,

2010 WL 1530152

the plaintiff must show the following elements: (1) a benefit conferred upon the defendant at the plaintiff's expense; (2) a resulting appreciation of the benefit by the defendant, and (3) an inequitable retention of the benefit without payment for its value.” *Stonestreet Farm, LLC v. Buckram Oaks Holdings, N.V.*, 2007 U.S. Dist. LEXIS 31313, *15, 2007 WL 6995056 (E.D.Ky. Apr. 16, 2007) (citing *Guarantee Electric v. Bog Rivers Electric Corp.*, 669 F.Supp. 1371, 1381 (W.D.Ky.1987)). Equitable remedies are only available where legal remedies are insufficient. *Holley*, 2009 U.S. Dist. LEXIS 102709, at *7, 2009 WL 3613735 (citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962)).

*11 Plaintiffs claim to have conferred a non-gratuitous benefit upon Defendants. Consistent with the elements of a claim for unjust enrichment, it is unclear to the Court how a non-gratuitous benefit is incurred at the expense of Plaintiffs.

Nonetheless, Plaintiffs allege exclusively economic injury. On this ground, there is no indication that an adequate remedy at law is unavailable to Plaintiffs. Therefore, to the extent that Plaintiffs assert a claim for unjust enrichment pursuant to Kentucky State Law, Plaintiffs' Complaint is dismissed.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion is **granted in part** and **denied in part**. Plaintiffs' Complaint is **partially dismissed without prejudice** pursuant to [Fed.R.Civ.P. 12\(b\)\(1\)](#) and [Fed.R.Civ.P. 12\(b\)\(6\)](#). An appropriate Order accompanies this Opinion.

All Citations

Not Reported in F.Supp.2d, 2010 WL 1530152

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 13

2020 WL 3546750

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Lory D'ADDARIO and Peter D'Addario, Plaintiffs,

v.

JOHNSON & JOHNSON; Ethicon, Inc.;
and Mentor Worldwide, LLC, Defendants.

Civil Action No. 19-15627 (MAS) (TJB)

|
Filed 06/30/2020**Attorneys and Law Firms**Dena Rachel Young, Brian J. McCormick, Jr., Ross Feller
Casey LLP, Philadelphia, PA, for Plaintiffs.Michael Charles Zogby, Drinker Biddle & Reath, LLP,
Florham Park, NJ, Jessica Leigh Brennan, Faegre Drinker
Biddle & Reath LLP, Gillette, NJ, for Defendants.**MEMORANDUM OPINION**

SHIPP, District Judge

*1 This matter comes before the Court upon Defendants Mentor Worldwide, LLC ("Mentor"), Ethicon, Inc. ("Ethicon"), and Johnson & Johnson's (collectively, "Defendants") Motion to Dismiss. (ECF No. 6.) Plaintiffs Lory D'Addario ("D'Addario") and Peter D'Addario (collectively, "Plaintiffs") opposed (ECF No. 25), and Defendants replied (ECF No. 26). ¹ The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to [Local Civil Rule 78.1](#). For the reasons set forth below, Defendants' Motion is granted.

¹ Defendants filed a notice of supplemental authority, alerting the Court to three "district court decisions granting Mentor's motions to dismiss in nearly identical cases." (ECF No. 27.) Plaintiffs replied to Defendants' notice. (ECF No. 28.) Thereafter, Defendants filed an additional notice of supplemental authority on another "district court decision granting Mentor's motion to dismiss in a nearly identical case." (ECF No. 29.)

I. BACKGROUND²

² The Court accepts all well-pleaded factual allegations as true. See *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

On June 14, 2013, the United States Food and Drug Administration ("FDA") approved Mentor's premarket approval application for its MemoryShape breast implants (hereinafter, "Mentor Breast Implants"). (Compl. ¶¶ 74, 218, ECF No. 1.) Defendants design, manufacture, market, label, and distribute Mentor Breast Implants. (*Id.* ¶ 1.)

In July 2015, D'Addario underwent breast reconstruction surgery and received Mentor Implants. (*Id.* ¶ 152.) Plaintiffs allege that, at that time, Defendants were aware that Mentor Implants caused breast implant-associated anaplastic large cell lymphoma ("BIA-ALCL") but failed to advise D'Addario of the risk. (*Id.* ¶¶ 73, 153–55.) Had D'Addario known of the slightest risk of BIA-ALCL, she would not have proceeded with the implantation. (*Id.* ¶ 156.)

In July 2017, D'Addario tested positive for BIA-ALCL. (*Id.* ¶ 158.) Following diagnosis and treatment of BIA-ALCL, D'Addario suffered pain, swelling, and embarrassment. (*Id.* ¶ 161.) In August 2017, D'Addario underwent implant removal and total capsulectomy. (*Id.* ¶ 159.) The explantation caused D'Addario tremendous pain. (*Id.* ¶ 160.)

Plaintiffs bring the following Counts against Defendants: (1) Strict Liability—Manufacturing Defect in violation of the Connecticut Product Liability Act ("CPLA"), Con. Gen. Stat. §§ 52-572, *et seq.*; (2) Negligent Misrepresentation; (3) Breach of Express and Implied Warranty; (4) Violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110b, *et seq.*; and (5) Loss of Consortium. (*Id.* ¶¶ 176–233.)

II. LEGAL STANDARD

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (alteration in original).

*2 District courts undertake a three-part analysis when considering a motion to dismiss pursuant to [Federal Rule](#)

of Civil Procedure 12(b)(6). *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011). “First, the court must ‘tak[e] note of the elements a plaintiff must plead to state a claim.’ ” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)) (alteration in original). Second, the court must accept as true all of the plaintiff’s well-pled factual allegations and “construe the complaint in the light most favorable to the plaintiff.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (internal quotations and citation omitted). In doing so, the court is free to ignore legal conclusions or factually unsupported accusations that merely state, “the-defendant-unlawfully-harmed-me.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Finally, the court must determine whether “the facts alleged in the complaint are sufficient to show that the plaintiff has a ‘plausible claim for relief.’ ” *Fowler*, 578 F.3d at 211 (quoting *Iqbal*, 556 U.S. at 679). “The defendant bears the burden of showing that no claim has been presented.” *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005).

III. DISCUSSION

Defendants make the following arguments for the dismissal of Plaintiffs’ Complaint: (1) Counts Two through Four are subsumed by the CPLA (Defs.’ Moving Br. 10–12); (2) Plaintiffs’ product liability claims are preempted by federal law (*id.* at 13–36); (3) Plaintiffs’ claims do not satisfy applicable pleading requirements (*id.* at 36–40); and (4) Plaintiffs’ loss of consortium claim fails because it is a derivative claim. The Court addresses each argument in turn.

A. CPLA Subsumption³

³ Under New Jersey’s “most significant relationship” test, where plaintiffs assert product liability claims, the plaintiffs’ home state has the “most significant relationship” to the issues. *Arlandson v. Hartz Mountain Corp.*, 792 F. Supp. 2d 691, 699 (D.N.J. 2011) (citing *P.V. v. Camp Jaycee*, 962 A.2d 453 (N.J. 2008)). Here, the Court applies the law of Plaintiffs’ home state of Connecticut to Plaintiffs’ product liability claims, which the parties do not dispute. (Defs.’ Moving Br. 7, ECF No. 6; Pls.’ Opp’n Br. 5, ECF No. 25.)

Defendants argue that Counts Two through Four of the Complaint are subsumed by the CPLA. (*Id.* at 10.) The CPLA provides the exclusive vehicle in Connecticut for actions premised on “harm caused by a product.” Conn. Gen. Stat. § 52–572n(a) (“A product liability claim ... shall be in lieu of

all other claims against product sellers, including actions of negligence, strict liability and warranty, for harm caused by a product.”). The provision essentially consolidates all product liability claims into a “single form of action.” *LaMontagne v. E.I. Du Pont De Nemours & Co.*, 41 F.3d 846, 855 (2d Cir. 1994) (citing *Winslow v. Lewis-Shepard, Inc.*, 562 A.2d 517, 521 (Conn. 1989)).

Here, the Court finds—and Plaintiffs agree (Pls.’ Opp’n Br. 34)—that Counts Two and Three alleging negligent misrepresentation and breach of express and implied warranty are subsumed by the CPLA. Although the two claims are dismissed, Plaintiffs may, nonetheless, assert these common law theories of products liability under Count One, their CPLA claim. *Fraser v. Wyeth, Inc.*, 857 F. Supp. 2d 244, 252 (D. Conn. 2012) (“A plaintiff bringing a cause of action under the CPLA therefore retains the right to allege traditional theories of recovery under one unified CPLA claim.” (citation omitted)).

Next, the Court turns to Plaintiffs’ CUTPA claim. The CPLA will not bar a CUTPA claim if an injury was not caused by a defective product or if the plaintiffs are not pursuing a claim for “personal injury, death or property damage.” *Gerrity v. R.J. Reynolds Tobacco Co.*, 818 A.2d 769, 774 (Conn. 2003) (quoting Conn. Gen. Stat. § 52–572m(b)). In other words, where the plaintiffs’ CUTPA claim seeks “to redress merely a financial injury suffered ... of a kind that has never been regarded as part of the traditional tort remedy for harm caused by a defective product,” the CUTPA claim is not barred. *Id.* at 775.

*3 Plaintiffs’ characterization of D’Addario’s injuries as “financial” in nature belies their true nature as harms caused by a defective product. (See Pls.’ Opp’n Br. 23–24.) Plaintiffs allege that, because of Defendants’ deceptive trade practices, she suffers from permanent and continuing injuries, which “require medical treatment and hospital expenses” and “lost ... financial gains.” (Compl. ¶ 228.) The Court, however, fails to distinguish between the injuries Plaintiffs allege and those typically asserted in garden-variety products liability suits. The Court, therefore, dismisses Plaintiffs’ CUTPA claim as barred by the CPLA’s exclusivity provision. For these reasons, the Court dismisses Counts Two, Three, and Four as subsumed by the CPLA.

B. Federal Preemption

Defendants argue that Plaintiffs’ state-law claims are either expressly or impliedly preempted by federal law. (Defs.’

Moving Br. 13–36.) Defendants also argue that certain claims fail because Plaintiffs have not alleged parallel state-law duties (*id.* at 28–36) or causal nexuses between her injuries and Defendants’ alleged violations (*id.* at 36).

The Medical Device Amendments of 1976 (“MDA”) to the Federal Food Drug & Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*, “imposed a regime of detailed federal oversight” for medical devices. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 316, 319 (2008). Of the devices regulated under the MDA, Class III devices that undergo the “premarket approval” process receive the greatest oversight. *Id.* at 317. The premarket approval process is “rigorous” and “includes review of the device’s proposed labeling. The FDA evaluates safety and effectiveness under the conditions of use set forth on the label, § 360c(a)(2)(B), and must determine that the proposed labeling is neither false nor misleading, § 360e(d)(1)(A).” *Id.* at 317–18.

Premarket approval further imposes “requirements” that are “specific to a medical device.” *Id.* at 323–24. Devices are “to be made with almost no deviations from the specifications in its approval application.” *Id.* at 323. “Once a device has received premarket approval, the MDA forbids the manufacturer to make, without FDA permission, changes in design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness.” *Id.* at 319 (citing § 360e(d)(6)(A)(i)).

To determine whether the MDA expressly preempts a state claim under § 360k(a), courts consider (1) whether the FDA has established “requirements” applicable to the specific device at issue; and if so, (2) whether the plaintiffs’ claims are based on state requirements that are “different from, or in addition to,” the federal ones and that “relate to safety and effectiveness.” *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 (3d Cir. 2018) (citing *Riegel*, 552 U.S. at 321–22). If the answer is yes to both questions, the state claim is preempted. *Id.* “If, instead, the answer to the second question is no, then the state duties in such a case parallel, rather than add to, federal requirements, and the claims are not preempted.” *Id.* (citation omitted) (internal quotation marks omitted).

Even if a state-law claim is not expressly preempted, it may be impliedly preempted under § 337(a). Under the MDA, all actions to enforce FDA requirements “shall be by and in the name of the United States.” 21 U.S.C. § 337(a). “[T]he Federal Government rather than private litigants ... are authorized to file suit for noncompliance with

the medical device provisions.” *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341, 349 n.4 (2001). To that end, the *Buckman* Court held that “state-law fraud-on-the-FDA claims inevitably conflict with the FDA’s responsibility to police fraud consistently with the Administrations judgment and objectives” and are impliedly preempted by the MDA. *Id.* at 350.

*4 Ultimately, where a state-law claim for violating a state-law duty “parallels” a federal-law duty under the MDA, the MDA will not preempt the state-law claim. *Riegel*, 552 U.S. at 330. It is not enough to state that a state law parallels federal law generally. Plaintiffs must also allege a link between a product’s deviation from an FDA requirement and the alleged injury. *Clements v. Sanofi-Aventis, U.S., Inc.*, 111 F. Supp. 3d 586, 598 (D.N.J. 2015); see *Simoneau v. Stryker Corp.*, No. 13-1200, 2014 WL 1289426, at *10 (D. Conn. Mar. 31, 2014) (dismissing a plaintiff’s misbranding, failure to warn, and failure to report claims for failure to link her injury to a violation of an FDA requirement).

Here, it is undisputed that Mentor *Breast Implants* received premarket approval. (Compl. ¶ 74.) It is also undisputed that the first part of the *Riegel* preemption analysis is satisfied. (Pls.’ Opp’n Br. 18.) The Court, therefore, only considers the second part of the *Riegel* test—whether Plaintiffs’ state-law claims would impose requirements that are “different from or in addition to” federal safety and effectiveness requirements.

1. Strict Product Liability—Manufacturing Defect

Plaintiffs allege that “Mentor *Breast Implants* were manufactured in a flawed manner that violated the FDA approved design standards and specifications.” (Compl. ¶ 178.) Plaintiffs allege that the *breast implants* she received were manufactured in a non-conforming manner because they “contained a graham-negative biofilm/endotoxin released from the surface of the textured surface which stimulates *lymphocytes*” (Compl. ¶ 180), and that these “bacteria stimulating *lymphocytes*” caused D’Addario’s BIA-ALCL (*id.* ¶ 182).

Plaintiffs do not, however, allege that the FDA required the exclusion of this endotoxin. If a federal requirement is not properly identified, the Court is unable to determine whether Plaintiffs’ state-law claim based upon Connecticut requirements is “different from, or in addition to,” the federal ones, that relate to safety and effectiveness. *Mendez v. Shah*,

2020 WL 3546750

94 F. Supp. 3d 633, 639 (D.N.J. 2015). Moreover, although Plaintiffs broadly allege that Defendants “failed to adhere to [numerous] federal specifications” (e.g., Compl. ¶ 184a-e), Plaintiffs fail to allege how these violations resulted in the presence of lymphocytes in her implants or any other injury. Plaintiffs’ manufacturing defect claim is, accordingly, dismissed.

To the extent Plaintiffs now base their manufacturing defect claim on violations of FDA’s Current Good Manufacturing Practices (see Pls.’ Opp’n Br. 9, 17–18), these allegations are improperly pleaded in the opposition brief. “[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.” *Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) (citation omitted). Because the Court grants Plaintiffs leave to amend the Complaint, Plaintiffs may further flush out this theory in an amended complaint.

2. Failure to Warn

The contours of Plaintiffs’ failure-to-warn claim are unclear, as allegations that could potentially support such a claim are scattered throughout the Complaint. (See generally Compl.) Nonetheless, liberally construing the Complaint, the Court identifies the following two theories: (1) Defendants failed to warn “consumers, healthcare providers, the general public, and the FDA that ALCL or BIA-ALCL ... was a potential risk of Mentor Breast Implants, and that hundreds, if not thousands, of patients had suffered negative experiences and events as a result of such known risk” (Compl. ¶ 117); and (2) Defendants failed to warn D’Addario “of the defective and unreasonably dangerous conditions of its Mentor Breast Implants that could cause serious injury or death and to timely and accurately report such adverse events to the FDA” (*id.* ¶ 179).

*5 To the extent Plaintiffs take issue with the original warning Mentor provided to “consumers, [including D’Addario], healthcare providers. [and] the general public” (Compl. ¶ 117), this claim is preempted. A device’s “proposed labeling” is reviewed during the PMA process and a manufacturer may not revise the labeling without FDA permission. *Riegel*, 552 U.S. at 318–19. “[S]tate claims based on labeling defects such as false or missing information about health risks ... are[, therefore,] preempted in the case of Class III medical devices, because these claims necessarily impose requirements different from or additional

to the FDA’s requirements.” *Simoneau*, 2014 WL 1289426, at *11; see also *Horn v. Thoratec Corp.*, 376 F.3d 163, 176 (3d Cir. 2004) (finding a plaintiff’s state-law claims would add to the requirements imposed by the FDA on device labeling). Because Plaintiffs’ claim would require Mentor to provide different warnings or instructions from those initially approved by the FDA, the claim is preempted.

To the extent Plaintiffs challenge the information Mentor provided to the FDA in its premarket approval application (Compl. ¶ 117), Plaintiffs “identif[y] no separate state law duty to warn the FDA.” *Simoneau*, 2014 WL 1289426, at *11. Moreover, such a claim fundamentally alleges fraud-on-the-FDA and would be impliedly preempted under *Buckman*. For these reasons, the Court dismisses Plaintiffs’ failure-to-warn claim.

3. Negligent Misrepresentation

Plaintiffs allege that Defendants “negligently misrepresented material information regarding their product including, but not limited to, its safety.” (Compl. ¶ 202.) According to Plaintiffs, “Defendants knew or should have known that their breast implants were not actually safe as they were manufactured in a defective condition.” (*Id.* ¶ 203.) Plaintiffs allege that “[D’Addario] was[, therefore,] unaware and ignorant of the falsity of the statements and reasonably ... relied upon them and believed them to be true.” (*Id.* ¶ 204.)

Here, Plaintiffs’ negligent misrepresentation claim fails because they wholly fail to set forth a relevant federal requirement. To the extent Plaintiffs’ claim is based on defective manufacturing, the Court reiterates that Plaintiffs fail to allege a violation of a federal requirement on this basis. See *supra* Section III.B.2. Plaintiffs’ negligent misrepresentation claim is dismissed.

4. Breach of Implied and Express Warranty

The Complaint alleges that “Mentor Breast Implants do not conform to ... implied or express warranties and representations because [they] are not safe or effective for their ordinary purpose, nor are they safer or more effective than other breast implants available, [and] they were not manufactured in the specifications required by the FDA.” (Compl. ¶ 220; see also *id.* ¶¶ 213–16, 221.)

Here, again, Plaintiffs' breach of warranty claim based on device safety and effectiveness fails because Plaintiffs fail to allege a violation of a federal regulation. *Supra* Section III.B.2. Furthermore, Plaintiffs' breach of warranty claim essentially challenges the safety and effectiveness of Mentor [Breast Implants](#), and, to find for Plaintiffs, the Court would necessarily contradict the FDA's determination of safety and effectiveness during premarket approval. Plaintiffs' breach of express and implied warranty claim is, accordingly, dismissed.

C. Group Pleading

Defendants argue that Plaintiffs make "the same conclusory and generic allegation against each defendant—i.e., that each defendant is responsible for 'designing, formulating, testing, packaging, labeling, producing, assembling, advertising, marketing, promoting, distributing, manufacturing, and selling' " Mentor [Breast Implants](#). (Defs.' Moving Br. 37 (quoting Compl. ¶ 22).) According to Defendants, by "lumping" together their alleged misconduct, Plaintiffs fail to provide fair notice of the basis of their claims as against each individual defendant. (*Id.*) Defendants further argue that, although Plaintiffs allege that Johnson & Johnson and Ethicon are "agents" or "alter-egos" of Mentor or that Johnson & Johnson "controlled" Mentor, Plaintiffs fail to allege facts that support these theories. (*Id.* at 38–39.) Plaintiffs argue that they have fulfilled their duty at this pleading stage—pointing to allegations that Johnson & Johnson has owned Mentor since 2009 and that Johnson & Johnson and Ethicon admitted they are "combining forces" with Mentor. (Pls.' Opp'n Br. 37–38.)

*6 Plaintiffs' Complaint broadly alleges Defendants' misconduct but fails to allege the conduct for which each defendant is culpable. "Courts in this district generally agree that this type of 'group pleading' does not satisfy [Rule 8](#), because it does not place Defendants on notice of the claims against each of them." *Sheeran v. Blyth Shipholding S.A.*, No. 14-5482, 2015 WL 9048979, at *3 (D.N.J. Dec. 16, 2015). Moreover, the lack of well-pleaded facts does not allow the

Court "to draw the reasonable inference that [each] defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Plaintiffs, accordingly, have not alleged sufficient facts to identify each defendant's role with the Mentor [Breast Implants](#). It is not enough to say that "each of the defendants is responsible for everything." *Sheeran*, 2015 WL 9048979, at *5. Nor does the *In re Riddell Concussion Reduction Litigation*, 77 F. Supp. 3d 422 (D.N.J. 2015) decision mandate a contrary conclusion. There, the plaintiffs alleged that the defendant entities took concerted action and "operat[ed] under a single brand." *Id.* at 431–32. Plaintiffs make no such allegations as to Defendants here. (*See generally* Compl.) Because Counts One through Five are directed to each of the Defendants, they are dismissed without prejudice.

D. Plaintiffs' Loss-of-Consortium Claim Fails

Because a loss of consortium claim is a derivative claim and because D'Addario fails to assert a product liability claim, Peter D'Addario's loss of consortium claim fails as a matter of law and must be dismissed. *Jacoby v. Brinckerhoff*, 735 A.2d 347, 352 (Conn. 1999) (Finding a "plaintiff cannot pursue an action for loss of consortium in the absence of any basis in the record for a finding that his ... spouse was injured as a result of her treatment by the defendant"); *see also O'Dell v. Greenwich Healthcare Servs., Inc.*, No. CV116008364S, 2013 WL 2278752, at *5 (Conn. Super. Ct. Apr. 25, 2013).

IV. CONCLUSION

For these reasons, the Court grants Defendants' Motion to Dismiss. The Complaint is dismissed without prejudice subject to the filing of an amended complaint. The Court will enter an Order consistent with this Memorandum Opinion.

All Citations

Slip Copy, 2020 WL 3546750

TAB 14

686 Fed.Appx. 101

This case was not selected for
publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued
on or after Jan. 1, 2007. See also U.S.Ct. of
Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

David DANON, Appellant

v.

VANGUARD GROUP, INC.

No. 16-2881

|
Submitted under Third Circuit
LAR 34.1(a) on January 26, 2017

|
(Opinion filed: April 12, 2017)

Synopsis

Background: Former employee sued former employer
alleging violations of Sarbanes-Oxley Act, Dodd-Frank
Wall Street Reform and Consumer Protection Act, and
Pennsylvania whistleblower law, The United States District
Court for the Eastern District of Pennsylvania, [C. Darnell
Jones, II, J.](#), [2016 WL 2988987](#), dismissed action. Former
employee appealed.

[Holding:] The Court of Appeals, [Roth](#), Circuit Judge, held
that New York case did not preclude former employee's
federal suit, where federal complaint did not suffer from same
defect as state case.

Vacated in part and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (2)

[1] Judgment **Matters which were not or
could not have been adjudicated**

Former employee was not precluded under issue
preclusion doctrine from asserting that former
employer knew about his activities in federal

suit alleging violations of Sarbanes-Oxley Act,
Dodd-Frank Wall Street Reform and Consumer
Protection Act, and Pennsylvania whistleblower
law, where issue decided in prior New York case
was whether employee's complaint adequately
alleged facts regarding employer's knowledge
of his whistleblowing activities. [15 U.S.C.A. §
78u-6\(h\)\(1\)](#); [18 U.S.C.A. § 1514A](#); [43 P.S. §
1423](#).

[2 Cases that cite this headnote](#)

[2] Judgment **Dismissal and nonsuit**

Judgment  **Matters which were not or
could not have been adjudicated**

Federal complaint, which did allege knowledge
on part of former employer in suit by former
employee alleging violations of Sarbanes-Oxley
Act, Dodd-Frank Wall Street Reform and
Consumer Protection Act, and Pennsylvania
whistleblower law, was not precluded by prior
New York decision, which affirmed dismissal
for failure to adequately plead knowledge of
employee's allegedly protected conduct. [15
U.S.C.A. § 78u-6\(h\)\(1\)](#); [18 U.S.C.A. § 1514A](#);
[43 P.S. § 1423](#).

[1 Cases that cite this headnote](#)

***102** On Appeal from the United States District Court for
the Eastern District of Pennsylvania (D. C. Civil Action No.
2-15-cv-06864), District Judge: Honorable [C. Darnell Jones,
II](#)

Attorneys and Law Firms

[James L. Griffith, Sr.](#), Esq., Blue Bell, PA, for Plaintiff-
Appellant

[Kelly A. Carrero](#), Esq., [Jones Day](#), New York, NY, [Paul G.
Nofer](#), Esq., Klehr Harrison Harvey Branzburg, Philadelphia,
PA, for Defendant-Appellee

[Stephen G. Yoder](#), Esq., United States Securities & Exchange
Commission, Washington, DC, for Amicus Appellant
Securities & Exchange Commission

OPINION *

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

ROTH, Circuit Judge

David Danon used to work as a tax lawyer for The Vanguard Group, Inc., an investment services firm. He came to believe that Vanguard was violating certain tax and corporate laws, and he informed various senior employees of Vanguard of this belief. Vanguard's officers disagreed with Danon's assessment of the law, but Danon continued to inform Vanguard employees of his legal conclusions. Three years later, Vanguard terminated his employment. He then sued Vanguard in New York state court, specifying numerous causes of action, one of which was retaliation. However, his case was dismissed because, as relevant here, it did not adequately plead facts relating to Vanguard's knowledge of Danon's activities. He has now sued Vanguard for retaliation under several different statutes in federal court, but his case was dismissed again—this time because, among other reasons, he was precluded from asserting that Vanguard knew about his activities. He has now appealed that dismissal, arguing that he is not precluded. For the reasons that follow, we agree. However, because he has not appealed with respect to any other issue, and because the District Court provided sufficient alternative grounds for dismissing all of Danon's claims except the Dodd-Frank claim, we will vacate only the dismissal of the Dodd-Frank claim.

I. Background

In 2010, Danon, while working as a tax lawyer for Vanguard, came to the conclusion *103 that Vanguard was engaged in illegal tax and corporate practices. He alleges that, beginning at that time and continuing throughout the remainder of his employment with Vanguard, he advised various senior corporate employees and members of Vanguard's tax department of his conclusion. However, these individuals rejected his conclusion. He alleges that Vanguard's senior employees told him to stop attempting to notify individuals at Vanguard of his conclusion and not to put this conclusion in writing. In addition, he alleges that, around this time, a Vanguard employee requested that Danon perform certain

duties (which he does not specify) that Danon refused to perform because he believed they were in violation of the law. On or around January 3, 2013, Vanguard informed Danon that it was going to terminate his employment soon and that he should seek other employment. Vanguard ultimately terminated his employment in June 2013.

Shortly before his termination, on May 8, 2013, Danon filed an action against Vanguard with the Supreme Court of New York in New York County. Among other causes of action, he suggested that Vanguard retaliated against him by firing him for his efforts to stop Vanguard's illegal activities, and that this retaliation violated the New York False Claims Act. Upon Vanguard's motion, his complaint was dismissed. The court held that the complaint failed to allege a claim for retaliation under the statute because it did not "contain any allegations that [Vanguard] knew in January 2013[] that Danon was involved in protected conduct." While he repeatedly stressed that Vanguard knew about his conduct, he did "not indicate the dates when he expressed his concerns to Vanguard's employees and, in particular, whether he did so before he was informed of his termination in January 2013."¹ Because knowledge was a necessary element of Danon's claim, failing to plead knowledge adequately was sufficient to warrant dismissal.

¹ App. 174.

While Danon was appealing that dismissal, he filed this suit against Vanguard in the United States District Court for the Eastern District of Pennsylvania. He claimed that his termination was retaliation in violation of the whistleblower protections of the Sarbanes-Oxley Act,² the Dodd-Frank Wall Street Reform and Consumer Protection Act,³ and the Pennsylvania Whistleblower Law.⁴ Vanguard moved to dismiss on the basis of, among other things, issue preclusion and failure to provide sufficient factual allegations to support the claim for retaliation.⁵ The District Court held that issue preclusion applied and defeated Danon's claims.⁶ The District Court also held that the Pennsylvania Whistleblower Law claim was time-barred because Danon did not bring his claim within 180 days after occurrence of the alleged violation, as required by the statute, and the Sarbanes-Oxley claim was barred because it was not administratively exhausted with the Occupational Safety and Health Administration, as required by the statute.⁷

2 18 U.S.C. § 1514A.

3 15 U.S.C. § 78u-6(h)(1).

4 43 P.S. § 1423.

5 Because the District Court did not decide whether the complaint provided sufficient factual allegations to support the claim, we do not decide that issue here either.

6 *Danon v. Vanguard Grp., Inc.*, No. 15-6864, 2016 WL 2988987, at *3-*4 (E.D. Pa. May 23, 2016).

7 *Id.* at *6. Danon has not appealed these determinations.

This appeal followed.

*104 II. Discussion ⁸

8 The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Our review over a District Court's grant of a motion to dismiss on the basis of issue preclusion is generally plenary. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 248 (3d Cir. 2006).

The District Court held that Danon was precluded "from relitigating whether there was a causal connection between his firing and his activities, even if such activities are protected. As a causal connection is a component of the *prima facie* case for retaliation claims under SOX, Dodd-Frank, and the Pennsylvania Whistleblower Law, Plaintiff's Complaint must be dismissed."

The District Court held that a New York state court case gave rise to preclusion here. "[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."⁹ Hence, we look to New York law to determine whether Danon would be precluded in this suit. Under New York law, issue preclusion prevents a party from relitigating an issue that was decided in an earlier proceeding.¹⁰ For preclusion to apply, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second,

there must have been a full and fair opportunity to contest the decision now said to be controlling."¹¹

9 *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984).

10 *Atl. Mut. Ins. Co. v. Lauria*, 291 A.D.2d 492, 739 N.Y.S.2d 394, 396 (2002).

11 *Schwartz v. Pub. Adm'r of Bronx Cty.*, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725, 729 (1969). See also *PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 491 (2d Cir. 2004) (quoting *Schwartz* to describe New York issue preclusion).

[1] [2] The issue that was decided in the New York case was whether Danon's complaint adequately alleged facts regarding Vanguard's knowledge of Danon's whistleblowing activities. The court did not decide whether, in fact, Vanguard knew about Danon's activities.¹² Hence, Danon is not precluded from asserting that Vanguard knew about Danon's activities in this case; that factual issue was not decided. More generally, the New York decision can give rise to issue preclusion only insofar as Danon's complaint suffers from the same defects as the New York complaint did.¹³ The federal complaint does allege knowledge, so it does not suffer from the same defect.¹⁴ For this reason, we will vacate the issue preclusion portion of the District Court's opinion.

12 App. 173-75.

13 *175 E. 74th Corp. v. Hartford Acc. & Indem. Co.*, 51 N.Y.2d 585, 435 N.Y.S.2d 584, 416 N.E.2d 584, 586 n.1 (1980) ("A dismissal [for failure to state a cause of action] has preclusive effect only as to a new complaint for the same cause of action which fails to correct the defect or supply the omission determined to exist in the earlier complaint.").

14 In determining that the federal complaint alleges knowledge, we are not deciding whether those allegations are appropriate or sufficient. We leave that determination to the District Court.

III. Conclusion

For the foregoing reasons, we will vacate the portion of the District Court's opinion dismissing the Dodd-Frank claim

2017 IER Cases 119,585

and remand for further proceedings consistent with this opinion.¹⁵

these claims in the first instance. Thus, we will not resolve them here.

¹⁵ The parties raised additional arguments regarding the Dodd-Frank claim before this Court. The District Court, however, is better situated to rule on

All Citations

686 Fed.Appx. 101, 2017 IER Cases 119,585

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 15

2006 WL 1373230

United States District Court, D. New Jersey.

Craig P. DONOVAN, et al., Plaintiffs,

v.

The PUBLIC POLICY CENTER OF
NEW JERSEY, et al., Defendants.

Civil Action No. 05–1181 (MLC).

|
May 17, 2006.**Attorneys and Law Firms**[Kimberly G. Jinks](#), Markowitz Gravelle, LLP, Lawrenceville,
NJ, for Plaintiffs.[Michael A. Cifelli](#), Scarinci & Hollenbeck LLC, Lyndhurst,
NJ, for Defendants.**MEMORANDUM OPINION**[COOPER](#), District Judge.

*1 The defendants, the Public Policy Center of New Jersey (“PPCNJ”), Mark J. Magyar (“Magyar”), Sharon L. Naeloe (“Naeloe”), W. Michael Murphy, Jr. (“Murphy”), Judith Shaw (“Shaw”), Richard H. Bagger, Michael F. Candwell, Susan A. Cole, Ellen M. Dotto, William G. Dressel, Jr., Joseph E. Gonzales, Jr., Jeannine LaRue, Roger E. Nutt, James Morford, James E. Schroeder, Robert G. Sommer, John Torok, Joan C. Verplanck, Sharon L. Weiner, Melanie Willoughby, and Ronald Applebaum (collectively, the “defendants”) move to dismiss the complaint filed by the plaintiffs, Craig P. Donovan (“Donovan”) and Linda J. Holaday (“Holaday”) (collectively, the “plaintiffs”), for (1) failure to state a claim upon which relief may be granted, pursuant to [Federal Rule of Civil Procedure](#) (“Rule”) 12(b)(6), and (2) lack of subject matter jurisdiction, pursuant to [Rules](#) 12(b)(1) and 12(h)(3).¹ The Court, for the reasons stated herein, will deny the motion.

¹ Laurence M. Downes (“Downes”) is a named defendant in the action and has been served with a copy of the complaint. (Dkt. entry no. 37, 2–21–06 Aff. of Serv.) However, no counsel has properly entered an appearance on his behalf. (See Dkt. entry no. 40, 3–16–06 Stipulation.) Counsel for the

other defendants has not indicated that they also represent Downes.

BACKGROUND

The plaintiffs are two former employees of PPCNJ. Magyar founded PPCNJ on or about September 1, 2001, to serve as a “nonprofit organization with missions and programs geared toward the public’s education of policy issues facing New Jersey’s citizens.” (Compl., at ¶¶ 38, 40.) PPCNJ publishes, *inter alia*, the New Jersey Reporter (the “Reporter”) and the New Jersey Heritage magazines. (*Id.* at ¶ 39.)

PPCNJ hired Holaday to serve as the “full-time Marketing Director ... when it opened its doors on or about September 1, 2001.” (*Id.* at ¶ 52.) PPCNJ employed Holaday at a salary of \$40,000 annually, plus reimbursement of out-of-pocket expenses. (*Id.* at ¶¶ 32, 53.) As Marketing Director, Holaday was assigned responsibility for PPCNJ’s marketing, and she (1) edited photography for all of PPCNJ’s publications, and (2) attended and participated in conferences and staff meetings. (*Id.* at ¶ 54.) Holaday voluntarily terminated her employment with PPCNJ effective November 4, 2003. (*Id.* at ¶ 55.)

PPCNJ hired Donovan as its Vice President of Policy and Research, and he “began working in that capacity ... on or about September 1, 2001.” (*Id.* at ¶ 57.) PPCNJ employed Donovan at a salary of \$25,000 annually, plus reimbursement of out-of-pocket expenses. (*Id.* at ¶¶ 31, 58.) Donovan worked at PPCNJ part-time, for approximately 20–25 hours per week. (*Id.* at ¶ 59.) Donovan’s employment at PPCNJ supplemented his full-time position as a college professor. (*Id.* at ¶ 64.)

As Vice President of Policy and Research, Donovan was primarily responsible for writing and editing articles for publication in the Reporter and on the Internet. (*Id.* at ¶ 60.) In this regard,

[h]is efforts were focused on supporting and developing PPCNJ’s work, by analyzing public policy issues, providing research to support such work, promoting public awareness and participation in the analyses and discussions of major issues relating to New Jersey and its citizens, and writing columns

or articles about such issues in each edition of the Reporter. He also attended and participated in conferences and regular staff meetings.

*2 (*Id.*) Donovan voluntarily terminated his employment with PPCNJ on or about December 1, 2003.

The plaintiffs brought this action alleging that the defendants—in particular, PPCNJ—failed to pay their earned wages or reimburse them for expenses incurred while working for PPCNJ. (Compl., at ¶¶ 30, 37, 73–75.) The plaintiffs assert that the defendants violated the (1) Fair Labor Standards Act (“FLSA”), (2) New Jersey State Wage and Hour Law (“NJWHL”), and (3) New Jersey State Wage Payment Law (“NJWPL”). (*Id.* at ¶¶ 77–107.) The plaintiffs also assert claims for breach of contract and quantum meruit. (*Id.* at ¶¶ 108–135.) The defendants moved to dismiss on December 1, 2005, claiming that (1) the plaintiffs failed to state a claim upon which relief may be granted, pursuant to [Rule 12\(b\)\(6\)](#), and (2) the Court lacked subject matter jurisdiction, pursuant to [Rules 12\(b\)\(1\)](#) and [12\(h\)\(3\)](#). (Dkt. entry no. 28.)

DISCUSSION

I. Standard Of Review For A 12(b)(6) Motion

A complaint may be dismissed for “failure to state a claim upon which relief can be granted.” [Fed.R.Civ.P. 12\(b\)\(6\)](#). On a motion to dismiss, the Court must accept as true all of the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff. *Doe v. Delie*, 257 F.3d 309, 313 (3d Cir. 2001). But a court need not credit a complaint’s “bald assertions” or “legal conclusions” when deciding a motion to dismiss. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429–30 (3d Cir.1997) (citation omitted). “Dismissal of claims under [Rule 12\(b\)\(6\)](#) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim upon which relief may be granted.” *Jakomas v. McFalls*, 229 F.Supp.2d 412, 419 (W.D.Pa.2002).

The Court, when considering a motion to dismiss, may generally not “consider matters extraneous to the pleadings.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426. However, if the Court exercises discretion and permits a party to present matters outside the pleadings, the Court must

(1) convert the motion to dismiss into one for summary judgment, and (2) allow the parties a reasonable opportunity to present all material pertinent to such a motion under [Rule 56](#). [Fed.R.Civ.P. 12\(b\)](#). An exception to this general rule is that the Court may consider (1) exhibits attached to the complaint, (2) matters of public record, and (3) all documents that are integral to or explicitly relied upon in the complaint without converting the motion to dismiss into one for summary judgment. *Angstadt v. Midd–West Sch. Dist.*, 377 F.3d 338, 342 (3d Cir.2004) (citation omitted).²

2 “The rationale underlying this exception is that the primary problem raised by considering documents outside the complaint—lack of notice to the plaintiff—is dissipated where the plaintiff has actual notice and has relied upon the documents in framing the complaint.” *Jones v. Intelli–Check, Inc.*, 274 F.Supp.2d 615, 625–26 (D.N.J.2003) (citations omitted).

The defendants, in moving to dismiss, in part, under [Rule 12\(b\)\(6\)](#), rely on materials beyond the allegations of the amended complaint, including, *inter alia*, (1) a certification from the defendants’ counsel, Michael Young, Esq. (“Young Cert.”), with attached exhibits, (2) a certification from Magyar (“Magyar Cert.”), (3) a certification from Naeole (“Naeole Cert.”), with attached exhibits, (4) Donovan’s curriculum vitae, (5) copies of Donovan’s opinion and editorial articles for PPCNJ, (6) a copy of Holaday’s 2001 W–2 Wage and Tax Statement, and (7) samples of Holaday’s photos published in PPCNJ publications. (*See* 11–30–05 Young Cert. & Exs.; 11–9–05 Magyar Cert.; 11–8–05 Naeole Cert. & Exs. .) The Court will not consider these additional documents submitted by the defendants because they constitute evidence outside the amended complaint, and are neither relied upon by the plaintiffs, nor integral to the amended complaint.³

3 The plaintiffs included certifications from Donovan and Holaday (with attached exhibits) with their opposition papers. The Court, for the reasons discussed *supra*, will not consider these certifications or any attached exhibits in resolving this motion.

II. Standard Of Review—Motion To Dismiss For Lack Of Subject Matter Jurisdiction

*3 A defendant may move to dismiss a complaint for lack of subject matter jurisdiction pursuant to [Rule 12\(b\)\(1\)](#) in one

of two ways. *Mortensen v. First Fed. Sav. & Loan Assoc.*, 549 F.2d 884, 891 (3d Cir.1977).⁴ First, a defendant may challenge subject matter jurisdiction by asserting that the complaint, on its face, does not allege sufficient grounds to establish subject matter jurisdiction (a “facial attack”). *Id.* The Court considers a facial attack under the same standard as a motion to dismiss under Rule 12(b)(6) and, as such, “assume[s] that the [well-pleaded] allegations contained in the complaint are true.” *Cardio-Med. Assocs. Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 75 (3d Cir.1983). Also, the Court may dismiss the complaint in a facial attack “only if it appears to a certainty that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction.” *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 438 (D.N.J.1999) (citations omitted).

⁴ The defendants also move under Rule 12(h)(3), which provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” *Id.* “The distinction between a Rule 12(h)(3) motion and a Rule 12(b)(1) motion is simply that the former may be asserted at any time and need not be responsive to any pleading of the other party.” *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880 n. 3 (3d Cir.1992) (citation omitted). However, here “the motions are analytically identical because the only consideration is whether subject matter jurisdiction arises.” *Id.*

A defendant may also challenge subject matter jurisdiction by factually contesting the plaintiff’s allegations of the existence of subject matter jurisdiction (a “factual attack”). *Id.* (citation omitted). The Court, when considering a factual attack to subject matter jurisdiction, “may look beyond the pleadings and make its own determination as to whether it has the power to hear the action.” *Bricker v. Stouchburg Nursery & Garden Ctr.*, No. 03–6483, 2004 WL 1576652, at *1 (E.D.Pa. July 14, 2004) (citation omitted). “Thus, ‘no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.’” *Iwanowa*, 67 F.Supp.2d at 438 (citation omitted). Moreover, the Court “may consider affidavits, depositions and testimony to resolve factual issues bearing on jurisdiction.” *Id.* (citation omitted). Furthermore, the plaintiff bears the burden of proving that jurisdiction exists. *Mortensen*, 549 F.2d at 891.

A 12(b)(1) “factual evaluation may occur at any stage of the proceedings, from the time the answer has been served until after the trial has completed.” *Id.* (explaining that “[a] factual jurisdictional proceeding cannot occur until plaintiff’s allegations have been controverted”). Because the defendants have not filed an answer, the Court considers this motion a facial attack.⁵ Thus, the Court will only analyze the allegations in the complaint and will not consider the additional documents provided by the parties as described *supra* in resolving the motion.

⁵ The defendants also characterize their motion as a “facial attack.” (Defs. Br., at 5.)

III. Subject Matter Jurisdiction Under The FLSA

The defendants contend that the Court lacks subject matter jurisdiction over this action because the plaintiffs are exempt from coverage under the FLSA as bona fide executive, professional, or administrative employees. (Defs. Br., at 1.)⁶ The FLSA provides, in those industries within its scope, minimum labor standards by regulating, *inter alia*, wages, hours, and overtime compensation. Excluded from the FLSA’s scope is “any employee employed in a bona fide executive administrative, or professional capacity.” 29 U.S.C. § 213(a)(1).⁷ PPCNJ, as the employer, bears the burden of establishing that an exemption applies to its employees, and the exemptions are narrowly construed against the employer. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974); see *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 183 (3d Cir.1988) (explaining that employer has “burden of proving the applicability of the [FLSA] exemption”).

⁶ The defendants argue for the first time in their reply brief that Donovan is an exempt independent contractor. (Defs. Reply Br., at 2.) The Court will not consider this contention because it is improper to raise arguments for the first time in reply papers. *Reap v. Cont’l Cas. Co.*, 199 F.R.D. 536, 550 n. 10 (D.N.J.2001).

⁷ “The FLSA does not define ‘executive, administrative, or professional capacity’; instead, it expressly delegates that task to the Secretary of Labor who may ‘from time to time’ alter the definitions.” *Kennedy v. Commw. Edison Co.*, 410 F.3d 365, 369 (7th Cir.2005) (citing 29 U.S.C. § 213(a)(1)).

A. FLSA Exemptions

1. Professional Employee Exemption

*4 The FLSA provides an exemption for any employee employed in a bona fide professional capacity. A bona fide professional employee is defined as any employee who is:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week ..., exclusive of board, lodging, or other facilities; and
- (2) Whose primary duty is the performance of work:
 - (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 - (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

29 C.F.R. § 541.300(a).⁸ The professional exemption is separated into two categories: (1) the “learned professional” exemption, and (2) the “creative professional” exemption. *Id.*

8 An employee is considered to be paid on a “salary basis” “if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 C.F.R. § 541.602(a). On the other hand, an employee is paid on a “fee basis” “if the employee is paid an agreed sum for a single job regardless of the time required for its completion.” *Id.* at § 541.605(a).

An employee’s “primary duty” is the “principal, main, major or most important duty that the employee performs.” *Id.* at § 541.700(a). The Court, in determining an employee’s primary duty, considers “all [of] the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.” *Id.* Further, the Court can consider, *inter alia*, the following factors: (1) “the relative importance of the exempt duties as compared with other types of duties”; (2) “the amount of time spent performing exempt work”; (3) “the employee’s relative freedom from direct supervision”; and (4) “the relationship between the employee’s salary and the wages paid to

other employees for the kind of nonexempt work performed by the employee.” *Id.* In determining whether exempt work is the primary duty of an employee,

the amount of time spent performing exempt work can be a useful guide.... Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and ... exempt employees [need not] spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

Id. at § 541.700(b).

a. The “learned professional” exemption

An employee’s primary duty, to qualify for the learned professional exemption, must be “the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.” *Id.* at § 541.301(a). Thus, PPCNJ must satisfy three elements to show that the plaintiffs are learned professionals: “(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.” *Id.*

“[W]ork requiring advanced knowledge” constitutes work which

is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.

Advanced knowledge cannot be attained at the high school level.

Id. at § 541.301(b). Also, “field[s] of science or learning” include

the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

Id. at 541.301(c).

The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” limits

the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the ... exemption is available to the occasional lawyer who has not gone to law school, or the occasional

chemist who is not the possessor of a degree in chemistry. However, the ... exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The ... exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

*5 *Id.* at § 541.301(d).

“The areas in which the [learned] professional exemption may be available are expanding.” *Id.* at § 541.301(f). “When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession.” *Id.* Moreover, “[a]ccrediting and certifying organizations ... may develop ... specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may [also] indicate that the occupation has acquired the characteristics of a learned profession.” *See id.* (listing examples).

b. The “creative professional” exemption

An employee's primary duty, to qualify for the creative professional exemption, must be “the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work.” *Id.* at § 541.302(a). Also, the work performed must be “in a recognized field of artistic or creative endeavor ... such [as] music, writing, acting and the graphic arts.” *Id.* at § 541.302(b).⁹ Further,

⁹ However, this exemption “does not apply to work which can be produced by a person with general manual or intellectual ability and training.” *Id.* at § 541.302(a).

[t]he requirement of “invention, imagination, originality or talent” distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an “animator” of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

Journalists may [also] satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

*6 *Id.* at §§ 541.302(c) & (d).

2. Administrative Employee Exemption

The FLSA also exempts any employee employed in a bona fide administrative capacity. 29 U.S.C. § 213(a)(1). An employee is employed in an administrative capacity if (1) the employee is paid on a salary or fee basis of at least \$455 per week; (2) the employee's “primary duty” includes the performance of office work and non-manual work that is “directly related to management policies or general business operations of the employer or the employer's customers”; and (3) the employee's performance of his or her primary duties include work “requiring the exercise of discretion and independent judgment.” 29 C.F.R. § 541.200(a).

“To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers.” *Id.* at § 541.201(a). Work “directly related to the management or general business operations” refers to work “assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.” *Id.* Moreover,

[w]ork directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

Id. at § 541.201(b).

An employee's primary duty, to meet the administrative exemption, must also "include the exercise of discretion and independent judgment with respect to matters of significance." *Id.* at § 541.202(a). The "exercise of discretion and independent judgment" "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." *Id.* "The term 'matters of significance' refers to the level of importance or consequence of the work performed." *Id.*

The Court must interpret the phrase "discretion and independent judgment" "in the light of all the facts involved in the particular employment situation in which the question arises." *Id.* at § 541.202(b). The Court, in conducting this analysis, considers, *inter alia*, the following factors:

[(1)] whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;

[(2)] whether the employee carries out major assignments in conducting the operations of the business;

*7 [(3)] whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;

[(4)] whether the employee has authority to commit the employer in matters that have significant financial impact;

[(5)] whether the employee has authority to waive or deviate from established policies and procedures without prior approval;

[(6)] whether the employee has authority to negotiate and bind the company on significant matters;

[(7)] whether the employee provides consultation or expert advice to management;

[(8)] whether the employee is involved in planning long- or short-term business objectives;

[(9)] whether the employee investigates and resolves matters of significance on behalf of management; and

[(10)] whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Id.

If an employee exercises "discretion and independent judgment",

the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment.... [Further, the] exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.... The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.

Id. at §§ 541.202(c) & (e).

B. Application of the Exemptions to the Plaintiffs

The complaint states that (1) Donovan's salary at PPCNJ was \$25,000 annually, and (2) Holaday's salary at PPCNJ was \$40,000 annually. Thus, examining only the allegations in the complaint, the plaintiffs' salaries appear to satisfy the salary and wage requirements of the professional and administrative exemptions.¹⁰ Concerning the plaintiffs' primary duties as employees of PPCNJ, Donovan served as the "Vice President of Policy and Research" and Holaday was the "Marketing Director". However, the mere fact that the plaintiffs' job titles seemingly imply management or supervisory positions at PPCNJ, is insufficient in itself to establish the plaintiffs' statuses as exempt employees. *See id.* at § 541.2 ("A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.")

¹⁰ At a salary of \$25,000, Donovan would earn approximately \$480 per week. Also, Holaday, at a salary of \$40,000, would earn approximately \$769 per week.

*8 The substantive allegations in the complaint regarding the plaintiffs' employment duties also do not support a finding that they were professional or administrative employees. As the determination whether the plaintiffs are exempt as professional or administrative employees is fact intensive and must be made on a case-by-case basis, a conclusion that the plaintiffs are exempt at this early stage of the litigation would be premature. Also, the defendants have not argued that the

allegations in the complaint demonstrate that the plaintiffs are exempt from FLSA coverage. Instead, the defendants rely on certifications and other documentation which the Court has already excluded from consideration. Therefore, because the allegations in the complaint do not establish that the plaintiffs¹¹ are exempt professional or administrative employees, the Court will deny the motion to dismiss under Rules 12(b)(1), 12(b)(6), and 12(h)(3).

¹¹ The defendants fail to address the claims concerning NJWHL and NJWPL.

CONCLUSION

The Court, for the reasons discussed herein, finds the defendants have not shown that the allegations in the complaint show that the plaintiffs are exempt from FLSA coverage as professional or administrative employees. Accordingly, the Court will deny the motion to dismiss under Rules 12(b)(1), 12(b)(6), and 12(h)(3). This ruling is without prejudice to the right of the defendants to move to dismiss under Rule 12(b)(1) at an appropriate time, if the defendants seek to assert a "factual" challenge to subject matter jurisdiction. The Court will issue an appropriate order.

All Citations

Not Reported in F.Supp.2d, 2006 WL 1373230, 11 Wage & Hour Cas.2d (BNA) 1135

TAB 16

2018 WL 4489677

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Marie DOPICO, for Plaintiff and the class
of members defined herein, et al., Plaintiffs,

v.

IMS TRADING CORP., et al., Defendants.

Civil Action No. 3:14-cv-1874-BRM-DEA

Signed 09/18/2018

Attorneys and Law Firms

Bruce Heller Nagel, Randee M. Matloff, Nagel Rice, LLP,
Roseland, NJ, Michael J. Epstein, The Epstein Law Firm,
P.A., Rochelle Park, NJ, for Plaintiffs.

Michael J. Marone, Michael David Celentano, Richard J.
Williams, JR., McElroy, Deutsch, Mulvaney & Carpenter
LLP, Morristown, NJ, for Defendants.

OPINION

BRIAN R. MARTINOTTI, United States District Judge

*1 Before this Court is Defendants IMS Trading Corporation a/k/a IMS Pet Industries¹ (collectively “Defendants”) Motion to Dismiss (ECF No. 70-1). Plaintiffs Marie Dopico, John Banks, Calvin Locke, and Carly Heron, for plaintiffs and the class of members (collectively “Plaintiffs”), oppose the Motion. (ECF No. 72.) Having reviewed the parties’ submissions filed in connection with the Motion and having declined to hold oral argument pursuant to [Federal Rule of Civil Procedure 78\(b\)](#), for the reasons set forth below and for good cause having been shown, Defendants’ Motion to Dismiss is **DENIED in part** and **GRANTED in part**.

¹ IMS Pet Industries is improperly captioned as IMS Pet Industries, Inc.

I. BACKGROUND**A. Factual Background**

Defendants are engaged in the “business of manufacturing, producing, marketing, distributing, advertising, and/or selling

dog treats, including the Chinese-made duck jerky dog treats at issue in this litigation.” (Compl. (ECF No. 68) ¶ 12.) Plaintiffs are purchasers of the duck jerky dog treats, who allege their dogs became ill after ingesting Defendants’ product. (*See* ECF No. 68.)

Defendants made several representations on the packaging of the dog treats they manufactured, including:

- A. No artificial colors;
- B. No artificial additives;
- C. No artificial fillers;
- D. No by-products;
- E. The ingredients were duck breast filets, vegetable [glycerin](#), soy protein, isolate, salt;
- F. “Healthy and natural treats with only the finest ingredients.”
- G. “We guarantee our product 100%!”
- H. “Inspected and independently tested.”
- I. “A healthy natural treat for dogs.”

(*Id.* ¶ 17.) Defendants also made two representations regarding the treats on their website: (1) “That’s why we go to great lengths to maintain the quality and consistency of our products;” and (2) “Offer the best treats for your pet.” (*Id.* ¶ 18.)

Plaintiffs contend the representations found on the packaging were false. (*Id.* ¶ 20.) The FDA allegedly “issued warnings, as early as 2007 and as recently as November 18, 2011, about dog illnesses after consuming duck jerky dog treats, which were made in China.” (*Id.* ¶ 22.) However, Defendants’ packaging did not warn purchasers of the danger and side effects of the treats. (*Id.* ¶¶ 23, 30.) Plaintiffs also contend that prior to October 2013, Defendants had received complaints regarding their dog treats stating their product has caused dogs to become ill or die. (*Id.* ¶ 28.)

B. Procedural History

Plaintiff Dopico commenced this class action in the Superior Court of New Jersey, Law Division, Middlesex Count in January 2014. (Ex. A. to ECF No. 1.) The matter was removed on March 20, 2014, and on April 17, 2014, Dopico

filed a First Amended Complaint alleging: (1) Count I, breach of express warranty under the Uniform Commercial Code (“UCC”); (2) Count II, breach of implied warranty under the UCC; (3) Count III, violation of the New Jersey Consumer Fraud Act (“NJCA”); (4) Count, IV violation of the Magnuson-Moss Warranty Act (“MMWA”); (5) Count V, unjust enrichment; (6) Count VI, failure to warn (products liability); and (7) Count VII, defective design or manufacture (products liability). (ECF Nos. 1, 9.) On May 7, 2014, IMS moved to dismiss the Amended Complaint, and on April 20, 2015, Judge Peter G. Sheridan, U.S.D.N.J., who has since then assumed senior status. dismissed Counts II, III, and V with prejudice as being subsumed by the New Jersey Products Liability Act (“NJPLA”). (ECF No. 20.)

*2 On September 18, 2015, Dopico filed a Motion to Amend the First Amended Complaint, naming two additional class representatives, one a resident of New Jersey, Banks, and the other a resident of Arizona, Locke. (ECF No. 31.) The proposed Second Amended Complaint included claims applicable to the Arizona plaintiff. (*Id.*) On February 1, 2016, the Court granted Plaintiffs’ Motion to Amend, and on February 2, 2016, Plaintiffs filed their Second Amended Complaint. (ECF Nos. 34, 35.) On February 16, 2016, Defendants filed an Answer to the Second Amended Complaint. (ECF No. 37.)

On June 23, 2017, Plaintiffs filed another Motion to Amend the Second Amended Complaint. (ECF No. 52.) On June 28, 2017, Defendants requested an extension of time to file an opposition to Plaintiff’s Motion for Leave to file a Third Amended Complaint and “permission to file a dispositive motion with respect to all breach of warranty claims set forth in Plaintiffs’ Complaint.” (ECF No. 53.) On June 30, 2017, the Court considered Plaintiffs’ letter and granted all requests. (ECF No. 54.) On July 24, 2017, Defendants filed a Motion to Dismiss Plaintiffs Second Amended Complaint. (ECF No. 56.) On January 30, 2018, the Court granted Plaintiffs’ Motion to Amend the Second Amended Complaint and administratively terminated without prejudice Defendants’ Motion to Dismiss. (ECF No. 67.) Plaintiffs filed the Third Amended Complaint on January 30, 2018. (ECF No. 68.) On February 13, 2018, Defendants filed this Motion to Dismiss Counts I and IV of Plaintiffs’ Third Amended Complaint. (ECF No. 70.) Plaintiffs oppose the Motion. (ECF No. 72.)

II. LEGAL STANDARD

In deciding a motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a district court is “required to

accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff].” *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). “[A] complaint attacked by a ... motion to dismiss does not need detailed factual allegations.” *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). However, the Plaintiff’s “obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.” *Id.* This “plausibility standard” requires the complaint allege “more than a sheer possibility that a defendant has acted unlawfully,” but it “is not akin to a ‘probability requirement.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Detailed factual allegations” are not required, but “more than an unadorned, the defendant-harmed-me accusation” must be pled; it must include “factual enhancements” and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

*3 “Determining whether a complaint states a plausible claim for relief [is] ... a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* at 679 (quoting *Fed. R. Civ. P. 8(a)(2)*).

While as a general rule, a court may not consider anything beyond the four corners of the complaint on a motion to dismiss pursuant to 12(b)(6), the Third Circuit has held “a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant under Rule 56].” *In re Rockefeller Ctr.*

Props. Sec. Litig., 184 F.3d at 287. Specifically, courts may consider any “document *integral to or explicitly relied upon* in the complaint.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426.

III. DECISION

A. Whether Defendants’ Motion is Procedurally Barred

Plaintiffs argue Defendants’ Motion to Dismiss is procedurally deficient because it seeks dismissal after Defendants have already filed their Answer to Count I and Count IV to both the First Amended Complaint and the Second Amended Complaint. (ECF No. 72 at 7.) Defendants contend the Court granted Defendants permission to file a Motion to Dismiss as to all warranty claims set forth in the Third Amended Complaint. (ECF No. 73 at 1-2.) Defendants are correct.

On February 2, 2016, Plaintiffs filed their Second Amended Complaint. (ECF No. 35.) On February 16, 2016, Defendants filed an Answer to the Second Amended Complaint. (ECF No. 37.) On June 23, 2017, Plaintiffs filed another Motion to Amend the Second Amended Complaint. (ECF No. 52.) On June 28, 2017, Defendants requested an extension of time to file an opposition to Plaintiff’s Motion for Leave to file a Third Amended Complaint and “permission to file a dispositive motion with respect to all breach of warranty claims set forth in Plaintiffs’ Complaint.” (ECF No. 53.) On June 30, 2017, the Court considered Defendants’ letter and granted its request to file a dispositive motion with respect to all warranty claims. (ECF No. 54.) Defendants are in compliance with the Order as their Motion only seeks to dismiss two warranty claims. Accordingly, Plaintiffs’ argument that Defendants’ Motion is procedurally barred is misguided.

B. Breach of Express Warranty (Count I)

Defendants argue Plaintiffs’ breach of express warranty claim is “unsustainable” because the “representations” identified in the Third Amended Complaint “do not amount to express warranties under New Jersey law.” (ECF No. 70-1 at 18.) Specifically, they contend the representations are “affirmation[s] merely of the value of the goods or [] statement[s] purporting to be merely the seller’s opinion or commendation of the goods.” (*Id.* at 19 (quoting N.J. Stat. Ann. § 12A:2-313).) Plaintiffs contend the Third Amended Complaint sets forth specific representations which constitute

warranties, including statements that the dog treats were “healthy,” “natural,” “guarantee[d],” “inspected,” “tested,” and contained “no artificial additives.” (ECF No. 72 at 11.) Plaintiffs allege these representations constitute “affirmations of fact rather than opinions or amorphous boasts regarding quality.” (*Id.* at 12.)

*4 New Jersey’s Statute Annotated § 12A:2-313, which is analogous to U.C.C. § 2-313, provides:

- (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

Pursuant to New Jersey law, a plaintiff must allege the following to state a claim for breach of express warranty: “(1) that Defendant made an affirmation, promise or description [of] the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description.” *Snyder v. Farnam Cos.*, 792 F. Supp. 2d 712, 721 (D.N.J. 2011) (internal citations omitted). “A statement can amount to a warranty, even if unintended to be such by the seller, if it could fairly be understood ... to constitute an affirmation or representation that the [product] possesses[s] a certain quality or capacity relating to future performance.” *Avram v. Samsung Elecs. Am., Inc.*, 11-6973, 2013 WL 3654090, at *8 (D.N.J. July 11, 2013) (citations omitted). However, affirmations “merely of the value of the goods or a statement purporting to be

merely the seller's opinion or commendation of the goods does not create a warranty." *Snyder*, 792 F. Supp. 2d at 721 (quoting N.J. Stat. Ann. § 12A:2-313(2)). Moreover, mere puffery is "not considered specific enough to create an express warranty." *Id.* "While the alleged warranties may later be found to be no more than 'puffery,' except in clear cases, this is normally a question of fact for the jury." *Id.* at 723; see *In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.*, No. 08-939, 2009 WL 2940081, at *16 (D.N.J. Sept. 10, 2009) (dismissing a breach of warranty claim based on Defendant's statement that HD DVD Players were for "Today, Tomorrow, and Beyond," since the statement is just "puffery").

Typically, "courts have noted that 'whether a given statement constitutes an express warranty is normally a question of fact for the jury.'" *Id.* (quoting *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, No. 03-4558, 2008 WL 4126264, at *4 (D.N.J. Sept. 3, 2008)).

The Court finds Plaintiffs have adequately alleged a breach of express warranty claim as to labeling on the dog treats, but not as to the representations on the website. Here, Plaintiffs contend the following phrases on Defendants duck jerky dog treats label constitute express warranties that formed the basis of the bargain between Plaintiffs and Defendants:

*5 A. No artificial colors;

B. No artificial additives;

C. No artificial fillers;

D. No by-products;

E. The ingredients were duck breast filets, vegetable glycerin, soy protein, isolate, salt;

F. "Healthy and natural treats with only the finest ingredients."

G. "We guarantee our product 100%!"

H. "Inspected and independently tested."

I. "A healthy natural treat for dogs."

(ECF No. 68 ¶ 17.) They also allege Defendants made two express warranties on their website: (1) "That's why we go to great lengths to maintain the quality and consistency of our products" and (2) "Offer the best treats for your pet." (*Id.* ¶ 18.) Defendants only contest that the label on the dog treats did not make an "affirmation, promise or description [of]

the product." (ECF No. 70-1 at 180-21.) They contend that the above representations are either puffery or "affirmation[s] merely of the value of the goods or [] statement[s] purporting to be merely the seller's opinion or commendation of the goods." (ECF No. 70-1 at 19.) As such, the Court will only address this element.

When analyzing the packaging label as a whole "it could fairly be understood ... to constitute an affirmation or representation that the [product] possesses a certain quality or capacity relating to future performance." *Avram*, 2013 WL 3654090, at *8. The phrase "We guarantee our product 100%" coupled with "Inspected and independently tested" could be "fairly" understood to mean the product was tested and contained: (1) "No artificial colors"; (2) "No artificial additives"; (3) "No artificial fillers"; (4) "No by-products"; and (5) that "the ingredients were duck breast filets, vegetable glycerin, soy protein, isolate, salt." See *Snyder*, 792 F. Supp. 2d at 722 (holding "Plaintiffs have pointed to specific affirmations or promises by Defendants regarding the safety of the use of their Products on pets, and therefore their breach of warranty claim survives a motion to dismiss"); see also *Elias v. Ungar's Food Prod., Inc.*, 252 F.R.D. 233, 240 (D.N.J. 2008) (finding packaging statements regarding fat and calories per serving created express warranties). "[W]hether a given statement constitutes an express warranty is normally a question of fact for the jury." *Stewart v. Smart Balance, Inc.*, No. 11-6174, 2012 WL 4168584, at *12 (D.N.J. June 26, 2012) (finding that "[t]he question of whether the labeling as a whole is misleading to an average consumer is a question of fact, and is not appropriate basis for dismissal at this time"). Accordingly, Defendants' Motion to Dismiss the breach of warranty claim as to the labeling of the dog treats is **DENIED**.

However, the Court finds Defendants' website statements do not amount to express warranties. The website statements are more akin to puffery and "affirmation[s] merely of the value of the goods or [] statement[s] purporting to be merely the seller's opinion or commendation of the goods." N.J. Stat. Ann. § 12A:2-313. Courts have established that words such as "great" and "best" are mere puffery. See *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993) (dismissing a claim based on Defendant's statement that its product provided "superior engine protection," since that statement is just "puffery"); *Wojcik v. Borough of Manville*, No. A-1627-08T3, 2010 WL 322893, at *3 (N.J. Super. Ct. App. Div. Jan. 29, 2010) (holding "[s]tatements that the helmet was 'top rated' and a 'top seller' are not express warranties but are statements of value or commendations" and "[s]tatements

that the helmet was ‘one of the best’ and ‘great’ are opinions, and therefore, not express warranties”). Both words were used in the phrases quoted from Defendants’ website. Accordingly, Defendants’ Motion to Dismiss Plaintiffs’ claim that Defendants’ website contains express warranties that were breached is **GRANTED**.

C. MMWA (Count IV)

*6 Defendants argue “this case is utterly bereft of any legal or factual foundation” of MMWA warranty claims for three reasons: (1) the MMWA is inapplicable to written warranties that are governed by federal law; (2) the warranty claims are mere product descriptions and do not constitute written warranties under the MMWA; and (3) any MMWA implied warranty claims cannot be maintained by any of the New Jersey Plaintiffs because they are linked to a state law implied warranty claim that has already been dismissed by this Court. (See ECF No. 70-1 at 6-17.) Plaintiffs contend the warranty claims at issue are adequately plead and not governed by federal law, and if they are governed by federal law, they should be determined on summary judgment. (ECF No. 72 at 16-22.)

The MMWA provides that “a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.” 15 U.S.C. § 2310(d)(1). However, the MMWA is “inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this chapter.” 15 U.S.C. 2311(d).

In this case, the Federal Food, Drug, and Cosmetic Act (“FDCA”) and Food and Drug Administration (“FDA”) governs the Chinese-made duck jerky dog treats labeling on Defendants’ product. In 1938, Congress passed the FDCA, which gives the FDA power to ensure “foods are safe, wholesome, sanitary, and properly labeled.” 21 U.S.C. § 393(b)(2)(A); *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 251 (3d Cir. 2008) (“The FDCA grants the FDA authority to regulate the field of food safety.”). The FDCA defines “food” as “articles used for food or drink for man or other animals.” 21 U.S.C.A. § 321. Indeed, the Code of Federal Regulations contains a subsection dedicated to “Animal Food Labeling.” 21 C.F.R. § 501.1, *et seq.* This subsection is comprised of numerous FDA regulations governing the packaging of animal food,

including regulations such as: (1) the display panel of package form animal food (§ 501.1); (2) information panel of package for animal food (§ 501.2); (3) identity labeling of animal food in package form (§ 501.3); (4) designation of ingredients (§ 501.4); (5) name and place of business of manufacturer, packer, or distributor (§ 501.5); (6) labeling of animal food with number of servings (§ 501.6); (7) prominence of required statements (§ 501.8); (8) labeling warning statements (§ 501.17); and (9) misbranding of animal food (§ 501.18).

In addition, the FDA has explicitly stated on its public governmental website that it “regulates that can of cat food, bag of dog food, or box of dog treats or snacks in your pantry”. U.S. Food & Drug Administration, Pet Food, <https://www.fda.gov/animalveterinary/products/animalfoodfeeds/petfood/default.htm>. The FFDCa “requires that all animal foods, like human foods, be safe to eat, produced under sanitary conditions, contain no harmful substances, and be truthfully labeled.” *Id.*

Lastly, Plaintiffs’ Third Amended Complaint acknowledges the FDA regulates dog treats. (See ECF No. 68 ¶ 22) (“The FDA had issued warning, as early as 2007 and as recently as November 18, 2011, about dog illnesses after consuming duck jerky dog treats, which were made in China.”). As such, the MMWA is inapplicable to any alleged express or implied warranty claims on the labeling of the dog treats. See *Stewart*, 2012 WL 4168584, at *14 (finding “[t]o the extent that ‘fat free’ is the equivalent of ‘defect free,’ despite the fact that compliant milk may contain no less than 0.5 grams of fat, the making or content of the claim is governed by Federal law”); *Reid v. GMC Skin Care USA Inc.*, No. 15-277, 2016 WL 403497, at *13 (N.D.N.Y. Jan. 15, 2016) (“The majority of courts that have considered whether § 2311(d) bars an MMWA claim founded on the labels of products governed by the FDCA have concluded that MMWA claim is barred.”); *Jasper v. MusclePharm Corp.*, No. 14-02881, 2015 WL 2375945, at *5-6 (D. Colo. April 9, 2015) (finding that because dietary supplement product labels containing allegedly misleading claims about the supplement’s attributes or effects were governed by the FDCA, § 2311(d) barred the plaintiff’s MMWA claim), *recommendation adopted*, 2015 WL 2375945 (D. Colo. May 15, 2015).² Defendants’ Motion to Dismiss Count IV of Plaintiffs’ Third Amended Complaint pertaining to the labeling of the dog treats is **GRANTED**.

2

While many courts have dismissed MMWA claims on a motion to dismiss, the Southern District of California has denied a defendant’s motion to

dismiss, explaining that the issue of “[w]hether § 2311(d) precludes Plaintiff’s MMWA claim is better suited for a motion for summary judgment, when the record is more fully developed and the parties further analyze the statutory scheme under the facts of the case.” *Kanfer v. Pharmacare US, Inc.*, No. 15–0120, 2015 WL 6742201, at *10 (S.D. Cal. Nov. 4, 2015). This Court will follow the with the majority and *Stewart*, a previous New Jersey District Court case.

*7 Plaintiffs argue Defendants website warranty claims are unaffected by 15 U.S.C. 2311(d) because websites are not regulated by the FDA or FDCA. (ECF No. 72 at 22.) This argument is immaterial. “Claims under the MMWA depend upon the disposition of the underlying state law warranty claims.” *Argabright v. Rheem Mfg. Co.*, 201 F. Supp. 3d 578, 600 (D.N.J. 2016); see *Johansson v. Cent. Garden & Pet Co.*, 804 F. Supp. 2d 257, 265 (D.N.J. 2011) (“A claim under the MMWA relies on the underlying state law claim.”) Therefore, “if there exists no actionable warranty claim, there can be no violation of the MMWA.” *Argabright v. Rheem Mfg. Co.*, 201 F. Supp. 3d at 600; *In re: Ford Motor Co. Ignition Switch Prods. Liability Litig.*, No. 96–1814, 2001 WL 1266317, at *24 (D.N.J. Sept. 30, 1997) (dismissing MMWA claims against defendant because all express and implied warranty claims against defendant had been dismissed). The Court has dismissed Plaintiffs’ New Jersey state law express warranty claim above as to the website. Therefore, Defendants’ Motion to Dismiss Plaintiffs’ MMWA express warranty claim is also **DISMISSED** as to that claim. Plaintiffs’ implied warranty claim pertaining to the website is also **DISMISSED** as to the New Jersey Plaintiffs because they are inextricably linked to state law

implied warranty claims that have already been dismissed by this Court.³ All implied warranty claims as to out-of-state residents will proceed. Accordingly, Defendants’ Motion to Dismiss Count IV of the Third Amended Complaint is **GRANTED** as to all express warranties. It is also **GRANTED** as to New Jersey Plaintiffs’ implied warranty claims.

³ Defendants’ Motion to Dismiss only seeks to dismiss Plaintiffs’ implied warranty claims under the MMWA as to all New Jersey Plaintiffs. (ECF No. 70-1 at 16.) Plaintiffs concede Judge Sheridan dismissed these claims, but argue the claims are not precluded as to non-New Jersey Plaintiffs.

IV. CONCLUSION

For the reasons set forth above, Defendants’ Motion to Dismiss is **GRANTED in part** and **DENIED in part**. Defendants’ Motion to Dismiss the breach of warranty claim (Count I) as to the labeling of the dog treats is **DENIED** but **GRANTED** as to Plaintiffs claim that Defendants’ website contains express warranties that were breached. Defendants’ Motion to Dismiss the MMWA claim (Count IV) as it pertains to the labeling of the dog treats is **GRANTED**. Plaintiffs’ implied warranty MMWA claim pertaining to the website is only **DISMISSED** as to the New Jersey Plaintiffs. All implied warranty claims as to out-of-state residents will proceed.

All Citations

Not Reported in Fed. Supp., 2018 WL 4489677, 96 UCC Rep.Serv.2d 960

TAB 17

2014 WL 3056026



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Beavers-Gabriel v. Medtronic, Inc.](#), D.Hawai'i, January 9, 2015

2014 WL 3056026

Only the Westlaw citation is currently available.

United States District Court,
C.D. California.Kabina DUNBAR, et al
v.
MEDTRONIC, INC., et al.

No. CV 14-01529-RGK (AJWx).

Signed June 25, 2014.

Attorneys and Law Firms[Jaime Erin Moss](#), [James Paul Sizemore](#), Sizemore Law Firm PLC, [Lowell W. Finson](#), Phillips Law Firm, El Segundo, CA, for Kabina Dunbar, et al.[Lisa M. Baird](#), [Michael Kevin Brown](#), [Mildred Y. Segura](#), [Nabil A. Bisharat](#), Reed Smith LLP, Los Angeles, CA, for Medtronic, Inc., et al.**Proceedings: (IN CHAMBERS) Order re:
Defendants' Motion to Dismiss (DE 32)**[R. GARY KLAUSNER](#), District Judge.

*1 Sharon L. Williams (Not Present) Deputy Clerk

I. INTRODUCTION

On January 30, 2014, Kabina Dunbar and 28 other individuals ("Plaintiffs") filed a state court action against Medtronic, Inc., Medtronic Sofamor Danek USA, Inc., and Medtronic Vertelink, Inc. (collectively, "Medtronic"). The action arises from alleged injuries caused by a medical product manufactured and sold by Medtronic. Plaintiffs allege the following eight claims: (1) Fraudulent Misrepresentation and Fraud in the Inducement; (2) Strict Products Liability—Failure to Warn; (3) Strict Products Liability—Design Defect; (4) Strict Products Liability—Misrepresentation; (5) Products Liability—Negligence; (6) Negligence Per Se; (7) Breach of Express Warranty; and (8) Loss of Consortium.

On February 28, 2014, Medtronic removed the action to federal court on the ground of diversity jurisdiction. On March 7, 2014, Medtronic filed the current Motion to Dismiss. For the following reasons, the Court **grants in part** Medtronic's motion.

II. FACTUAL BACKGROUND

Medtronic is the manufacturer and seller of the INFUSE [Bone Graft](#) and LT-Cage (collectively known as "INFUSE"), a prescription medical device used in [spinal fusion](#) surgeries. The purpose of the device is to accomplish the same outcome as implanting a patient's own bone or cadaver bone between the vertebrae in the spine, obviating the need for bone harvesting. The two components of the device are (1) a metallic cylindrical cage (LT-Cage), and (2) a liquid protein and collagen sponge carrier for the protein (INFUSE [Bone Graft](#)), both of which are placed inside the cage. The LT-Cage maintains the spacing between the vertebrae and temporarily stabilizes the diseased region of the spine, and the liquid protein binds with the sponge to stimulate bone growth.

INFUSE is a Class III device under the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA"), as amended by the Medical Device Amendments of 1976 ("MDA"). Class III is a classification reserved for devices that pose the greatest risk of death or complications. For this reason, Medtronic was required to obtain pre-market approval ("PMA") from the FDA before it could sell or distribute INFUSE.

In 2001, Medtronic filed a PMA application, and in 2002, the FDA granted approval for use of INFUSE to treat [degenerative disc disease](#). In its approval letter, the FDA stated that INFUSE may only be implanted (1) from the anterior (front) abdomen, and (2) placed within lumbar spine levels L4 through S1. Additionally, the FDA approved label states that the INFUSE [bone graft](#) must be used within the LT-Cage. Therefore, any variation of its use (e.g., posterior implant or use without the LT-Cage) constitutes "off-label" use of the device.

According to the Complaint, each of the plaintiffs underwent spinal surgery using the off-label INFUSE. Specifically, the plaintiffs' surgeries either did not conform with the method of implant approved by the FDA and/or did not conform with the labeling specifications. Each of the plaintiffs have suffered post-operative injury in the form of severe pain as a result of uncontrolled bone growth. Plaintiffs allege that Medtronic actively promoted the off-label use of INFUSE, failed to warn about the risks of off-label use, failed to report adverse events,

and misrepresented material health and safety product risk information. According to Plaintiffs, had the risks associated with off-label INFUSE been known, they would not have undergone that particular course of treatment, which allegedly resulted in their injuries.

III. JUDICIAL STANDARD

*2 The federal pleading standard states in relevant part that “a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss for failure to state a claim upon which relief can be granted. In deciding a Rule 12(b)(6) motion, the court must assume allegations in the challenged complaint are true, and construe the complaint in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir.1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. See *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981). Furthermore, a pleading must contain sufficient factual matter that, if accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

IV. DISCUSSION

Medtronic seeks dismissal on the ground that the FDCA and MDA expressly or impliedly preempt all of Plaintiffs' claims. Medtronic also challenges Plaintiffs' claims on grounds independent of the preemption argument. The Court agrees in part with Medtronic's arguments as follows.

A. Federal Preemption Pursuant to the FDCA and MDA

1. Express Preemption Under § 360k(a)

§ 360k(a) of the MDA provides for express preemption, and states in pertinent part:

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

- (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a).

The U.S. Supreme Court has set forth a two-step analysis for courts to determine whether the MDA expressly preempts a state law claim within the meaning of § 360k(a). First, a court must determine whether the FDA has established requirements applicable to the particular medical device at issue. *Reigel v. Medtronic, Inc.*, 552 U.S. 312, 321, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008). If the first step is answered in the affirmative, the court must proceed to the second step. The second step requires a court to determine whether the state law claims are based on state requirements that are different from, or in addition to, the federal requirements.¹ *Id.* at 321–322. “State requirements” include a state's common law legal duties. *Reigel*, 552 U.S. at 324–25. If the state requirements stemming from the claim differ from, or add to, the federal requirements, the state claim is expressly preempted by operation of § 360k(a). However, state claims that are premised on a violation of FDA regulations escape express preemption, as they are considered “parallel,” rather than different from, or in addition to, the federal requirements. *Id.*

¹ As stated in the statute, the court must also determine whether the state requirements relate to the safety and effectiveness of the device. Here, there is no dispute that the state requirements asserted by Plaintiffs relate to the safety and effectiveness of the INFUSE.

*3 Even if a state claim runs parallel to federal requirements and escapes express preemption, it may still be subject to implied preemption under § 337(a) and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001).

2. *Implied Preemption Under § 337(a) and Buckman*
§ 337(a) of the MDA provides that all actions to enforce FDA requirements “shall be by and in the name of the United States.” 21 U.S.C. § 337(a). In *Buckman Co. v. Plaintiffs' Legal Comm.*, the U.S. Supreme Court interpreted this

provision to mean that even state claims that run parallel to federal requirements are preempted unless they are grounded in traditional state tort law, and do not depend exclusively on a federal requirement. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 343, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001). As pointed out by other courts, this does not mean that a plaintiff can never bring a state law claim based on conduct that violates the FDCA. In fact, the conduct that gives rise to the claim *must* violate the FDCA to escape express preemption. Instead, to avoid implied preemption, the conduct giving rise to the state claim must also be the type of conduct that would traditionally give rise to liability under state law even if the FDCA had never been enacted. See *Houston v. Medtronic, Inc.*, 957 F.Supp.2d 1166, 1175 (C.D.Cal.2013).

B. Plaintiffs' Claims

Medtronic argues at the outset that the MDA expressly preempts all of Plaintiffs' claims. As stated above, determination of express preemption involves a two-step process. First, a court determines whether the FDA has established requirements applicable to the device at issue. If the court determines that requirements on the device have been established, the court must then determine whether the state claims are based on requirements different from, or in addition to, the federal requirements. The Court begins its analysis of Plaintiffs' claims by addressing step one—whether the FDA has established requirements—since this issue is device-specific (as opposed to claim-specific), and the Court's determination of this issue applies to all claims asserted by Plaintiffs.

Riegel v. Medtronic involved a Class III catheter that had received premarket approval. 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008). The U.S. Supreme Court in *Riegel* noted that, unlike general labeling duties, premarket approval is specific to individual devices. *Riegel*, 552 U.S. at 323. The Court further stated that, with respect to such devices, the FDA allows almost no deviation from the specifications contained in the approved applications, as adherence to the specifications allows reasonable assurance of safety and effectiveness. *Id.* Based on this, the Court reasoned that obtaining premarket approval for the catheter was akin to the establishment of federal requirements on the device. *Id.*

Similarly, INFUSE is also a Class III device that obtained premarket approval. It was subject to the same rigorous review process and post-approval manufacturing requirements. Therefore, the Court finds that the first

prong of the *Riegel* test—whether the FDA has established requirements for the device—has been met.

*4 Having made the above finding with respect to the INFUSE device, the Court will determine step two of the express preemption analysis and other the claim-specific issues, addressing each claim in turn.

1. Strict Products Liability—Failure to Warn

Plaintiffs allege that Medtronic knew of the dangers relating to off-label use of INFUSE, and had a duty to warn Plaintiffs and their physicians of these dangers. (Compl., ¶¶ 358–361.) Nonetheless, Medtronic failed to provide adequate warning, even though the off-label use was reasonably foreseeable and the dangers from such use were not readily recognizable to an ordinary consumer or physician. (Compl., ¶¶ 362–365.)

By way of their allegations, Plaintiffs base their claim on a theory that either (1) Medtronic was required to include warnings beyond those in the FDA-approved label of INFUSE, or (2) Medtronic was obligated to issue post-sale warnings about potential adverse effects from off-label use of INFUSE. As to post-sale warnings, while the FDA permits such warnings, it does not require them. See *Stengel*, 704 F.3d at 1234. In either case, Plaintiffs' claim seeks to impose on Medtronic labeling or warning requirements that go beyond what federal law requires. As there is no dispute that the issue of labeling and warning relate to the safety and effectiveness of the device, this claim is expressly preempted by the MDA.

Plaintiffs' Strict Products Liability—Failure of Warn claim is dismissed.

2. Strict Products Liability—Design Defect

This claim alleges that INFUSE was defectively designed because it was unsafe when used in the manner that was either promoted by Medtronic or reasonably foreseen by Medtronic. (Compl., ¶ 378.) Plaintiffs further allege that the device was defectively designed because the risks of danger outweigh its benefits. (Compl., ¶ 379.)

By way of their claim, Plaintiffs attack the risk/benefit analysis that led the FDA to approve an inherently dangerous Class III device. To prevail on this claim, a jury would have to making findings that conflict with those of the FDA. Circuit courts have found that such claims are expressly preempted by § 360k. See *Bryant v. Medtronic, Inc.*, 623 F.3d 1200, 1206 (8th Cir.2010); *Mitchell v. Collagen Corp.*, 126 F.3d

2014 WL 3056026

902, 913–14 (7th Cir.1997), *cert. denied*, 523 U.S. 1020, 118 S.Ct. 1300, 140 L.Ed.2d 467 (1998) (holding that strict liability claim that product was “unreasonably dangerous” was expressly preempted because it conflicted with FDA premarket approval of the product).

Plaintiffs' Strict Products Liability—Design Defect claim is dismissed.

3. Products Liability—Negligence

Plaintiffs allege that Medtronic breached its duties to Plaintiffs by performing the following acts or omissions: (1) improper promotion and marketing of INFUSE for off-label use; (2) failure to warn Plaintiffs and physicians of the dangers associated with off-label INFUSE; (3) failure to exercise reasonable care in complying with federal law and regulations applicable to the sale and marketing of INFUSE; and (4) failure to exercise reasonable care in preventing INFUSE from creating an unreasonable risk of harm to Plaintiffs when used in a reasonably foreseeable manner. (Compl., ¶ 407.)

*5 As to the first alleged act of negligence, the Court finds the claim not expressly preempted, but rather, impliedly preempted. In *Carson v. Depuy Spine, Inc.*, the Ninth Circuit considered whether off-label promotion by a drug manufacturer is prohibited by the FDCA, and determined that it is. *See Carson*, 365 Fed.Appx. 812, 815 (9th Cir.2010) (unpublished) (“[T]he marketing and promotion of a Class III device for an unapproved use violates Section 331 of the FDCA.”). Although *Carson* is not binding, this Court finds the Ninth Circuit's reasoning persuasive and follows its holding. As such, Plaintiffs' claim based on off-label promotion runs parallel to the FDCA and survives express preemption. However, there is no claim for illegal off-label promotion rooted in traditional state tort law. Therefore, any common law claim arising from such an action exists only by virtue of the FDCA. Permitting this claim to proceed would essentially allow a private litigant to attempt enforcement of the FDCA. *Buckman* bars such an action under § 337(a). Therefore, Plaintiffs' negligence claim based on off-label promotion is impliedly preempted.

As to Plaintiffs' negligence claim based on a failure to warn or dangerous design (2 and 4), the claim is expressly preempted for the same reasons stated in the preceding sections, IV.B. 1. and 2. Specifically, the claim fails because it is premised on the theory that state law required Medtronic to warn about the risks of off-label use, or make cost-benefit decisions about the design. These requirements are different from, or in addition

to, those imposed by the federal requirements. Therefore, Plaintiffs' claim based on failure to warn and dangerous design is expressly preempted

Finally, to the extent Plaintiffs base their claim on failing to comply with other federal laws or regulations applicable to the sale or marketing of INFUSE, Plaintiffs fail to allege sufficient facts. Specifically, Plaintiffs fail to allege facts substantiating a violation of any particular federal requirement applicable to the device. Therefore, the Court cannot reasonably infer that these other “federal law of regulations” run parallel to the FDCA. Nor can the Court determine whether the claim can exist independently from the FDCA. Plaintiffs' conclusory allegation that Medtronic failed to comply with federal law and regulations is insufficient to overcome either express or implied preemption.

Plaintiffs' Products Liability—Negligence claim is dismissed.

4. Negligence Per Se

Under the theory of negligence per se, as long as other requirements are met,² a presumption of negligence arises from the violation of a statute. *Padilla v. Pomona College*, 166 Cal.App.4th 661, 675, 82 Cal.Rptr.3d 869 (2008).

2 The other requirements are: the statute at issue must have been enacted to protect a class of persons, of which the plaintiff is a member, against the type of harm the plaintiff suffered as a result of the statutory violation. *Padilla v. Pomona College*, 166 Cal.App.4th 661, 675, 82 Cal.Rptr.3d 869 (2008).

Here, Plaintiffs' claim for negligence per se is “based on [Medtronic's] violations of FDCA regulations.”³ (Compl.¶ 417.) As such, the standard of care for this negligence claim relies exclusively on the FDCA, and adjudication of this claim relies on the existence of the federal requirements. While courts have generally allowed a negligence per se claim based on violation of a federal statute, the plain language of § 337(a) and the *Buckman* decision indicate that, where the FDCA is concerned, such claim fails.

3 Plaintiffs specifically refer to regulations involving, among other things, compliance with PMA approval standard orders, promotion of devices for off-label uses, approval by the FDA for any product changes, and reporting adverse events. (Compl., ¶ 418.)

*6 § 337(a) expressly states that all actions to enforce FDA requirements “shall be by and in the name of the United States.” 21 U.S.C. § 337(a). As *Buckman* concluded, this provision “leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions.” *Buckman*, 531 U.S. at 349 n.4. Allowing a litigant to assert a negligence per se claim based on violation of the FDCA would frustrate congressional intent regarding the regulation of medical devices, and interfere “with the federal statutory scheme, which ‘amply empowers the FDA to punish and deter fraud against the Administration.’ ” *Id.* at 348. Stated differently, a negligence per se claim alleging violation of the FDCA is nothing more than a private right of action under the FDCA for damages. Since the latter is not available as a result of § 337(a), the Court finds that the former is preempted as well.

Plaintiffs' Negligence Per Se claim is dismissed.

5. Fraud Claims: Fraudulent Misrepresentation, Fraud in the Inducement and Strict Products Liability—Misrepresentation

Plaintiffs' claim for Fraudulent Misrepresentation and Fraud in the Inducement alleges that Medtronic “fraudulently and intentionally misrepresented material and important health and safety product risk information from Plaintiff and Plaintiff's physicians.” (Compl., ¶ 343.) Specifically, Plaintiffs allege that Medtronic fraudulently concealed and misrepresented (1) the health and safety hazards, symptoms, constellation of symptoms, diseases and/or health problems associated with the off-label use of INFUSE; (2) the practice of promoting and marketing to physicians the off-label practice of using INFUSE without an LT-Cage and placing it posteriorly or laterally; and (3) information about the known comparative risks and benefits of the use of INFUSE, and the relative benefits and availability of alternate products, treatments and/or therapies. (Compl., ¶ 345.)

Similarly, Plaintiffs' claim for Strict Products Liability—Misrepresentation alleges that in the course of marketing INFUSE, Medtronic made untrue representations of material facts and omitted material information to Plaintiffs, Plaintiffs' physicians, and the public at large. (Compl., ¶ 388.) Plaintiffs further allege that Medtronic sponsored biased medical trials, reports, and articles that wrongfully and inaccurately claim that the dangers inherent to off-label use of INFUSE did not exist, or were significantly less than the actual dangers. *Id.* Finally, Plaintiffs allege that Plaintiffs and their

physicians would not have proceeded with the off-label use of INFUSE had they known the material facts that Medtronic misrepresented or omitted. *Id.*

As to the issue of preemption, federal law that prohibits promotion of off-label uses of approved devices certainly prohibits *false or misleading* promotion. As such, Plaintiffs' fraud claims are not expressly preempted, because they run parallel to requirements and prohibitions imposed by the FDCA. Additionally, Plaintiffs' claims also escape implied preemption under § 337(a) and *Buckman* because claims of fraud are moored in traditional state common law and exist independently from the FDCA. Therefore, Plaintiffs' fraud claims are not preempted.

*7 Because these claims sound in fraud, Federal Rule of Civil Procedure (“Rule”) 9(b) applies. Under Rule 9(b), a plaintiff who asserts a fraud claim must plead the specific circumstances surrounding the alleged fraud. Here, Plaintiffs allege separate paragraphs for each of the named plaintiffs who underwent *bone graft* surgery. For each plaintiff, Plaintiffs uniformly allege “representatives of Medtronic ... intentionally and/or carelessly, informed plaintiff's surgeon of the safety and efficacy of [INFUSE] as applied to [that] procedure.” (Compl., ¶¶ 269–324.) Plaintiffs also allege a series of allegations involving Medtronic's off-label promotion. Such allegations primarily involve general statements that Medtronic manipulated medical literature and paid opinion leader consultants to misrepresent the safety and efficacy of INFUSE's off-label use. These boilerplate and general allegations fail to meet the heightened pleading requirements, as they fail to allege “the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.” *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392–93 (9th Cir.1988).

However, Plaintiffs also allege that Dr. Burkus and Dr. Haid received large sums of money from Medtronic to create fraudulent research. (Compl., ¶¶ 132–134.) Such research led to publications and presentations that promoted the use of off-label INFUSE, one of which was a 2004 article published in *The Spine Journal*. *Id.* These publications and presentations allegedly concealed the risk and danger of the off-label INFUSE. (Compl., ¶ 133.) Plaintiffs allege that prior to the surgeries, Plaintiffs' surgeons “believe that he/she read articles by Drs. Burkus and Haid endorsing the use of [INFUSE] as safe and effective, while failing to warn of the true risks of bone overgrowth and inflammatory

reactions.” (Compl., ¶ 327.) The Court finds that these allegations provide sufficient factual basis that meet the heightened pleading requirements of Rule 9(b).

Plaintiffs' claims for Fraudulent Misrepresentation/Fraud in the Inducement and Strict Products Liability—Misrepresentation are not preempted and adequately state a claim for relief.

6. Breach of Express Warranty

Plaintiffs allege that Medtronic “utilized journal articles, advertising media, sales representatives/consultants and paid Key Opinion Leaders to urge the use, purchase, and utilization of the off-label use of [INFUSE] and expressly warranted to physicians and other members of the general public and medical community that such off-label uses ... were safe and effective.” (Compl., ¶ 427.) Plaintiffs further allege that their treating surgeon relied on Medtronic's express warranties regarding the safety and efficacy of off-label use of INFUSE, but such uses, in fact, were not effective, safe and proper for the uses as warranted. (Compl., ¶ 429.)

As an initial matter, the Court finds that this claim is neither expressly or impliedly preempted. As discussed in the preceding section, federal law prohibits false or misleading off-label promotion. To the extent Plaintiffs base their claim on Medtronic's alleged misleading warranties of off-label INFUSE, Plaintiff does not seek to impose any requirement different from, or additional to, existing federal requirements. Nor is the claim preempted under § 337(a) and *Buckman*, as a claim for breach of express warranty originates from traditional state law that predates, and exists independently from, the FDCA.

*8 However, under California law, a breach of express warranty requires that (1) the seller made an affirmation of fact or promise, or provided a description of its goods; (2) the promise or description formed the basis of the bargain; (3) the seller breached the express warranty; and (4) the breach caused injury to the plaintiff. [Cal. Comm.Code § 2313\(1\)\(a\)](#);

Williams v. Beechnut Nutrition Corp., 185 Cal.App.3d 135, 142, 229 Cal.Rptr. 605 (1986). Here, Plaintiffs have alleged no facts demonstrating that Medtronic made any affirmations specifically to Plaintiffs or their surgeons, so as to form the basis of the bargain.

Moreover, to adequately state a claim for breach of express warranty, a plaintiff must plead that notice of the alleged breach was provided to the seller within a reasonable time after discovery of the breach. *Alvarez v. Chevron Corp.*, 656 F.3d 926, 932 (9th Cir.2011) (internal citations omitted). Here, Plaintiffs make no such allegation. Therefore, Plaintiffs' claim fails for this additional reason.

Plaintiffs' claim for Breach of Express Warranty is dismissed.

7. Loss of Consortium

As pointed out by Medtronic, Plaintiffs' loss of consortium claim alleges injuries suffered by Plaintiffs' spouses. However, none of the plaintiffs are named as spouses of an individual allegedly injured by INFUSE, nor does any plaintiff claim to be married. Plaintiffs fail to raise any argument in response to Medtronic's challenge to this claim.

Plaintiffs' claim for Loss of Consortium is dismissed.

V. CONCLUSION

Based on the foregoing reasons, the Court **grants in part** Medtronic's Motion to Dismiss. Specifically, the Court dismisses all claims except for Plaintiffs' claims for (1) Fraudulent Misrepresentation and Fraudulent Inducement; and (2) Strict Products Liability—Misrepresentation.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 3056026

TAB 18

2013 WL 1845615

2013 WL 1845615

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Stanley FISHMAN, Suzanne Bowser, and
Vicki Plunkett, individually and on behalf
of all others similarly situated, Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, Defendant.

Civ. No. 2:12-cv-00585 (WJM).

|
April 30, 2013.

Attorneys and Law Firms

Caroline F. Bartlett, Donald A. Ecklund, James E. Cecchi,
Carella Byrne Cecchi Olstein Brody & Agnello, P.C.,
Roseland, NJ, for Plaintiffs.

Charles J. Falletta, Herve Gouraige, Jeffrey J. Greenbaum,
Sills Cummis & Gross P.C., Newark, NJ, for Defendant.

OPINION

WILLIAM J. MARTINI, District Judge.

*1 Plaintiffs Stanley Fishman, Suzanne Bowser,¹ and Vicki Plunkett filed this putative class action against Defendant General Electric Company (“GE”). This matter comes before the Court on Defendant’s motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). There was no oral argument. [Fed.R.Civ.P. 78\(b\)](#). For the reasons set forth below, Defendant’s motion to dismiss is **GRANTED** in part, and **DENIED** in part.

¹ Plaintiff Bowser’s name is improperly listed in the caption as “Suzanne Bowser.”

I. BACKGROUND

GE manufactures, produces, distributes, and sells washing machines throughout the United States. Am. Compl. ¶ 20. Sales occur both directly to the consumer and through GE’s network of authorized dealers, which includes leading retailers and online merchants. *Id.* ¶ 21. The Amended Complaint alleges that GE’s “front-loading washer machines” have design defects that cause them to: (1) accumulate

mold and mildew, (2) produce a moldy or mildew odor that permeates the washing machines and the clothes and other items washing in the machines; and that (3) fail to remove the moisture, residue, and bacteria that lead to the formation of mold, mildew, and foul odors (collectively, the “Mold Problems”). *Id.* ¶ 2. The Amended Complaint alleges that defects in the drum, the door, and the door seal play a role in the accumulation of mold and mildew. *Id.* ¶ 39.

The Amended Complaint alleges that GE made numerous misrepresentations to conceal the design defects in its front-loading washing machines. Am. Compl. ¶ 37. Specifically, Plaintiffs allege that GE “made express representations” about the quality of its washing machines. *Id.* ¶ 24. Plaintiffs also allege that GE made “affirmations of fact and promises including those found in its advertisements, promotional and marketing materials, point-of-sale displays, product specifications, and within the washing machine manuals.” *Id.* ¶ 115. The Amended Complaint alleges that consumers received an express one-year factory warranty from GE, but does not provide any other information about this warranty. *Id.* ¶ 22. Finally, the Amended Complaint alleges that GE publicized the machines as certified ENERGY STAR products.² *Id.* ¶ 25. The Amended Complaint alleges that all of these representations were false because the washing machines were not of a merchantable quality, were not fit for their ordinary purpose, and were not energy efficient. *See id.* ¶ 37.

² Certified ENERGY STAR products are more energy efficient than regular products. *Id.* ¶ 28. In order to use the ENERGY STAR mark, manufacturers must comply with current ENERGY STAR guidelines. *Id.* ¶ 26.

The named Plaintiffs filed this action on behalf of themselves, a putative nationwide class, and a putative sub-class comprised of “[a]ll persons in Missouri, New Jersey, and Pennsylvania who own a Washing Machine for personal, family, or household purposes.” Am. Compl. ¶ 72. The Amended Complaint alleges that the putative class members were damaged because they paid far too much for defective washing machines. *Id.* ¶ 8. The Amended Complaint makes the following specific allegations with respect to the named Plaintiffs.

A. Plaintiff Fishman

*2 Fishman purchased a GE washing machine for household purposes in November 2006. Am. Compl. ¶ 53. He paid

approximately \$1,000 for the washing machine and at all times used the washing machine as instructed by GE's manual or as otherwise directed by GE. *Id.* Approximately six months after purchasing his washing machine, Fishman noticed a foul, mold, or mildew odor emanating from the machine. *Id.* Fishman contacted GE so that GE could correct the problem. *Id.* ¶ 54. GE recommended that Fishman leave his washing machine door open between washes to reduce the incidence the Mold Problem. *Id.* ¶ 55. This recommendation did not solve the problem. *Id.* In addition, the GE owner's manual specifically warns that leaving the washer door open creates a risk of injury to children and pets who might be enticed to hang on the door or crawl inside the washer. *Id.* GE never resolved the Mold Problems in Fishman's machine, and instead provided Fishman with a check for \$75 .00. *Id.* ¶ 57.

B. Plaintiff Bowser

Bowser purchased a washing machine from Builders Surplus for household purposes on or about March 3, 2007. Am. Compl. ¶ 59. She paid approximately \$579.99 for the washing machine and at all times used the washing machine as instructed by GE's manual or as otherwise directed by GE. *Id.* At some unspecified time after the purchase of her washing machine, Bowser noticed a foul, mold, or mildew odor emanating from the machine. *Id.* Bowser tried to clean her washing machine using bleach, vinegar, and Tide Washing Machine Cleaner. *Id.* ¶ 61. She also manually cleaned the visible Mold Problem from the gasket and the hose at the bottom of the machine. *Id.* She also arranged for a certified technician from Sears to attempt to remedy the Mold Problems, but these measures were unsuccessful. *Id.* Bowser contacted GE. *Id.* ¶ 62. GE recommended that Bowser keep her washing machine door open and provided her with a box of Tide Washing Machine Cleaner. *Id.* None of these measures solved the Mold Problems. *Id.* ¶ 64.

C. Plaintiff Plunkett

Plunkett purchased a washing machine from Foster's Appliance for household purposes on or about January 23, 2010. Am. Compl. ¶ 65. She paid approximately \$2023.74 for the washing machine and matching dryer, and at all times used the washing machine as instructed by GE's manual or as otherwise directed by GE. *Id.* At some unspecified time after the purchase of her washing machine, Plunkett noticed a foul, mold, or mildew odor emanating from the washing machine. *Id.* Plunkett left the door open and cleaned the unit on a regular basis, but these measures failed to correct the Mold

Problems. *Id.* Plunkett also contacted Foster's Appliance, but never received a response. *Id.* ¶ 66.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir.2005). In deciding a motion to dismiss under Rule 12(b)(6), a court must take all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir.1998).

*3 Although a complaint need not contain detailed factual allegations, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, the factual allegations must be sufficient to raise a plaintiff’s right to relief above a speculative level, such that it is “plausible on its face.” *See id.* at 570; *see also Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 64 (3d Cir.2008). 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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). While “[t]he plausibility standard is not akin to a ‘probability requirement’ ... it asks for more than a sheer possibility.” *Iqbal*, 129 S.Ct. at 1949 (2009).

Pursuant to Federal Rule of Civil Procedure 9(b), a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the “precise misconduct with which [it is] charged.” *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir.2007) (quoting *Lum v. Bank of America*, 361 F.3d 217, 223–24 (3d Cir.2004)) (internal quotations omitted). To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation. *Id.*

III. DISCUSSION

Plaintiffs' Amended Complaint asserts six causes of action:

- (1) Count 1: Violation of the New Jersey Consumer Fraud Act ("New Jersey CFA");
- (2) Count 2: Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("Pennsylvania UTPCPL");
- (3) Count 3: Violation of the Missouri Merchandising Practices Act ("Missouri MPA");
- (4) Count 4: Breach of Express Warranty;
- (5) Count 5: Breach of the Implied Warranty of Merchantability; and
- (6) Count 6: Unjust Enrichment.

Plaintiffs assert that New Jersey law applies to the putative nationwide class. Defendant does not dispute that New Jersey law applies for purposes of this motion.³ Defendant argues that every count of the Amended Complaint, except Count 4 (Breach of Express Warranty), is subsumed by the New Jersey Product Liability Act ("New Jersey PLA"). Defendant also argues that each of the six counts in the Amended Complaint should be dismissed. Finally, Defendant argues that the nationwide class allegations in the Amended Complaint should be "dismissed." Def.'s Br. at 13. The Court will discuss: (1) the New Jersey PLA; (2) the statutory consumer fraud claims (Counts 1–3); (3) the warranty claims (Counts 4 and 5); (4) the unjust enrichment claim (Count 6); and (5) the nationwide class allegations.

³ Defendant reserved its right to analyze each Plaintiff's claims under New Jersey's choice-of-law principles at a later stage in the litigation. See Def.'s Br. at 9–10 n. 4.

A. The New Jersey PLA

*4 Defendant argues that Plaintiffs' statutory consumer fraud, breach of implied warranty, and unjust enrichment claims are subsumed by the New Jersey PLA and should be dismissed. The Court disagrees.

The New Jersey PLA "effectively creates an exclusive statutory cause of action for claims falling within its purview." *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir.1991). The statute defines a "product liability action" as "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying

the claim, except actions for harm caused by breach of an express warranty." N.J.S.A. 2A:58C–1(b)(3). The statute defines "harm" caused by a product to include: "(a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; [and] (c) pain and suffering, mental anguish or emotional harm...." N.J.S.A. 2A:58C1 (b)(2).

This is not a product liability action. Defendant argues that the essence of the Amended Complaint is that mold problems in the washing machines caused damage to Plaintiffs' property (clothes and other items washed), and to Plaintiffs themselves or their children and pets. This mischaracterizes the Amended Complaint. Plaintiffs do not claim any physical injury to person (or pet) as part of their damages. Rather, the crux of Plaintiffs' allegations is that the washing machines themselves do not work as promised; *i.e.*, Plaintiffs' allege that the harm was "to the product itself." N.J.S.A. 2A:58C–1(b)(2); see also *Montich v. Miele USA, Inc.*, 849 F.Supp.2d 439, 457 (D.N.J.2012) (where plaintiff's claim of harm was for the "accumulation of mold inside the Miele washing machine and the resulting odor," the "damage is to the product itself and therefore falls outside the ambit of the NJPLA") (internal quotations omitted).

Accordingly, the Court finds that none of Plaintiffs' claims are subsumed by the New Jersey PLA.

B. The Statutory Consumer Fraud Claims (Counts 1–3)

In Count 1, Plaintiffs assert a claim for Violation of the New Jersey CFA, N.J.S.A. 56:8–1, *et seq.* In Count 2, Plaintiffs assert a claim for violation of the Pennsylvania UTPCPL, 73 P.S. § 201–1, *et seq.* In Count 3, Plaintiffs assert a claim for violation of the Missouri MPA, Mo.Rev.Stat. § 407.010, *et seq.* Defendant moves to dismiss all three Counts, arguing that Plaintiffs failed to plead fraud with the particularity required by Rule 9(b). The Court agrees.

Despite filing a 39–page, 152–paragraph Amended Complaint, Plaintiffs failed to provide basic information about key aspects of their claims. For example, Plaintiffs do not specify which washing machines they are talking about. Plaintiffs do not provide model numbers, dates of manufacture or any other information identifying precisely which products are at issue in this litigation. Further, Plaintiffs failed to provide essential dates, such as the dates on which Bowser and Plunkett discovered the alleged defect in their washing machines. Finally, Plaintiffs assert that "GE ... made

2013 WL 1845615

express representations about the quality of its washing machines” (Am.Compl.¶ 24), but do not identify what these representations were or when they were made. Without this basic information, the allegations in the Amended Complaint are not sufficient “to place the defendant [or the Court] on notice of the precise misconduct ... charged.” *Frederico*, 507 F.3d at 200. And they fall woefully short of meeting Rule 9(b)’s heightened pleading standard.

*5 Accordingly, the motion to dismiss Counts 1, 2 and 3 is **GRANTED**, and Counts 1, 2 and 3 are **DISMISSED WITHOUT PREJUDICE**.

C. The Warranty Claims (Counts 4 and 5)

In Count 4, Plaintiffs assert a claim for breach of express warranty. In Count 5, Plaintiffs assert a claim for breach of the implied warranty of merchantability. Defendant moves to dismiss, arguing that Plaintiffs failed to plead plausible warranty claims. The Court agrees.

The Amended Complaint does not provide enough information to support an express warranty claim. Under New Jersey law, in order to state a claim for breach of express warranty, Plaintiffs must allege: (1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description. N.J. Stat. Ann. § 12A:2–313; *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 706 (D.N.J.2011). In this case, the Amended Complaint fails to describe the most important part of the express warranty claim: the express warranty. Plaintiffs allege that “GE has breached its written warranty” (Am.Compl.¶ 119), but Plaintiffs do not identify the actual language or source of this written warranty, or specify when the warranty was in effect. Plaintiffs also allege that Defendant made “affirmations of fact and promises including those found in its advertisements, promotional and marketing materials, point-of-sale displays, product specifications, and within the washing machine manuals.” Am. Compl. ¶ 115. But Plaintiffs do not identify any specific affirmations of fact or promises, and do not provide the language of any advertisements, promotional or marketing materials, point-of-sale displays, or product specifications. Without the language of the warranty, and a start date and end date for the warranty, Plaintiffs cannot state a breach of express warranty claim. See *Arlandson*, 792 F.Supp.2d at 707 (breach of express warranty claim dismissed where plaintiffs “fail[ed] to identify the actual language or source of any

alleged warranty”); *Simmons v. Stryker Corp.*, No. 08–3451, 2008 WL 4936982, at *2 (D.N.J. Nov.17, 2008) (dismissing a claim that was “devoid of any ‘factual matter’ to support the existence of an express warranty”).

The Amended Complaint also does not provide enough information to support an implied warranty claim. Under New Jersey law, a warranty of merchantability is implied in every contract for the sale of goods. N.J. Stat. Ann. § 12A:2–314. “In order for the implied warranty of merchantability to be breached, the product at issue must have been defective or not fit for the ordinary purpose for which it was intended.” See *In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.*, No. 08–939, 2009 WL 2940081, at * 16 (D.N.J. Sept.11, 2009). “[A]n implied warranty cannot temporally exceed an express warranty under New Jersey law.” *Weske v. Samsung Electronics Am., Inc.*, No. 10–4811, 2012 WL 833003, at *6 (D.N.J. Mar.12, 2012) (citing N.J.S.A. 12A:2–317). Because Plaintiffs failed to specify the start and end date of any express warranty, and failed to identify when the alleged defect arose in Bowser and Plunkett’s washing machines, Plaintiffs have not established that the alleged defects arose during the implied warranty period. Thus, Plaintiffs have failed to state a claim for breach of the implied warranty of merchantability.

*6 Accordingly, the motion to dismiss Counts 4 and 5 is **GRANTED**, and Counts 4 and 5 are **DISMISSED WITHOUT PREJUDICE**.

D. The Unjust Enrichment Claim (Count 6)

In Count 6, Plaintiffs assert a claim for unjust enrichment. Defendant moves to dismiss this claim, arguing that Plaintiffs cannot recover for unjust enrichment because they did not purchase their washing machines directly from GE. The Court agrees.

Under New Jersey law, an indirect purchaser cannot succeed on a claim for unjust enrichment. “When an individual purchases a consumer product from a third-party store and not the manufacturer, the purchaser has not conferred a benefit directly to the manufacturer such that the manufacturer could be found to have been unjustly enriched.” *Weske*, 2012 WL 833003, at *7; see also *Hughes v. Panasonic Consumer Electronics, Co.*, No. 10–846, 2011 WL 2976839, at *27 (D.N.J. July 11, 2011) (dismissing unjust enrichment claim on Rule 12(b)(6) motion where plaintiffs in putative class action purchased allegedly defective product from third-party sellers). Plaintiffs cite to a single case, *Stewart v. Beam Global Spirits & Wine, Inc.*, 877 F.Supp.2d 192 (D.N.J.2012)

(“*Stewart* ”), holding that a plaintiff can bring an unjust enrichment claim against a manufacturer, even if the plaintiff bought the product in question from a third-party seller. *Id.* at 201. However, even the *Stewart* court acknowledged that the vast majority of courts in this District have come out the other way. See *Stewart*, 877 F.Supp.2d at 197. This Court joins the majority of courts in this District in finding that a manufacturer is not liable for unjust enrichment if plaintiffs purchased the goods in question from a third-party. It is undisputed that Plaintiffs did not purchase their washing machines directly from GE. Thus, they cannot recover from GE for unjust enrichment.

Accordingly, the motion to dismiss Count 6 is **GRANTED**, and Count 6 is **DISMISSED WITH PREJUDICE**.

E. The Nationwide Class Allegations

In a single paragraph of its motion, Defendant argues that the nationwide class allegations in the Amended Complaint should be “dismissed” “due to the differences in the consumer fraud laws of the various states across the country.” Def.’s Br. at 13. The Court disagrees. As an initial matter, the Court notes that the proper procedural mechanism for making this argument is a motion to strike under [Federal Rule of Civil Procedure 12\(f\)](#). However, even if Defendant had properly

filed a motion to strike, the Court would deny it, as any request to strike the class allegations is premature at this stage of the proceedings. See *Feldman v. Mercedes-Benz USA, LLC*, No. 11–984, 2012 WL 6596830, at * 13 (D.N.J. Dec.18, 2012) (“numerous cases in this District have emphatically denied requests to strike class allegations at the motion to dismiss stage as procedurally premature”); *Andrews v. Home Depot U.S.A., Inc.*, No. 03–5200, 2005 WL 1490474, at *3 (D.N.J. June 23, 2005) (same); *Myers v. Medquist, Inc.*, No. 05–4608, 2006 WL 3751210, at *5 (D.N.J. Dec.20, 2006) (same). Accordingly, the motion to dismiss the nationwide class allegations is **DENIED**.

IV. CONCLUSION

*7 For the reasons stated above, Defendant’s motion to dismiss is **GRANTED** in part, and **DENIED** in part. Counts 1, 2, 3, 4, and 5 are **DISMISSED WITHOUT PREJUDICE**. Count 6 is **DISMISSED WITH PREJUDICE**. The motion to dismiss the nationwide class allegations is denied. An appropriate order follows.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1845615

TAB 19



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Cantonis v. Stryker Corp.](#), D.Minn., November 23, 2010

2010 WL 3905854

United States District Court, D. Minnesota.

James FORSLUND, Plaintiff,

v.

STRYKER CORPORATION, a Michigan corporation; and Stryker Sales Corporation, a Michigan corporation, Defendants.

Civil No. 09–2134 (JRT/JJK).

|
Sept. 30, 2010.**Attorneys and Law Firms**[Paul M. Simmons](#) and [Colin P. King](#), Dewsnup King & Olsen, Salt Lake City, UT; and [Yvonne M. Flaherty](#), Lockridge Grindal Nauen PLLP, Minneapolis, MN, for plaintiff.[Timothy P. Griffin](#) and [Frederick W. Morris](#), Leonard Street and Deinard, P.A., Minneapolis, MN, for defendants.**MEMORANDUM OPINION AND ORDER**[JOHN R. TUNHEIM](#), District Judge.

*1 On August 13, 2009, plaintiff James Forslund filed a complaint against defendants Stryker Corporation, Stryker Sales Corporation, and Stryker Orthopaedics,¹ alleging various claims arising out of the insertion of a pain pump manufactured by Stryker into Forslund's shoulder after surgery. Forslund claims that the pain pump's continuous injection of anesthetic solutions directly into his shoulder caused permanent damage to his shoulder joint. Forslund alleges claims for strict liability, negligence, negligent misrepresentation, and breach of express and implied warranties. On September 28, 2009, Stryker filed a motion for judgment on the pleadings. Forslund opposes the motion and, in the alternative, moves for leave to amend his complaint. For the reasons set forth below, the Court grants Stryker's motion, dismissing Forslund's complaint without prejudice in part and with prejudice in part; and grants Forslund's motion for leave to amend.

¹ On October 16, 2009, the parties stipulated to the dismissal of Stryker Orthopaedics from the case. (Docket No. 25.)

BACKGROUND²

² For the purposes of the motion to dismiss, the Court accepts the factual allegations contained in the complaint as true. *Bhd. of Maint. of Way Employees v. Burlington N. Santa Fe R.R.*, 270 F.3d 637, 638 (8th Cir.2001) (per curiam); see also *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949 (2009).

On or about December 29, 2005, Forslund underwent shoulder surgery. (Compl. ¶ 5, Docket No. 1.) After the operation, a pain pump designed and manufactured by Stryker was implanted in Forslund's shoulder. (*Id.* ¶¶ 5, 12.) The pain pump is a medical device that “deliver[s] a continuous and rate-controlled amount of pain medication, via catheter, directly to a surgical site, including the joint space, for post-surgical pain management.” (*Id.* ¶ 7.) Stryker “designed, manufactured, sold, and/or distributed [the pain pumps] with the intent ... that they be used with a reservoir of anesthetic solution for 48 hours or more.” (*Id.* ¶ 9.) According to the complaint, “the continuous injections of anesthetic solutions ... directly into or in the vicinity of the shoulder joint, can cause and has caused catastrophic and permanent damage to ... [Forslund's] shoulder joint, resulting in severe and unremitting pain, weakness, loss of strength, decreased range of motion, and other profound injuries.” (*Id.*) As a result, Forslund “has been left severely and permanently disabled.” (*Id.* ¶ 10.)

Forslund alleges six claims against Stryker for (1) strict liability (design defect and failure to warn), (2) negligence (design defect and failure to warn), (3) negligent misrepresentation, (4) breach of express warranty, (5) breach of implied warranty of merchantability, and (6) breach of implied warranty of fitness for a particular purpose. On September 28, 2009, Stryker filed a motion for judgment on the pleadings. Forslund opposes the motion and alternatively requests leave to file an amended complaint pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#).

DISCUSSION**I. STANDARD OF REVIEW**

Rule 12(c) of the Federal Rules of Civil Procedure provides that “[a]fter the pleadings are closed ... a party may move for judgment on the pleadings.” A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir.1990). The Court considers all facts alleged in the complaint as true, and construes the pleadings in a light most favorable to the non-moving party. See, e.g., *Bhd. of Maint. of Way*, 270 F.3d at 638. To survive a motion for judgment on the pleadings, however, a complaint must provide more than “ ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’ ” See *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, to avoid dismissal, a complaint must include “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (internal quotation marks 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.” *Id.* “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility,” and therefore must be dismissed. *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).

II. FORSLUND’S ORIGINAL COMPLAINT

A. Strict Liability (Count 1)

*2 Forslund raises two strict liability claims in his complaint, alleging that the pain pump was defectively designed and that the pain pump was defective because Stryker failed to provide adequate warnings and instructions. Stryker argues that Forslund has not pleaded facts sufficient to establish either strict liability claim.

1. Design Defect

To recover for strict liability under Minnesota products liability law, “the plaintiff must establish (1) that the defendant’s product was in a defective condition unreasonably dangerous for its intended use, (2) that the defect existed when the product left the defendant’s control, and (3) that the defect was the proximate cause of the injury sustained.” *Bilotta v. Kelly Co., Inc.*, 346 N.W.2d 616, 623 n. 3 (Minn.1984); *Drager v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 882 (Minn.Ct.App.1993). “Minnesota merges negligence and strict liability claims into a single products liability theory, which employs a reasonable-care balancing test to determine

whether a product is defective.” *Thompson v. Hirano Tecseed Co., Ltd.*, 456 F.3d 805, 809 (8th Cir.2006); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1009 (8th Cir.1998) (“The reasonable care balancing test is used in Minnesota to determine if a product was designed in a defective condition unreasonably dangerous for its intended use.” (internal quotation marks omitted)). To determine whether a product is unreasonably dangerous in its design, the Court balances “the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm.” *Bilotta*, 346 N.W.2d at 621; accord *Trost*, 162 F.3d at 1009. “The test is an objective standard ‘which focuses on the conduct of the manufacturer in evaluating whether its choice of design struck an acceptable balance among several competing factors.’ ” *Trost*, 162 F.3d at 1009 (quoting *Bilotta*, 346 N.W.2d at 622); see also *Young v. Pollock Eng’g Group, Inc.*, 428 F.3d 786, 789 (8th Cir.2005).

Forslund alleges that “the pain pump was defectively designed and manufactured by the Defendants in that the continuous feed of post-surgical anesthetic solution at the delivery rate used by the pain pump caused permanent injury.” (Compl.¶ 13(a), Docket No. 1.) Forslund also alleges that the pain pump’s delivery of anesthetic solutions directly to the shoulder joint caused “catastrophic and permanent damage” to Forslund’s shoulder joint, (*id.* ¶ 9); that the Food and Drug Administration (“FDA”) denied Stryker’s application to permit the use of pain pumps in the shoulder joint space, (*id.* ¶ 13(g)); and that continuous injection of anesthetics into the shoulder joint by the pain pump “is very likely to cause serious and permanent injury to the joint,” (*id.* ¶ 13(d)).

Forslund alleges only conclusory statements that the pain pump is unreasonably dangerous in its design. Reciting the elements of the reasonable-care balancing test, Forslund alleges that the pain pump’s continuous injection of anesthetic solutions directly into the shoulder joint “is very likely to cause permanent injury,” but Forslund does not allege facts supporting that conclusion. Although Forslund characterizes the potential harm caused by that defect as “catastrophic and permanent,” Forslund does not allege facts identifying the burden on Stryker to adopt a precaution that would avoid such harm. Forslund’s claim boils down to an allegation that the pain pump is defective and unreasonably dangerous in its design because it is “very likely” to cause serious harm. Consequently, Forslund’s complaint does not allege sufficient facts to plead a plausible design defect claim under Minnesota law. See *Iqbal*, 129 S.Ct. at 1949 (“Nor does a

complaint suffice if it tenders naked assertions devoid of further factual enhancement.” (internal quotation marks and alteration omitted)).³

³ Forslund has clarified that he did not intend to and does not now assert a claim for defective manufacturing. (PL's Mem. in Opp'n to Defs.' Mot. for J. on Pleadings at 6 n. 30, Docket No. 29.)

2. Failure to Warn

*3 Forslund alleges that Stryker “marketed, sold, and/or distributed the [] pain pumps specifically to be used directly in the shoulder joint space.” (Compl. ¶ 13(g), Docket No. 1.) Forslund alleges that Stryker “failed to provide adequate warnings and instructions concerning the risks presented by (i) using a higher dosage of pain medication, (ii) inserted into the surgical site, and (iii) for an extended period of time.” (*Id.* ¶ 13(b).) Forslund also claims that the pain pump's “instructions and labeling failed to include a precaution against placing the catheter of the [] pain pumps in or near the joint space,” and that the pain pump's “instructions and labeling failed to provide [Forslund], his surgeon, or the United States medical community at large adequate instructions and warnings for safe use of the [] pain pumps in or near the joint shoulder space.” (*Id.* ¶ 13(e)-(f), Docket No. 1.) Forslund alleges that the defective warnings rendered the pain pumps unreasonably dangerous. (*Id.* ¶ 13(h).)

Stryker argues that Forslund's complaint does not establish a failure-to-warn claim because it does not plead facts (1) identifying the use for which the Stryker pain pump was designed and marketed; (2) showing that Forslund's surgeon used the pain pump in the manner for which it was designed and marketed; (3) demonstrating that Stryker knew or should have known that the pain pump was likely to be dangerous for its intended use; or (4) indicating that Stryker failed to use reasonable care in informing Forslund's surgeon that certain uses of the pain pump could be unreasonably dangerous. (Defs.' Mem. in Supp. of Mot. for J. on the Pleadings at 9, Docket No. 18.)

“[A] supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in [the] use [for which it is supplied].”⁴ *Gray v. Badger Min'g Corp.*, 676 N.W.2d 268, 274 (Minn.2004); see also *Gamradt v. Federal Lab., Inc.*, 380 F.3d 416, 419 (8th Cir.2004) (applying Minnesota law). “The duty to warn has been described as two duties: (1) The duty to give

adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage.” *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 787 (Minn.1977). “[W]here the manufacturer ... of a product has actual or constructive knowledge of danger to users, the ... manufacturer has a duty to give warning of such dangers.” *Id.* at 788. “To be legally adequate, the warning should (1) attract the attention of those that the product could harm; (2) explain the mechanism and mode of injury; and (3) provide instructions on ways to safely use the product to avoid injury.” *Gray*, 676 N.W.2d at 274.

⁴ The Minnesota Supreme Court “has adopted the position that strict liability for failure to warn is based upon principles of negligence.” *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 926 n. 4 (Minn.1986).

With respect to the use or purpose for which the pain pump was designed, Forslund contends that Stryker “designed and marketed pain pumps for use directly in the shoulder joint space.” (Pl.'s Mem. in Opp'n to Mot. for J. on the Pleadings at 9, Docket No. 29.) Forslund's complaint, however, alleges only that Stryker designed and manufactured the pain pumps for use in “the joint space.” (Compl. ¶ 7, Docket No. 1.) From that language, the Court is required to make a significant assumption that Stryker intended the pain pumps be used in shoulder joint spaces. Given the disjointed, vague allegations in the complaint, the Court declines to draw such an inference.

*4 Forslund also alleges that Stryker failed to take reasonable care to inform Forslund's surgeon of the dangers inherent in the intended use of or misuse of the pain pump, (*see id.* ¶ 20(d)), but Forslund does not allege facts supporting that conclusion. Indeed, Forslund does not allege facts showing that Stryker knew or should have known that the pain pump would be dangerous for the use for which it was supplied.⁵ Accordingly, Forslund's complaint does not allege sufficient facts to support a plausible claim for relief for failure to warn.

⁵ Forslund alleges that the FDA did not approve the pain pump for use in the shoulder joint space. (*Id.* ¶ 13(g).) That allegation, however, is not probative of whether Stryker knew or should have known of the risks relating to the use of the pain pump in the shoulder joint space and therefore that Stryker had a duty to warn about that potential use. Forslund also filed a supplemental declaration with his opposition to Stryker's motion, which includes

an FDA advisory relating to the use of pain pumps in joint spaces. Because that declaration is not necessarily embraced by the pleadings, the Court declines to consider that exhibit in this motion. See *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir.1999).

3. Redundant Claims

Stryker also contends that the Court should dismiss Forslund's strict liability claims for design defect and failure to warn for the additional reason that they would be redundant with Forslund's negligence claims. (Defs.' Mem. in Supp of Mot. for J. on the Pleadings at 7, 10, Docket No. 18.) Minnesota law merges strict liability and negligence theories under a single products liability theory and analyzes design defect claims under the reasonable-care balancing test. See *Thompson*, 456 F.3d at 809. Forslund, however, does not need to decide at this stage of the litigation whether he will pursue his strict liability claims or negligence claims. Although Forslund will eventually have to choose only one of those claims to submit to the jury, Forslund "can plead and prove at trial either or both theories," and then determine which theory to submit to the jury. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn.1984); cf. *Bilotta*, 346 N.W.2d at 622 ("Whether strict liability or negligence affords a plaintiff the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court and on the jury instructions given under each theory.").

For the reasons stated above, the Court dismisses without prejudice Forslund's strict liability design defect and failure to warn claims.

B. Negligence (Count 2)

In addition to his strict liability claims, Forslund brings claims for negligent design and negligent failure to warn. Stryker argues that the Court should dismiss the negligence claims because they are redundant with his strict liability claims. Forslund responds that because his negligence cause of action incorporates the prior allegations—including his strict liability allegations—in the complaint, he has stated a claim for negligence:

The same facts from which a jury could conclude that [Stryker's] pain pump was defectively designed also support a claim that [Stryker] failed to

exercise reasonable care in designing the pain pump, and the same facts from which a jury could conclude that the pain pump was defective because it was not accompanied by adequate warnings and instructions regarding its use also support a claim that [Stryker was] negligent in not providing proper warnings.

(Pl.'s Mem. in Opp'n to Defs.' Mot. for J. on the Pleadings at 12, Docket No. 29.)

To the extent that Forslund's negligence allegations rely on the preceding allegations of fact and allegations relating to his strict liability claims, the Court similarly concludes that Forslund has not adequately pleaded his negligence claims under the reasonable-care balancing test.⁶ See, e.g., *Westbrock v. Marshalltown Mfg. Co.*, 473 N.W.2d 352, 356 (Minn.Ct.App.1991) ("*Bilotta* merged strict liability [and] negligence ... remedies into a single products liability theory. To recover, an injured party must show (1) the product was in a defective condition, unreasonably dangerous to the user, (2) the defect existed when the product left the manufacturer's control, and (3) causation. The [Minnesota] supreme court fused a negligence standard into a traditional strict liability theory by employing a reasonable care balancing test to determine whether the product was defective." (citations omitted)); see also *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 926 n. 4 (Minn.1986). Accordingly, the Court dismisses without prejudice Forslund's negligence claims.

⁶ "The distinction between strict liability and negligence in design-defect and failure-to-warn cases is that in strict liability, knowledge of the condition of the product and the risks involved in that condition will be imputed to the manufacturer, whereas in negligence these elements must be proven." *Bilotta*, 346 N.W.2d at 622.

*5 As noted above, however, the negligence claims are not redundant with the strict liability claims at this stage of the litigation, and Forslund may plead both theories in his complaint. See *Hauenstein*, 347 N.W.2d at 275.

C. Negligent Misrepresentation (Count 3)

Forslund alleges that Stryker negligently misrepresented and communicated false information to Forslund and his surgeon that the “pain pumps were safe, effective, and would not harm or adversely affect ... Forslund's health.” (Compl. ¶ 26, Docket No. 1.) Forslund further alleges that Stryker knew those representations to be false, that he and his surgeon reasonably relied on those representations, and that the misrepresentations proximately caused him damages. (*Id.* ¶¶ 26–29.)

Stryker asks the Court to dismiss Forslund's negligent misrepresentation claim for two reasons: First, Stryker contends that Forslund has not pled his negligent misrepresentation claim with particularity as required under [Federal Rule of Civil Procedure 9\(b\)](#). Second, Stryker argues Forslund may not recover under a negligent misrepresentation theory because Minnesota law only permits a party to recover pecuniary damages for negligent misrepresentation and, here, Forslund alleges personal injury.

1. Federal Rule of Civil Procedure 9(b)

To establish a claim for negligent misrepresentation, Forslund must demonstrate that “(1) [Stryker] owe [d] him a duty of care in obtaining or communicating information; (2) [Stryker] supplied false information in breach of that duty of care; (3) [Forslund] justifiably relied on the false information; and (4) [Forslund] was damaged as a result.” See *Masepohl v. Am. Tobacco Co., Inc.*, 974 F.Supp. 1245, 1251 (D.Minn.1997).

Forslund must plead his claim for negligent misrepresentation with particularity as required under [Federal Rule of Civil Procedure 9\(b\)](#). *McGregor v. Uponor, Inc.*, Civ. No. 09–1136, 2010 WL 55985, at *3 (D.Minn. Jan. 4, 2010) (“Minnesota law holds that allegations of ... negligent misrepresentation [] sound in fraud and therefore must satisfy the pleading requirements of [Rule 9\(b\)](#).”); *ADT Sec. Servs., Inc. v. Swenson*, No. Civ. 07–2983, 2008 WL 2828867, at *4 (D.Minn. July 21, 2008); see also *McLain v. Andersen Corp.*, 567 F.3d 956, 970 (8th Cir.2009). A claim for negligent misrepresentation must generally plead circumstances “includ[ing] such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.” *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir.1995).

Forslund's allegations do not identify who made the representations to Forslund or his surgeon, the content of those representations, or when the representations were

made. As a consequence, the complaint does not allege facts by which to determine that the representations were false at the time they were made. Accordingly, Stryker is entitled to judgment on the pleadings on Forslund's negligent misrepresentation claim because Forslund has not pleaded that claim with particularity.

2. Pecuniary Damages

*6 Stryker also argues that Forslund's negligent misrepresentation claim should be dismissed because it does not arise out of a business or commercial setting and seek damages for pecuniary loss. The Minnesota Supreme Court has held:

One who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Bonhiver v. Graff, 248 N.W.2d 291, 298 (Minn.1976).

Forslund contends that although the Minnesota Supreme Court has not permitted claims for negligent misrepresentation involving the risk of physical harm, the Supreme Court has also not “foreclose [d] the possibility of recognizing in Minnesota the tort of negligent misrepresentation involving the risk of physical harm.” *Smith v. Bruger Cos.*, 569 N.W.2d 408, 411 (Minn.1997). Alternatively, Forslund argues that he has pleaded that Stryker's alleged statements were made in a business or commercial setting or in a setting in which Stryker had a pecuniary interest, and that Forslund suffered pecuniary loss in the form of extensive medical bills and follow-up care by relying on those representations. (Pl.'s Mem. in Opp'n to Mot. for J. on Pleadings at 15, Docket No. 29.)

Putting aside Forslund's inability to plead the negligent misrepresentation claim with particularity, Forslund has not

stated a claim for negligent misrepresentation as a matter of law. Forslund offers no support for the argument that while the Minnesota Supreme Court has not foreclosed the possibility of recognizing a negligent misrepresentation claim for physical harm, Minnesota law would permit such a claim here. Moreover, in the Court's view, if medical bills constituted pecuniary loss in these circumstances, the Minnesota Supreme Court would have recognized negligent-misrepresentation claims involving allegations of physical harm. The court has not done so, however, and has instead limited the scope of a negligent misrepresentation claim to a commercial or business setting with consequent pecuniary loss. See *Bonhiver*, 248 N.W.2d at 298. Because Forslund's injuries do not arise out of a business or commercial setting in which he had suffered pecuniary harm, the Court dismisses with prejudice Forslund's negligent misrepresentation claim.

D. Breach of Express Warranty (Count 4)

In his fourth cause of action for breach of express warranty, Forslund alleges “[o]n information and belief, [Stryker] ... expressly communicated to ... Forslund's surgeon that the pain pump was appropriate for use in or near the shoulder joint, and ... Forslund's surgeon reasonably relied on that statement in choosing to use [Stryker's] pain pump in or near ... Forslund's shoulder joint.” (Compl. ¶ 31, Docket No. 1.) Stryker argues that the Court should dismiss Forslund's breach of express warranty claim because the complaint does not allege a plausible claim for relief under that theory.

*7 Under Minnesota law, an express warranty is “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.” Minn.Stat. § 336.2–313(1)(a). “It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warranty’ or ‘guarantee’ or that the seller have a specific intention to make a warranty[.]” *Id.* § 336.2–313(2).

Although Forslund may plead his claims on information and belief, Forslund's allegations lack any factual support. The complaint does not identify who made affirmations or promises about the pain pump, to whom those statements were made, or the general terms of those statements. Although standard notice pleading practice may not require Forslund to plead all such facts, see Fed.R.Civ.P. 8, Forslund's allegations are so deficient as to render the breach of express warranty claim implausible on its face. Accordingly, the Court dismisses that claim without prejudice.

E. Breach of Implied Warranty of Merchantability (Count 5)

Forslund alleges that Stryker's pain pumps, at the time they were placed in the stream of commerce “were not fit for the ordinary purposes for which such products are intended and were unmerchantable to users and consumers, including Plaintiff James Forslund.” (Compl. ¶ 36, Docket No. 1.)

Stryker contends that in a personal injury case, where a defect is alleged to render a product unfit for its ordinary purpose under implied warranty, the claim sounds in tort and is merged under the strict liability doctrine. See *Masepohl*, 974 F.Supp. at 1253. As a result, Stryker argues that Forslund's claim for breach of implied warranty of merchantability is redundant. (Defs.' Mem. in Supp. of Mot. for J. on Pleadings at 15, Docket No. 18.)

Under Minnesota Statute § 336.2–314, “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” Minn.Stat. § 336.2–314. The implied warranty of merchantability assures that a product is “fit for the ordinary purposes for which such goods are used.” *Id.* § 336.2.314(2) (c); *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 53 (Minn.1982). “To prevail on an implied warranty claim, a plaintiff must prove (1) the existence of a warranty; (2) a breach; and (3) a causal link between the breach and the alleged harm.” *Masepohl*, 974 F.Supp. at 1253.

Forslund's claim for breach of implied warranty of merchantability fails as a matter of law. “S trict products liability has effectively preempted implied warranty claims where personal injury is involved.” *Id.* (internal quotation marks and alteration omitted); see also *Nimeth v. Prest Equip. Co.*, No. C1–93–685, 1993 WL 328767, at *1 (Minn.Ct.App. Aug. 31, 1993) (citing *Continental Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 462 (Minn.Ct.App.1984)); *Goblirsch v. Western Land Roller Co.*, 246 N.W.2d 687, 690 (Minn.1976)). Because Forslund's complaint alleges strict products liability claims and personal injury, Forslund's claim for breach of implied warranty of merchantability is preempted. Accordingly, the Court dismisses with prejudice Forslund's breach of implied warranty of merchantability claim.

F. Breach of Implied Warranty of Fitness for a Particular Purpose (Count 6)

*8 Forslund alleges that the Stryker pain pump, at the time it was placed in the stream of commerce, “was not fit for the particular purpose for which it was used by ... Forslund and his surgeon.” (Compl. ¶ 39, Docket No. 1.)

Stryker argues the Court should dismiss the claim for breach of implied warranty of fitness for a particular purpose because Stryker did not deal directly with Forslund, Stryker had no knowledge of Forslund's particular needs, and the complaint does not allege facts that Forslund relied on Stryker's expertise in electing to have the pain pump implanted in his shoulder. (Defs.' Mem. in Supp. of Mot. for J. on Pleadings at 17, Docket No. 18.) Stryker refers to this failure as a lack of “vertical privity.” Stryker also contends that the complaint does not identify Forslund's “particular purpose .”

Under [Minnesota Statute § 336.2–315](#), “[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified ... an implied warranty that the goods shall be fit for such purpose.” [Minn.Stat. § 336.2–315](#). To establish a claim for breach of an implied warranty of fitness for a particular use, Forslund must establish that: “(1) the seller had reason to know of the buyer's particular purpose; (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods; and (3) the buyer's actual reliance.” [Driscoll v. Standard Hardware, Inc.](#), 785 N.W.2d 805, 2010 WL 2813532, at *10 (Minn.Ct.App. July 20, 2010).

As an initial matter, Forslund's failure to plead vertical privity is not dispositive, because as a surgical patient, it is reasonable to expect that Forslund would use or be affected by the Stryker pain pump. See [Minn.Stat. § 336.2–318](#) (“A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty.”).

Forslund's allegations, however, merely recite the elements of the claim. Forslund does not allege any facts identifying the “particular purpose” for which the pain pump was supplied or indicating that Forslund or his surgeon relied on Stryker's skill or judgments in electing to use the pain pump. Thus, the claim is not plausible on its face. See [Iqbal](#), 129 S.Ct. at 1949–50 (internal quotation marks omitted). Accordingly, the Court dismisses without prejudice Forslund's claim for breach of implied warranty of fitness for particular purpose.

III. FORSLUND'S REQUEST FOR LEAVE TO AMEND UNDER [RULE 15\(a\)\(2\)](#)

Forslund filed a conditional motion for leave to amend the complaint. (See Docket No. 30.) Under [Federal Rule of Civil Procedure 15\(a\)\(2\)](#), leave to amend “s hall be freely given where justice so requires.” “A district court may appropriately deny leave to amend where there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.” [Moses.com Secs., Inc. v. Comprehensive Software Sys., Inc.](#), 406 F.3d 1052, 1065 (8th Cir.2005) (internal quotation marks omitted).

*9 Stryker argues that the Court should deny Forslund's request for leave to amend, asserting that the proposed First Amended Complaint, (see Ex. 1, Docket No. 30), does not address the shortcomings of the original complaint. Stryker, however, does not argue that Forslund has unduly delayed these proceedings, acted in bad faith, or repeatedly failed to cure deficiencies in his complaint. Further, the Court's guidance in this Order provides Forslund with a better understanding of deficiencies in the original complaint, and Forslund may file an amended complaint addressing those deficiencies within thirty days of this Order.

To summarize: the Court dismisses with prejudice Forslund's third and fifth causes of action for negligent misrepresentation and breach of implied warranty of merchantability as not supported by the facts pleaded or the applicable law. The Court dismisses without prejudice the remaining claims, and grants Forslund leave to amend the complaint consistent with the Court's reasoning in this Order.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Stryker's Motion for Judgment on the Pleadings [Docket No. 16] is **GRANTED** as follows:

- a. Count 3 for negligent misrepresentation and Count 5 for breach of implied warranty of merchantability are **DISMISSED with prejudice**.
- b. Count 1 for strict liability, Count 2 for negligence, Count 4 for breach of express warranty, and Count 6 for breach

2010 WL 3905854, 72 UCC Rep.Serv.2d 1088

of implied warranty of fitness for a particular purpose are
DISMISSED without prejudice.

All Citations

2. Forslund's Conditional Motion for Leave to Amend the Pleadings [Docket No. 30] is **GRANTED**. Forslund may file an amended complaint within thirty (30) days of the filing of this Order.

Not Reported in F.Supp.2d, 2010 WL 3905854, 72 UCC Rep.Serv.2d 1088

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 20

2018 WL 9439696

Only the Westlaw citation is currently available.

United States District Court,
S.D. Iowa, Central Division.

Austin GLICK, Plaintiff,

v.

LEATT CORPORATION, and Western Power
Sports, Inc. d/b/a Fly Racing, Defendants.

Case No. 4:17-CV-00291-SMR-RAW

Signed 05/03/2018

Attorneys and Law FirmsAngela M. Schneider-Pollard, Pro Hac Vice, Schneider-Pollard Law, LLC, Greenwood, IN, [Brian P. Galligan](#), Galligan & Reid PC, Des Moines, IA, for Plaintiff.[Connie L. Diekema](#), [Joseph F. Moser](#), Finley Law Firm, Des Moines, IA, [John L. Tate](#), Pro Hac Vice, Stites & Harbison PLLC, Louisville, KY, for Defendants.**ORDER ON MOTION TO DISMISS****STEPHANIE M. ROSE**, JUDGE

*1 Plaintiff Austin Glick alleges he was injured on August 20, 2015, in Madison County, Iowa when a neck brace caused and/or failed to protect him from serious bodily injury. Plaintiff filed this lawsuit against the makers and sellers of the brace, Defendants Leatt Corporation (“Leatt”) and Western Power Sports, Inc. d/b/a Fly Racing (“Western Power Sports”), on August 7, 2017. [ECF No. 1]. Glick is suing Defendants for strict products liability, breach of warranty, negligence, gross negligence, and consumer fraud. [ECF No. 10]. On October 12, 2017, Leatt filed a Motion to Dismiss for Failure to State a Claim. [ECF No. 13]. Glick responded on October 26, 2017. [ECF No. 15]. The parties did not request oral argument, and the Court finds this matter can be resolved without it. *See* LR 7(c). For the reasons set forth below, Leatt’s Motion to Dismiss, [ECF No. 13], is GRANTED.

I. BACKGROUND¹

¹ The facts come from the Amended Complaint, [ECF No. 10], and are assumed true for the purposes of the Motion to Dismiss. *See Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010) (indicating courts must accept as true the plaintiff’s factual allegations, but they need not accept as true the plaintiff’s legal conclusions).

Glick is twenty-nine years old and a resident of Des Moines, Iowa. [ECF No. 10 ¶ 1]. Leatt is a Nevada corporation. *Id.* ¶ 2. Western Power Sports is an Idaho corporation. *Id.* ¶ 3. Glick alleges Defendants designed, assembled, and manufactured a product called the “Fly Racing Leatt Pro Lite Carbon Brace” (the “brace”) prior to August 20, 2015. *Id.* ¶¶ 2, 3, 5, 7. Glick also alleges Defendants advertised, distributed, and otherwise sold the brace in Southern Iowa. *Id.* ¶¶ 2, 3.

On August 20, 2015, Glick was injured in Madison County, Iowa. *Id.* ¶ 8. At the time of the injury, Glick alleges he was using the neck brace in a reasonably foreseeable manner, but he does not describe how he was using the brace. *Id.* ¶¶ 8, 14. In fact, Glick does not allege whether he purchased the brace, only that he obtained the brace and chose to wear it. *Id.* ¶ 54. Glick also alleges the brace caused and/or failed to protect him from serious bodily injury. *Id.* ¶ 8. Glick alleges his injury is permanent and disabling in nature. *Id.* ¶ 15. According to Glick, Defendants “represented that the brace would protect a rider from [spinal cord injury](#) ... that the brace was safe for use with standard motocross gear, that the brace was safe for motocross riding ... and that the brace would not cause or exacerbate injury to the rider in the event of an accident.” *Id.* ¶¶ 52, 53. However, Glick does not describe in any detail the nature of his injuries, how the brace caused his injuries, nor how it failed to protect him.

Rather, these facts are the only facts contained in the Amended Complaint. *See* [ECF No. 10]. The remaining allegations in the Amended Complaint are legal conclusions and statements reciting the elements of the causes of action, and Glick fails to provide facts supporting these assertions. Accordingly, Leatt argues Glick has failed to state a claim upon which relief can be granted pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). [ECF No. 13]. Glick attempts to supplement the facts contained in his Amended Complaint by providing additional facts in his response to Leatt’s Motion to Dismiss. [ECF No. 15 at 3]. However, in analyzing a motion to dismiss the Court is limited to reviewing the facts contained in the Amended Complaint. *See Riley v. St. Louis Cty. of Mo.*, 153 F.3d 627, 629 (8th Cir. 1998) (“When reviewing a [Rule 12\(b\)\(6\)](#) dismissal for failure to state a claim, we look only to

the facts alleged in the complaint and construe those facts in the light most favorable to the plaintiff.”).

II. STANDARD OF REVIEW

*2 Rule 12(b)(6) permits a motion to dismiss for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To meet this standard, and thus survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. Although the plausibility standard “is not akin to a ‘probability requirement,’ ” it demands “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). “The facts alleged in the complaint ‘must be enough to raise a right to relief above the speculative level.’ ” *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009) (quoting *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009)). All reasonable inferences must be drawn in the plaintiff’s favor. *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009).

III. ANALYSIS

As an initial matter, the Court notes that Glick fails to resist Leatt’s motion to dismiss as to Counts Three and Four. Accordingly, the Court grants Leatt’s motion to dismiss on these Counts. See *Olson v. Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1073 (8th Cir. 2016) (noting that an issue not argued or briefed on a motion to dismiss is considered waived). However, as indicated below the Court determines that Counts Three and Four also fail to adequately state a claim for which relief may be granted, and are subject to dismissal on this ground as well.

Ordinarily, on a motion to dismiss, this Court would analyze the complaint count by count, stating the elements of the causes of action, and then determining whether the plaintiff had alleged “sufficient factual matter, accepted as true, to state

a claim to relief that is plausible on its face.” *Braden*, 588 F.3d at 594 (quoting *Iqbal*, 556 U.S. at 678). However, in the present case, Glick’s Amended Complaint alleges so few facts that that the Court declines to address each count separately. Based on the facts alleged in the Amended Complaint, the Court lacks such elementary facts such as how Glick became injured, how Glick obtained the Defendant’s brace, or how Glick was using the brace when it allegedly caused or failed to protect him from injury.

The Amended Complaint does allege “the brace was being used in a reasonably foreseeable manner by Plaintiff.” [ECF No. 10 ¶ 8]. But this statement is a legal conclusion. It tells the Court nothing about how Glick was actually using the brace. Although a complaint does not need to provide “ ‘detailed factual allegations’ ... ‘naked assertion[s]’ devoid of ‘further factual enhancement,’ ” are insufficient. *Iqbal*, 556 U.S. at 678 (alteration in original) (citations omitted) (quoting *Twombly*, 550 U.S. at 555, 557). Further, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ ” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

Moreover, the remaining allegations in Glick’s Amended Complaint are also nothing more than legal conclusions and statements reciting the elements of the causes of actions. See *id.* (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”). For instance, Glick argues that his strict products liability claim should proceed as a design defect claim. [ECF No. 15 at 6]. Under Iowa law this requires that the plaintiff prove “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design” *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 168 (Iowa 2002). However, Glick’s Amended Complaint merely states that “[a] reasonable alternative safe design could have been practically adopted at the time of sale and/or distribution of the brace.” [ECF No. 10. ¶ 13]. This is a legal conclusion, unsupported by any other facts. Here, the Amended Complaint fails to “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’ ” and the “facts do not permit the [C]ourt to infer more than the mere possibility of misconduct,” which means Glick has not shown he is entitled to relief. See *Iqbal*, 556 U.S. at 678–79 (quoting *Twombly*, 550 U.S. at 570).

2018 WL 9439696

IV. CONCLUSION

*3 For the foregoing reasons and others stated in Leatt's brief, Leatt's Motion to Dismiss, [ECF No. 13], is GRANTED. Consequently, Glick's claims against Leatt are dismissed in their entirety.

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 9439696

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 21



KeyCite Yellow Flag - Negative Treatment

Called into Doubt by [Fidelity and Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.](#), D.N.J., March 26, 2013

2012 WL 1018842

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Charles HAMMER, on behalf of herself
and all others similarly situated, Plaintiffs

v.

VITAL PHARMACEUTICALS, INC. d/b/a VPX;
ABC Cos. nos. 1–100; John Does Nos. 1–100;
XYZ Cos Nos. 1–100; Robert Roes Nos. 1–
100, DEF Cos. Nos. 1–100 and John Smiths
Nos 1–100 and (fictitious names), Defendants.

Civil Action No. 11–4124.

|

March 26, 2012.

Attorneys and Law Firms

[Frank V. Floriani](#), Sullivan, Papain, Block, McGrath &
Cannavo, PC, Hackensack, NJ, for Plaintiffs.

[George H. Parsells](#), McElroy, Deutsch, Mulvaney &
Carpenter, LLP, Morristown, NJ, for Defendants.

OPINION[WOLFSON](#), District Judge.

*1 This putative class action brought by Plaintiff Charles Hammer (“Hammer” or “Plaintiff”) challenges the marketing and sales practices of Liquid Clenbutrx Hardcore (“Clenbutrx”), a “dietary supplement” manufactured by Defendant Vital Pharmaceuticals, Inc. d/b/a VPX/REDLINE (improperly pled as Vital Pharmaceuticals, Inc. d/b/a VPX) (“VPX” or “Defendant”). In the Complaint, Plaintiff alleges that Defendant’s advertisements and packaging of Clenbutrx contained various affirmative misrepresentations concerning the supplement that were deceptive and misleading, that Plaintiff purchased the products pursuant to these misrepresentations, and he suffered damages as a result thereof. Based on these averments, Plaintiff asserts violations of the New Jersey Consumer Fraud Act, [N.J.S.A. § 56:8–1 et seq.](#) (“NJCF”) (Count I), as well as claims for common law fraud (Count II), unjust enrichment (Count

III), breaches of express (Count IV) and implied warranties (Count V) and injunctive relief (Count VI). In the instant matter, Defendant moves to dismiss the Complaint in its entirety. For the reasons set forth below, Defendant’s motion is granted as follows: with respect to Counts I (NJCF) and II (Common Law Fraud), Plaintiff’s claims regarding the misrepresentation that Clenbutrx is “certified by science” and that Clenbutrx is a “dietary supplement” are DISMISSED WITHOUT PREJUDICE. The remaining fraud allegations—i.e., statements regarding Clenbutrx is the world’s fastest, hardest hitting fat incinerator and authentic synergistic blend of ingredients—are DISMISSED WITH PREJUDICE. In addition, Counts III (Unjust Enrichment) and VI (Injunctive Relief) are DISMISSED WITHOUT PREJUDICE. Lastly, Count IV (Breach of Express Warranty) and Count V (Breach of Implied Warranty) are DISMISSED WITHOUT PREJUDICE.

I. BACKGROUND

In addressing Defendant’s Motion to Dismiss, this Court must accept as true the allegations contained in the Complaint. *See Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir.2003); *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1301 (3d Cir.1996). Thus, the facts recited herein are taken from the Complaint and do not represent this Court’s factual findings.

VPX manufactures, markets and sells a line of “dietary supplements” including Clenbutrx. Compl. ¶ 14. Since 2006¹, *inter alia*, internet advertisements and the product packaging represented and warranted that Clenbutrx contains “Apple Geranium (Pelargoium odorantissomum) (leaves) standardized to 1, 3 Dimethylpentylamine.” *Id.* ¶ 16. In addition, VPX advertises that Clenbutrx is “certified by science, backed by the real world, and proven to give you mind blowing energy” and that its “authentic synergistic blend of ingredients ... leave[s] scientists wondering how amazing this stuff is.” *Id.* ¶ 17. Because of these misrepresentations, Plaintiff purchased Clenbutrx for \$29.99. *Id.* ¶ 36.

¹

The Court notes that in Plaintiff’s opposition brief, he points out that after being served with the Complaint, Defendant removed “Apple Geranium (Pelargonium odorantissomum) (leaves) standardized to 1, 3 dimethylpentylamine” from the ingredients of Clenbutrx, as well as its marketing materials. Pl’s Opp. Br. at 3. This fact was not disputed by Defendant.

*2 On July 18, 2011, Plaintiff filed the instant Complaint against VPX, asserting a violation of the NJCFA, common law fraud, unjust enrichment, and breaches of express and implied warranties. The genesis of Plaintiff's complaint is that Defendant's advertisements and packaging of the dietary supplement, Clenbutrx, contained false and misleading statements which led Plaintiff to purchase such product.² Specifically, Plaintiff alleges that the various representations concerning Clenbutrx induced consumers to believe that they were purchasing a product containing "apple geranium ... [standardized] to 1, 3 Dimethylpentylamine." *Id.* ¶ 18. Contrary to this representation, Plaintiff alleges that, apple geranium, a natural substance, does not normally contain 1, 3 Dimethylpentylamine, which is a synthetic laboratory-produced chemical compound. *Id.* ¶¶ 20–21. In that regard, Plaintiff complains that he was induced into purchasing Clenbutrx, a self proclaimed dietary supplement, when the supplement actually contains a synthetic compound. *Id.* ¶ 26. As a result, Plaintiff avers that Defendant's "misrepresentation[]" that Clenbutrx "is a 'DIETARY SUPPLEMENT' " that contains Apple Geranium has "misled consumers in general and Plaintiff in particular into believing that ... Clenbutrx ... is a dietary supplement, and as a dietary supplement contains *only* dietary ingredients" *Id.* ¶ 28 (emphasis added). In addition, Plaintiff claims that VPX's representations that Clenbutrx is "certified by science, backed by the real world," and that "scientists [are] wondering how amazing this stuff is" are false because "[n]o scientist has ever 'certified' or 'backed' this product's ingredient at issue." *Id.* ¶ 57.

² The language of the allegations in the Complaint, specifically, ¶¶ 18–22, are subject to varying interpretations. However, in light of the nature of Plaintiff's claims, the Court will construe these allegations in the manner set forth in this Opinion.

On or about August 9, 2011, Defendant filed the instant Motion to Dismiss, contending that: (1) Plaintiff did not plead the fraud claims with sufficient particularity; (2) the labeling of Clenbutrx as a "dietary supplement" was mandated by federal law; (3) the alleged misleading statements on Clenbutrx's website are puffery; and (4) Plaintiff did not suffer an ascertainable loss. Def's Mot. at 6–11. In addition, Defendant contends that Plaintiff's unjust enrichment and warranty claims fail as a matter of law.

On or about September 28, 2011, Plaintiff filed opposition to Defendant's Motion to Dismiss. Defendant filed a Reply Brief on or about October 17, 2010.

II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure provide that a complaint "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." *Fed.R.Civ.P.* 8(a). The purpose of a complaint is "to inform the opposing party and the court of the nature of the claims and defenses being asserted by the pleader and, in the case of an affirmative pleading, the relief being demanded." *Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 1182 (3d ed.2004).

*3 When reviewing a motion to dismiss, courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008) (citation and quotations omitted). In *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court "retired" the language contained in *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 561 (quoting *Conley*, 355 U.S. at 45–46). Instead, the factual allegations set forth in a complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 555. As the Third Circuit has stated, "[t]he Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: 'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest 'the required element. This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of 'the necessary element'.'" *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 556).

In affirming that *Twombly* standards apply to all motions to dismiss, the Supreme Court recently explained the following principles. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, —, 129

S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir.2009). “Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1950. The plausibility standard requires that “the plaintiff plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” and demands “more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S.Ct. At 1949 (quoting *Twombly*, 550 U.S. at 556). Ultimately, “a complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.” *Fowler*, 578 F.3d at 211. In evaluating a motion to dismiss, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant’s claims are based upon these documents. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.1993).

III. DISCUSSION

A. NJCFA and Common Law Fraud

*4 The NJCFA provides in relevant part:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

N.J.S.A. § 56:8–2.

The term “person” as used in the NJCFA includes, *inter alia*, natural persons, partnerships, corporations, companies, trusts, business entities and associations. N.J.S.A § 56:8–1(d).

To state a prima facie case under the NJCFA, a plaintiff must sufficiently plead three elements: (1) unlawful conduct by the defendant; (2) an ascertainable loss by the plaintiff; and (3) a causal connection between the defendant’s unlawful conduct and the plaintiff’s ascertainable loss. *Payan v. GreenPoint Mortg. Funding, Inc.*, 681 F.Supp.2d 564, 572 (D.N.J.2010) (citing *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 964 A.2d 741, 749 (2009)). Unlawful practices under the NJCFA fall into three general categories: affirmative acts, knowing omissions, and regulation violations. *Frederico v. Home Depot*, 507 F.3d at 188 (3d Cir.2007)). Intent to defraud is not necessary to show unlawful conduct by an affirmative act of the defendant, but is an element of unlawful practice by knowing omission of the defendant. See *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350 (1997); *Torres–Hernandez v. CVT Prepaid Solutions, Inc.*, No. 08–1057, 2008 WL 5381227, at *6 (D.N.J. Dec.17, 2008).

Moreover, it is well-established that claims under the NJCFA must also meet the heightened pleading requirements of Fed.R.Civ.P. 9(b). See, e.g., *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir.2007); *Arcand v. Brother Intern. Corp.*, 673 F.Supp.2d 282 (D.N.J.2009). Pursuant to that rule, a plaintiff alleging fraud must state the circumstances of the alleged fraud with particularity. Fed.R.Civ.P. 9(b). In order to satisfy this heightened pleading standard, a plaintiff “must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the ‘precise misconduct with which [it is] charged.’ Specifically, the plaintiff must plead or allege the “date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.” *Frederico*, 507 F.3d at 200. Indeed, the Third Circuit has advised that, at a minimum, a plaintiff must support allegations of fraud with all the essential factual background that would accompany “the first paragraph of any newspaper story”—that is, the “who, what, when, where and how” of the events at issue.” *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276–77 (3d Cir.2006) (citations omitted) *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, L.T.D.*, 551 U.S. 308, 322–23, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). Moreover, a complaint sounding in fraud must do more than assert generalized facts, it must allege facts specific to the plaintiff. *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658–59 (3d Cir.1998) *abrogated on other grounds by Rotella v. Wood*, 528 U.S. 549, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (where the complaint failed to allege “what actually happened to either” of the plaintiffs, the complaint

did not plead “fraud with the specificity required by Rule 9(b).”).

*5 In addition, Plaintiff's common law fraud must also be pled with specificity. To plead a fraud claim, a plaintiff must allege “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resultant damages.” *Banco Popular North America v. Gandi*, 184 N.J. 161, 172–73, 876 A.2d 253 (2005).

1. Unlawful Conduct

Plaintiff's NJCFA claim must contain specific allegations of Defendants' unlawful conduct, subject to the heightened pleading requirements of Rule 9(b). To constitute an affirmative misrepresentation under the NJCFA, the statement must be: (1) material to the transaction; (2) a statement of fact; (3) found to be false; (4) and calculated to induce the buyer to make the purchase. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607, 691 A.2d 350, 366 (1997). “A statement of fact is material if: (a) a reasonable person would attach importance to its existence in determining a choice of action ...; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.” *Ji v. Palmer*, 333 N.J.Super. 451, 755 A.2d 1221, 1228 (N.J.App.Div.2000) (quoting *Restatement (Second) of Torts* § 538(2)).

In the Complaint, Plaintiff alleges that VPX marketed Clenbutrx as a dietary supplement, and that this advertising was misleading because the product did not contain only dietary ingredients. In addition, Plaintiff contends that the nutrition label on the product touted that the product contains “apple geranium ... [standardized] to 1, 3 Dimethylpentylamine”; however, Plaintiff contends that contrary to the representation on the label, apple geranium, a natural dietary ingredient, contained 1, 3 Dimethylpentylamine, which is a synthetic compound. Finally, Plaintiff argues that Defendant made false and misleading representations concerning Clenbutrx including that the product was “the world's fastest hardest hitting fat incinerator,” that the product was “certified by science, backed by the real world, and proven to give you mind blowing energy,” and that its “authentic synergistic blend of ingredients ... leave[s] scientists wondering how amazing this stuff is.” In response, Defendant argues that Plaintiff cannot establish a violation of the NJCFA for three separate

reasons: (1) there was no unlawful conduct by Defendant because the labeling of Clenbutrx as a “dietary supplement” was mandated by federal law; (2) the alleged misleading statements on Clenbutrx's website are puffery; and (3) Plaintiff did not suffer an ascertainable loss.

The Court will separately consider each of the alleged misrepresentations.

i. The Labeling of Clenbutrx as a “Dietary Supplement”

As discussed above, in the Complaint, Plaintiff alleges that Defendant's labeling of Clenbutrx as a “dietary supplement” is actionable under the NJCFA. Specifically, Plaintiff contends that Defendant affirmatively misrepresented Clenbutrx as a “dietary supplement” because the product does not contain “only dietary ingredients.” Compl. ¶ 26. In other words, Plaintiff appears to allege that because apple geranium contains 1, 3, Dimethylpentylamine, it was improper to label Clenbutrx as a dietary supplement. Plaintiff's allegations fall short of stating a viable claim.

*6 Pursuant to 21 U.S.C. § 321(ff)(1), a dietary supplement is “a product (other than tobacco) intended to supplement the diet that bears or contains *one or more* of the following dietary ingredients: (A) a vitamin; (B) a mineral; (C) an herb or other botanical; (D) an amino acid; (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in (A), (B), (C), (D), or (E).” 21 U.S.C. § 321(ff)(1) (emphasis added); see *GNC Franchising LLC v. Sala*, No. 06–191, 2006 U.S. Dist. LEXIS 11320, at *11–13 (W.D.Pa. Mar. 20, 2006). Significantly, a substance's intended use is relevant to deciding whether the product is a dietary supplement. See 21 U.S.C. § 321(ff)(1); see *United States v. Lane Labs–USA, Inc.*, 324 F.Supp.2d 547, 564 (D.N.J.2004).

Here, responding to Plaintiff's allegations, Defendants argue that “Clenbutrx contains dietary ingredients, including other botanicals, [thus] the labeling of this product as a ‘dietary supplement’ “ was entirely proper. Def's Rep. Br. at 5. At the motion to dismiss stage, the Court cannot credit Defendant's assertion regarding what types of ingredient are contained in Clenbutrx. However, even taking the Complaint as true, Plaintiff's allegations fail to state a claim. Plaintiff has failed to allege that there is *no* dietary ingredient listed on the Clenbutrx label; instead, Plaintiff alleges only that because apple geranium, a natural ingredient, contains 1, 3,

Dimethylpentylamine, it was improper to label Clenbutrx as a dietary supplement. This lone allegation does not come close to state a claim under the statutory scheme of § 321(ff). Rather, the statute specifically provides for the labeling of a product as a “dietary supplement” if the supplement contains *one or more* specified dietary ingredients. *See* 21 U.S.C. § 321(ff)(1). In fact, the statute does not require that *every* ingredient must be a dietary ingredient. In that regard, Plaintiff does not allege that Clenbutrx does not contain other botanicals, or that there are no other dietary ingredients in Clenbutrx. Simply stated, the mere fact that apple geranium in Clenbutrx may not be an herb or a botanical does not necessarily mean that Clenbutrx does not have other dietary ingredients that would qualify it as a dietary supplement. Moreover, Plaintiff has failed to allege that Clenbutrx is not intended to be used as a dietary supplement. Accordingly, the Court finds that Plaintiff’s claim, as it is currently pled, concerning the labeling of Clenbutrx as a dietary supplement is not actionable under the NJCFA. This claim is dismissed without prejudice.

ii. Statements Made on Clenbutrx’s Website

Next, Plaintiff contends that the following separate statements on Defendant’s website constitute affirmative misrepresentations: (1) Clenbutrx is “the world’s fastest, hardest hitting fat incinerator”; (2) Clenbutrx is “certified by science, backed by the real world, and proven to give you mind-blowing energy”; and (3) Clenbutrx’s “authentic synergistic blend of ingredients ... leave[s] scientists wondering how amazing this stuff is.” (Compl.¶ 16.) In response, Defendant argues that these statements are not actionable under the NJCFA because they are puffery.

*7 “The NJCFA distinguishes between actionable misrepresentations of fact and ‘puffery.’ “ *In re Toshiba America HD DVD Marketing and Sales Practices Litigation*, Civ. No. 08–939, 2009 WL 2940081, at *9 (D.N.J. Sept. 11, 2009) (citing *Rodio v. Smith*, 123 N.J. 345, 352, 587 A.2d 621 (1991)) (finding that the slogan “[y]ou’re in good hands with Allstate” was “nothing more than puffery” and as such was not “a deception, false promise, misrepresentation, or any other unlawful practice within the ambit of the Consumer Fraud Act.”) “Advertising that amounts to ‘mere’ puffery is not actionable because no reasonable consumer relies on puffery. The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions.” *Id.* at *10, 587 A.2d 621 (quoting *Haskell v. Time, Inc.*, 857 F.Supp. 1392, 1399 (E.D.Cal.1994)); *see, e.g., Hughes v. Panasonic*, Civ. A.

No. 10–846, 2011 WL 2976839, at *35, 36 (D.N.J. July 21, 2011) (holding that Panasonic’s statements about the televisions’ “industry leading black levels and contrast ratios” as well its representations about the television technology’s ability to render images “the way the director intended” and producing “breathtaking” and “vivid” colors are non-actionable puffery). Moreover, “[i]t has been noted in the context of Lanham Act cases that, unlike puffery, ‘false claims that explicitly or implicitly address product attributes of importance to customers and make statements that are measurable by comparative research are not puffery.’” *Bracco Diagnostics, Inc., v. Amersham Health, Inc.*, 627 F.Supp.2d 384, 464 (D.N.J.2009) (citing *Castrol Inc., v. Pennzoil Co.*, 987 F.2d 939, 945–46 (3d Cir.1993) (holding that Pennzoil’s claim of superior engine protection was more than mere puffery because “it is both specific and measurable by comparative research”)). The Court will consider each statement in turn.

Here, Plaintiff argues that the statements that Clenbutrx is “the world’s fastest, hardest hitting fat incinerator” and that Clenbutrx contains an “authentic synergistic blend of ingredients ... [that] leave[s] scientists wondering how amazing this stuff is” are actionable misrepresentations under the NJCFA. The Court does not agree. These statements are the epitome of vague and highly subjective claims of superiority. *See, e.g., In re Toshiba*, 2009 WL 2940081, at *10. While Defendants use the buzz words “authentic” or “scientists,” that is not sufficient to bring the statements out of the realm of puffery because these statements are not making a specific claim as to the product. *See Tatum v. Chrysler Group LLC*, No. 10–4269, 2011 U.S. Dist. LEXIS 32362, at *14, 2011 WL 1253847 (D.N.J. Mar. 28, 2011) (“Absent specific claims as to the braking system, Defendant’s general advertising was puffery”). Indeed, neither of these statements contains a specific or detailed factual assertion upon which a reasonable consumer would rely. *See Angrisani v. Capital Access Network, Inc.*, 175 Fed. Appx. 554, 556 (3d Cir.2006) (“statements that can be categorized as ‘puffery’ or vague and ‘ill-defined opinions’ are not assurances of fact and do not constitute misrepresentations.”) (citation omitted). Rather, such statements are routinely made by companies seeking to gain a competitive advantage in their respective industries, and therefore they are considered puffery. *In re Toshiba*, 2009 U.S. Dist. LEXIS 82833 at *28. As such, the Court holds that these statements do not constitute actionable misrepresentations for purposes of the NJCFA, and Plaintiff is precluded from bringing NJCFA claims based upon those statements of puffery.

*8 On the other hand, the statement that Clenbutrx is “certified by science” is not puffery and thus could be actionable under the NJCFA. Indeed, unlike the above statements, Defendant’s use of the term “certified by science,” transforms a subjective statement that might otherwise be considered puffery, i.e., that the product will “give you mind blowing energy,” into something that appears “both specific and measurable.” *Castrol*, 987 F.2d at 946; see, e.g., *Liebersohn v. Johnson & Johnson Consumer Cos.*, No. 10–6196, 2011 U.S. Dist. LEXIS 107596, at *24, 2011 WL 4414214 (D.N.J. Sept. 21, 2011) (product labels touting that the products were “clinically proven to help babies sleep better” was not puffery). Moreover, Plaintiff alleges that no scientist has ever “certified” or “backed” Clenbutrx. Compl. ¶ 57. Thus, the Court finds that the statement that Clenbutrx is “certified by science, backed by the real world, and proven to give you mind blowing energy” is an actionable misrepresentation under the NJCFA.

Thus, the Court will consider the additional prongs required to set forth a claim under the NJCFA regarding the statement that Clenbutrx is “certified by science.”³

³ In the event Plaintiff amends the Complaint on his affirmative misrepresentation claim regarding Clenbutrx’s characterization as a “dietary supplement”—which the Court has dismissed—Plaintiff must be mindful that in order to properly allege a NJCFA claim based on that representation, the allegations must conform to the Court’s rulings on the remainder of the NJCFA elements.

2. Ascertainable Loss

Next, Defendant argues that Plaintiff has not pled an ascertainable loss sufficient to establish a cause of action under the NJCFA because he “purchased a dietary supplement manufactured in compliance with the dietary supplement guidelines. Thus, Plaintiff did not suffer a loss in receiving what he paid for.” Def’s Rep. Br. at 6. In response, Plaintiff argues that he suffered an ascertainable loss of \$29.99, i.e., the price he paid for Clenbutrx. The Court agrees that at this juncture, Plaintiff has pled an ascertainable loss.

Under the NJCFA, “[a]n ascertainable loss is a loss that is ‘quantifiable or measurable’; it is not ‘hypothetical or illusory.’” *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 522 (2010) (quoting *Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 248, 872 A.2d 783 (2005)). There

are at least three recognized theories of ascertainable loss that may apply to a NJCFA claim. In cases involving product misrepresentation, “either out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle....” *Thiedemann*, 872 A.2d at 792. The “out-of-pocket” theory may include the purchase price of a misrepresented product if the purchasers did not receive a refund and the seller’s misrepresentations rendered the product essentially worthless. See *Lee*, 2010 N.J. LEXIS 951, at *51–52, 2010 WL 3781595. A “loss-in-value” theory is based on the quantifiable difference in value between the merchandise as advertised and the merchandise as delivered. *Thiedemann*, 872 A.2d at 792 (stating that an expert may employ a “market conditions” approach to product value to determine ascertainable loss). Under the third theory, an “ascertainable loss” can include a nominal overcharge for which the plaintiffs have not made a “pre-suit demand for a refund.” *Bosland*, 964 A.2d at 751.

*9 Here, it is clear that Plaintiff is asserting an “out-of-pocket” theory of loss; specifically, Plaintiff alleges that he “suffered an ascertainable loss of monies, including, but not necessarily limited to the purchase price of the Liquid Clenbutrx Hardcore [he] purchased[.]” In addition, Plaintiff contends that he “would not have purchased” the product but for Defendant’s misrepresentations. Compl. ¶ 38. The Court notes, however, that the ascertainable loss would only relate to the misrepresentations regarding Clenbutrx as a dietary supplement and the statement that Clenbutrx is “certified by science.”

Accordingly, the Court finds that Plaintiff has sufficiently pled ascertainable loss.

3. Causation

Finally, Defendant argues that Plaintiff has not established the third prong of a NJCFA claim—i.e. a causal relationship between the alleged unlawful conduct and Plaintiff’s ascertainable loss. Indeed, it is well-established that “[c]ausation under the CFA is not the equivalent of reliance.” *Lee*, 203 N.J. at 522; see also *Int’l Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372, 929 A.2d 1076 (2007) (holding that the CFA “essentially replaces reliance, an element of proof traditional to any fraud claim, with the requirement that plaintiff prove an ascertainable loss.”) “To establish causation, a consumer merely needs to demonstrate that he or she suffered an ascertainable loss ‘as a result of’ the unlawful practice.” *Id.*

However, in the context of advertisements, causation is particularly crucial under the [Rule 9\(b\)](#) heightened pleading requirements. In that regard, Plaintiff, here, must allege how his ascertainable loss was attributable to the unlawful conduct. In other words, Plaintiff must allege where and when he saw the advertisement which contained the alleged misrepresentation. *See, e.g., Gross v. Johnson & Johnson–Merck Consumer Pharms. Co.*, 303 N.J.Super. 336, 346, 696 A.2d 793 (App.Div.1997) (CFA class could only include persons who “saw the challenged advertisements” and “would not have purchased the [Pepcid](#) but for the challenged advertisements.”); *Solo v. Bed Bath & Beyond, Co.*, No. 06–1908, 2007 U.S. Dist. LEXIS, at *12 (D.N.J. Apr. 26, 2007); *Franulovic v. The Coca–Cola Company*, No. 07–539, 2007 U.S. Dist. LEXIS, at *24, 2007 WL 3166953 (D.N.J. Oct.25, 2007) (plaintiff failed to “allege that she purchased Enviga because of a certain misleading ad, or that she purchased the prescribed amount of Enviga and did not enjoy the advertised effects. Melfi also does not allege that other consumers actually purchased the beverage because of Defendants' advertising, or that they did not get the advertised results. Instead, Melfi's claims generally state that Enviga's marketing was false and misleading, without alleging that this false advertising caused her a quantifiable loss.”).

Plaintiff has fail to so plead here. Instead, Plaintiff, in a broad-brush fashion, alleges that he purchased Clenbutrx “upon being induced, by Defendant VPX's packaging and promotional materials and Internet advertising” Compl. ¶ 26. While Plaintiff lists various websites wherein VPX advertised Clenbutrx, Plaintiff fails to identify any specific advertisement he viewed, where he viewed it, how he was misled by these advertisements and how these advertisements caused his injuries. In other words, the Complaint fails to identify which, if any, of the promotional or marketing materials were viewed by Plaintiff, and if they were, when these materials were viewed and how they induced Plaintiff to purchase Clenbutrx. More simply stated, Plaintiffs have failed to allege any specific facts establishing a connection between the alleged conduct of Defendants and the alleged injury claimed. Moreover, as a corollary issue, Plaintiff also fails to allege where he purchased Clenbutrx, i.e., a store, by mail, or on the internet. This is important because according to Plaintiff's allegations, he was induced by Defendants' online advertisement into purchasing the supplement. At the same time, Plaintiff also alleges that he was induced by the packaging of Clenbutrx, but he does not specify where he observed the packaging. Absent any explanation of the connection between Plaintiff's alleged damages and the

wrongful conduct of VPX, Plaintiff's NJCFA claim also fails on this basis.

*10 In light of the above analysis, the Court dismisses without prejudice Plaintiff's NJCFA claim regarding the alleged misrepresentation that Clenbutrx is a “dietary supplement” and the statement that Clenbutrx is “certified by science.” The remaining allegations related to Plaintiff's NJCFA claim are dismissed with prejudice.

Finally, Plaintiff's common law fraud claim is dismissed without prejudice for the same reasons stated above.

C. Plaintiff's Unjust Enrichment Claim

Under the set of facts Plaintiff has alleged, Plaintiff has not stated a claim for unjust enrichment. “To establish unjust enrichment, the plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust.” *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519 (1994). Specifically, “the unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time if performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.” *Id.* Importantly, in New Jersey, a claim for unjust enrichment requires a direct relationship between the parties. *See, e.g., Cooper v. Samsung Elecs. Am. Inc.*, No. 07–3853, 2008 U.S. Dist. LEXIS 75810, 2008 WL 4513924 (D.N.J.2008); *see also Premier Pork L.L.C. v. Westin Inc.*, No. 07–1661, 2008 U.S. Dist. LEXIS 20532, 2008 WL 724352, at *14 (D.N.J.2008) (“quasi contract claims involve either some direct relationship between the parties or a mistake on the part of the person conferring the benefit ...”); *Callano v. Oakwood Park Homes Corp.*, 91 N.J.Super. 105, 109, 219 A.2d 332 (App.Div.1966) (citing importance of either a direct relationship or a mistake in quasi-contract). For example, in *Cooper*, the court held that although plaintiff alleged that the manufacturer was unjustly enriched through the purchase of a television, plaintiff had not conferred a direct benefit on the manufacturer since the purchase was made through a retailer. As a result, the court dismissed plaintiff's unjust enrichment claim.

Applied here, the Court finds that Plaintiff has not sufficiently alleged a claim for unjust enrichment. Indeed, as in *Cooper*, Plaintiff has not alleged where he purchased Clenbutrx, i.e., whether he purchased it directly from Defendant or if he purchased the product through a retail establishment, online or otherwise. As a result, the Court is unable to determine

whether there is a direct relationship between the parties such that Plaintiff can establish that he conferred a benefit upon Defendant for purposes of an unjust enrichment claim. Thus, the Court will dismiss Plaintiff's unjust enrichment claim without prejudice.

D. Warranty Claims

1. Pre-litigation Notice

Plaintiff asserts claims of breach of express warranty and breach of implied warranty of merchantability. However, fatal to both claims is the lack of allegations involving pre-litigation notice. New Jersey has adopted the Uniform Commercial Code's ("UCC") notice requirement for an express warranty claim. *Luppino v. Mercedes-Benz USA, LLC*, No. 09-5582, 2011 U.S. Dist. LEXIS 65495, at *7, 2011 WL 2470625 (D.N.J. Jun. 20, 2011); *Joc, Inc. v. Exxonmobil Oil Corp.*, No. 08-5344, 2010 WL 1380750, at *4 (D.N.J. Apr.1, 2010); *Slack v. Suburban Propane Partners, L.P.*, No. 10-2548, 2010 WL 5392845, at *4-5 (D.N.J. Dec.22, 2010). It provides: "Where a tender has been accepted ... the buyer must within a reasonable time after [s]he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." N.J.S.A. 12A:2-607(3)(a). Based upon the language, this statutory notice is a "condition precedent to filing any suit for breach of warranty." *Joc*, 2010 WL 1380750 at *4. A similar requirement is needed for a breach of implied warranty. See *C.F. Seabrook Co. v. Beck*, 174 N.J.Super. 577, 593, 417 A.2d 89 (App.Div.1980) ("New Jersey law on sales requires notice as a prerequisite to the buyer's assertion that the seller breached an implied warranty of merchantability." (citing *Johnson v. Hoffman*, 7 N.J. 123, 131, 132, 80 A.2d 624 (1951))).

*11 Here, Plaintiff has failed to plead that he provided the pre-litigation notice of breach. More importantly, Plaintiff offers no excuse or explanation for his failure to do so. Accordingly, because Plaintiff has failed to allege that the condition precedent has been met—sending a pre-litigation notice—Plaintiff's express and implied warranty claims necessarily fail. See *Luppino*, 2011 U.S. Dist. LEXIS 65495 at *7 ("At no time has any court in this district or in the state of New Jersey found that a buyer is not required to provide a direct seller with pre-suit notice in an action for express breach of warranty. Thus, Stern and Casiero's admission that they have failed to provide notice to Defendant proves fatal to their breach of express warranty claims.").

However, regardless of notice, both warranty claims are also inadequately pled and thus subject to dismissal. The Court turns to those analyses.

2. Breach of Express Warranty

In the Complaint, Plaintiff alleges that by labeling Clenbutrx as a "dietary supplement," Defendant expressly warranted that the product contained only dietary ingredients including "Apple Geranium ... standardized to 1, 3 Dimethylpentylamine." Compl. ¶¶ 69, 71. In its Motion to Dismiss, Defendant argues that Plaintiff did not adequately plead his claim for breach of express warranty. Specifically, Defendant argues that Clenbutrx "conforms to all affirmations, promises or descriptions made by VPX," and that Clenbutrx "contains all of the ingredients on the product's label, which include components, in addition to apple geranium, that qualify it as a dietary supplement." Def's Br. at 14-15.

Under New Jersey law, a breach of express warranty claim has four elements: "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." *Frederico*, 507 F.3d at 203. Moreover, courts in this Circuit have held that an advertisement may create an express warranty. See, e.g., *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 575-76 (3d Cir.1990) rev'd in part on other grounds 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (concluding that cigarette advertisements representing that the cigarettes were safe could constitute an express warranty); *Elias v. Ungar's Food Products, Inc.*, 252 F.R.D. 233, 252 (D.N.J.2008) (packaging statements regarding fat and caloric content created express warranty). For example, in *Elias*, plaintiff alleged that descriptions on the packages of five products about fat and caloric content did not conform with the product because the product contained substantially more calories and fat than described. As a result, plaintiffs argued that the express warranty concerning the lower caloric and fat content had been breached. *Id.* at 251. The court agreed and held that the express warranty appeared to be breached. *Id.*

*12 In the instant matter, Plaintiff argues that by labeling Clenbutrx as a "dietary supplement," Defendant warranted that the product contained only dietary ingredients. As discussed above, 21 U.S.C. § 321(ff)(1) provides that a product may be labeled as a dietary supplement if it contains one or more dietary ingredients. Thus, even if Defendant's labeling of Clenbutrx as a "dietary supplement" created an

express warranty between the parties, because Plaintiff does not allege that the product does not contain any “dietary ingredients” as defined by 21 U.S.C. § 321(ff)(1), Plaintiff has not stated a claim for breach of that warranty. Simply put, taking Plaintiff’s Complaint as true, even if apple geranium is not a dietary ingredient, Plaintiff has failed to allege that there are no other dietary ingredients, or equivalent, contained in Clenbutrix. Without those allegations, Plaintiff has not sufficiently alleged a breach of an express warranty. Accordingly, this claim is dismissed without prejudice.

3. Breach of Implied Warranty of Merchantability

In addition, Plaintiff alleges that VPX breached the implied warranty of merchantability because Clenbutrx was “not adequately packaged, labeled, sold, promoted, or fit for the ordinary purposes” as a dietary supplement. Compl. ¶¶ 75, 78. Specifically, Plaintiff appears to argue that Defendant “impliedly warranted that the product is composed entirely of dietary ingredients, that 1, 3 dimethylpentylamine is found in apple geranium, and that therefore the product is safe.” Compl. ¶ 75.⁴

⁴ Plaintiff also asserts that Defendant breached an implied warranty by failing to publish its “money back” guarantee on the Clenbutrx packaging materials; the guarantee was only published on its website. As stated above, a breach of implied warranty concerns the merchantability of the product; however, nothing in Plaintiff’s allegations regarding the money back guarantee concerns the product’s fitness for its ordinary purpose. Thus, Plaintiff’s allegations in this context cannot form a legal basis for a breach of implied warranty claim. Moreover, even if this were a sufficient basis, Plaintiff has not cited any authority that requires a manufacturer or seller to offer a money back guarantee as a matter of law, let alone requiring companies to advertise that guarantee in a particular way. Accordingly, the Court will dismiss these allegations with prejudice.

Pursuant to N.J.S.A. 12A:2–314, “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind ...” N.J.S.A. 12A:2–314. “ ‘Merchantability’ requires that a product conform to its ordinary and intended use.” *Hughes*, 2011 WL 2976839 at *22 (quoting *Berenblat v. Apple, Inc.*, 2009 WL 2591366, at *2 (N.D.Cal. Aug.21, 2009)). “In order for the implied warranty of merchantability

to be breached, the product at issue must have been defective or not fit for the ordinary purpose for which it was intended.” *In re Toshiba Am. HD DVD Marketing and Sales Practices Litigation* at *16. “The implied warranty of merchantability does not ‘impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.’ ” *Hughes*, 2011 WL 2976839, at *22 (quoting *Berenblat* at *3). Indeed, the warranty of merchantability “ ‘simply means that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold.’ ” *Ferrari v. American Honda Motor Co., Inc.*, 2009 WL 211702, at *3 (N.J.App.Div. Jan. 30, 2009) (quoting *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 370, 161 A.2d 69 (1960) (emphasis added)).

In this instant matter, Plaintiff does not dispute that Clenbutrx is sold for the ordinary purpose as a dietary supplement. *See, e.g.*, Compl. ¶ 76 (“Defendant made such implied warranties knowing that the ordinary purpose for which Liquid Clenbutrx Hardcore was to be used was as a dietary supplement.”). Instead, with regard to the implied warranty claim, Plaintiff alleges, at most, that the product contains ingredients other than dietary ingredients, and therefore, the product is unsafe. However, Plaintiff has proffered nothing by way of pleadings to support its assertion that a dietary supplement is not “merchantable” if it contains components other than dietary ingredients or that Clenbutrx is somehow unsafe. Similarly, Plaintiff has entirely failed to allege or explain why the inclusion of “apple geranium standardized to 1, 3 Dimethylpentylamine” renders Clenbutrx unfit for the purpose of being a dietary supplement. Thus, the Court will dismiss Plaintiff’s claim for breach of the implied warranty of merchantability without prejudice.

E. Plaintiff’s Claim for Injunctive Relief

*13 Finally, Plaintiff asserts a cause of action for injunctive relief, arguing that Defendant should be enjoined from continuing its marketing and sale of Clenbutrx. Compl. ¶ 87. In response, Defendant contends that injunctive relief is not a recognized cause of action and should be dismissed. In addition, Defendant contends that even if the Court recognized this cause of action, since VPX has changed its labeling and advertisements, this cause of action is moot. Def’s Rep. Br. at 15.

Initially, the Court notes that at least one court in this district has held that injunctive relief is not separate cause of action. *See Smajlaj*, 2011 WL 1086764, at *2 (“Plaintiffs also seek injunctive relief, which they mistakenly characterize

as a cause of action.”). Moreover, the Court finds that in this matter, Plaintiff’s claim for injunctive relief appears to be expressly tied to his fraud claims; specifically, Plaintiff alleges that Defendant’s actions “of marketing, advertising, promoting, distributing, and selling” Clenbutrx “continue to deceive” the public. Compl. ¶ 85. Thus, Plaintiff asks this Court to enjoin Defendant from “continuing their marketing, advertisement, promotion, distribution, and sale” of Clenbutrx. Compl. ¶ 87. Because the Court has already dismissed Plaintiff’s fraud claims, and in the apparent absence of any other cause of action connected to Plaintiff’s claim for injunctive relief, the Court will dismiss Plaintiff’s cause of action for injunctive relief without prejudice. Importantly, however, in the event Plaintiff re-pleads his fraud claims, he must request an injunction as a part of the relief, not as a separate cause of action.

IV. CONCLUSION

For the foregoing reasons, Defendants’ Motion to Dismiss is GRANTED. Specifically, with respect to Counts I (NJCFRA) and II (Common Law Fraud), Plaintiff’s claims regarding the misrepresentation that Clenbutrx is “certified by science” and that Clenbutrx is a “dietary supplement” are DISMISSED WITHOUT PREJUDICE. The remaining fraud allegations—i.e., statements regarding Clenbutrx as the world’s fastest, hardest hitting fat incinerator and authentic synergistic blend of ingredients—are DISMISSED WITH PREJUDICE. In addition, Counts III (Unjust Enrichment) and VI (Injunctive Relief) are DISMISSED WITHOUT PREJUDICE. Moreover, with respect to Count IV (Breach of Express Warranty) and Count V (Breach of Implied Warranty) are DISMISSED WITHOUT PREJUDICE. An order will be entered consistent with this Opinion.

All Citations

Not Reported in F.Supp.2d, 2012 WL 1018842, 77 UCC Rep.Serv.2d 283

TAB 22

2013 WL 2650611

2013 WL 2650611

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Harold M. HOFFMAN, individually and on
behalf of those similarly situated, Plaintiff,
v.

NUTRACEUTICAL CORP., Defendant.

Civil Action No. 12–5803 (ES).

June 10, 2013.

Attorneys and Law Firms

Harold M. Hoffman, Englewood, NJ, pro se.

Michael R. O'Donnell, Riker, Danzig, Scherer, Hyland, &
Perretti, PA, Morristown, NJ, for Defendant.

OPINION

SALAS, District Judge.

I. INTRODUCTION

*1 Pending before this Court is Nutraceutical Corp.'s ("Defendant") Motion to Dismiss Harold M. Hoffman's ("Plaintiff") Complaint. (D.E. No. 10, Brief in Support of Motion to Dismiss Plaintiff's Complaint ("Br.")). The motion is unopposed. The Court has reviewed the submissions and decides the motion without oral argument pursuant to Fed.R.Civ.P. 78(b). For the following reasons, the Court GRANTS the motion without prejudice.

II. BACKGROUND

On August 9, 2012, Plaintiff, individually and on behalf of those similarly situated, filed a complaint against Defendant in the Superior Court of New Jersey, Bergen County. (D.E. No. 1, Complaint ("Compl.")). On September 14, 2012, Defendant removed the state court case to this District (D.E. No. 1, Notice of Removal ("Removal")).¹

¹ On September 21, 2012, Plaintiff filed a motion to remand to state court. (D.E. No. 4). The motion was denied by Judge Mannion via Report & Recommendation ("R & R") on January 24, 2013.

(D.E. No. 20). Plaintiff subsequently objected to Judge Mannion's decision exercising jurisdiction on January 27, 2013. (D.E. No. 21). Judge Salas adopted Judge Mannion's R & R and overruled Plaintiff's objection on March 8, 2013. (D.E. No. 25).

In the Complaint, Plaintiff alleges that Defendant advertised KAL [Glucosamine](#) Chondroitin MSM (the "product") as "pure, unadulterated and of the highest quality." (Compl.12). Plaintiff claims that despite the express promise that "[n]o ingredient other than those listed on the label have been added to this product," Defendant's product was "contaminated by 1.7 micrograms of lead per daily use." (*Id.* at 4). Next, Plaintiff claims that he and other members of the putative class relied on the express representations with respect to purity of the product and made the purchase of the product in reliance thereof. (*Id.* at 5–6). Accordingly, Plaintiff argues that Defendant's conduct violates the New Jersey Consumer Fraud Act, [N.J.S.A. 56:8–2](#), and constitutes: an unconscionable commercial practice (Count I); deception (Count II); fraud (Count III); false pretense, false promise and/or misrepresentation (Count IV); and knowing concealment, suppression and/or omission of material facts (Count V). In addition, Plaintiff raises the following claims—common-law fraud (Count VI); unjust enrichment (Count VII); breach of express warranty (Count VIII); and breach of implied warranty of merchantability (Count IX). (Compl.14–18).

In response, Defendant moves to dismiss the above counts pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) because Plaintiff does not state any claim upon which relief may be granted. (Br.2). Specifically, Plaintiff fails to "allege that he was injured by the Product or the alleged lead therein, nor could he as he never claims to have even used the Product." Nor does Plaintiff "make any allegations regarding the Product's performance or efficacy, again having never used the Product." (*Id.* at 5).²

² Defendant also seeks to disqualify Plaintiff as class counsel. The Court need not address the issue in this [Fed.R.Civ.P. 12\(b\)\(6\)](#) motion.

III. ANALYSIS**A. Legal Standard**

For a complaint to survive dismissal, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal](#),

556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). In determining the sufficiency of a complaint, the Court must accept all well-pleaded factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. See *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008). But, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions[;][t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

B. Plaintiff's Consumer Fraud Act (“CFA”) Claims (Counts I–V)

*2 Plaintiff claims that “[t]he product delivered by Defendant to [P]laintiff and members of the putative class misrepresented the safety, quality, constituent ingredients and purity of defendant's product. Indeed, the spoiled and contaminated product delivered by Defendant to consumers, lacked the purity and beneficial qualities promised by Defendant.” (Compl.6). Defendant contends that Plaintiff's CFA claims must be dismissed because Plaintiff fails to show damages in connection thereto. (Br.15). The Court agrees.

To state a cause of action under the CFA, plaintiff must allege: “(1) an unlawful practice by the defendants; (2) an ascertainable loss by plaintiff; and (3) a causal nexus between the first two elements—defendants' allegedly unlawful behavior and the plaintiff's ascertainable loss.” *Parker v. Howmedica Osteonics Corp.*, No. 07–02400, 2008 WL 141628, at *2 (D.N.J. Jan.14, 2008) (citing *N.J. Citizen Action v. Schering–Plough Corp.*, 367 N.J.Super. 8, 842 A.2d 174, 176 (N.J.Super.Ct.App.Div.2003)).

First, plaintiff must allege an unlawful practice. An unlawful practice “typically involves an affirmative act of fraud and can arise from an affirmative act, an omission, or a violation of an administrative regulation.” *Adamson v. Ortho–McNeil Pharm., Inc.*, 463 F.Supp.2d 496, 501 (D.N.J.2006). “[N]ot just ‘any erroneous statement’ will constitute a misrepresentation prohibited” under the CFA. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 607, 691 A.2d 350 (1997). “The misrepresentation has to be one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase.” *Id.*

Next, plaintiff must allege an ascertainable loss. Although the CFA does not define “ascertainable loss,” courts have interpreted it as a “cognizable and calculable claim of loss due to the alleged CFA violation.” *Solo v. Bed, Bath & Beyond, Inc.*, No. 06–1908, 2007 WL 1237825, at *3 (D.N.J. Apr., 26, 2007) (citing *Thiedmann v. Mercedes–Benz USA, LLC*, 183 N.J. 234, 249, 872 A.2d 783 (2005)); *Hoffman v. Hampshire Labs, Inc.*, 405 405 N.J.Super. 105, 963 A.2d 849, 854 (N.J.Super.Ct.App.Div.2009). To properly plead an ascertainable loss, plaintiff must allege facts showing “either an out-of-pocket loss or a demonstration of loss in value.” *Dist. 1199P Health and Welfare Plan v. Janssen, L.P.*, 784 F.Supp.2d 508, 530 (D.N.J.2011) (citing *Thiedmann*, 183 N.J. at 248, 872 A.2d 783). This requirement to show a demonstration of a loss in value includes a benefit-of-the-bargain theory that “requires nothing more than that the consumer was misled into buying a product that was ultimately worth less to the consumer than the product he was promised. *Smajlaj v. Campbell Soup Co.*, 782 F.Supp.2d 84, 99 (D.N.J.2011); *Henderson v. Hertz Corp.*, No. 6937–03, 2005 WL 4127090, at *7–8 (N.J.Super.Ct.App.Div.2005).

Finally, plaintiff must show a causal nexus between the misrepresentation or concealment of the material fact by defendant and the loss suffered by any person. *Dewey v. Volkswagen AG*, 558 F.Supp.2d 505, 526 (D.N.J.2008). Here, Plaintiff failed to make the necessary three-part showing under the CFA. Specifically, Plaintiff failed to show that Defendant's alleged CFA violation caused Plaintiff's “ascertainable loss.” Plaintiff merely alleged that some of Defendant's product contained 1.7 micrograms of lead in it. Even under a benefit-of-the-bargain theory of damages, Plaintiff failed to show that the alleged lead in Defendant's product caused the product to be worth less than was promised. Plaintiff failed to show that the product he used actually contained lead. Moreover, Plaintiff failed to establish that the presence of 1.7 micrograms of lead in the product constituted a misrepresentation that is contrary to the product being “pure, unadulterated and of the highest quality.”³ Because Plaintiff failed to make the requisite showing under the CFA, Plaintiff's CFA claims are dismissed.

3

On the contrary, Defendant notes that the recommended daily intake of lead is 75 micrograms, or 44 times the amount found in the product at issue. (Br.5).

C. Plaintiff's Common Law Fraud Claim (Count VI)

*3 Plaintiff avers that “Defendant, in the advertisement, marketing and sale of the [product], deliberately and knowingly engaged in concealment, suppression and/or omission of material facts with the intent that others, including members of the plaintiff-class, rely upon same, and, upon information and belief, members of the class did justifiably rely upon same to their detriment.” (Compl.14). Such conduct, according to Plaintiff, constitutes common-law fraud. (*Id.* at 15). Defendant disagrees and argues that Plaintiff’s common-law fraud claim must be dismissed because Plaintiff “failed to sufficiently plead damages resulting from the alleged trace amount of lead in the [p]roduct.” (Br.19).

To properly plead common-law fraud in New Jersey, plaintiff must show: “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610, 691 A.2d 350 (1997) (citing *Jewish Ctr. of Sussex Cnty. v. Whale*, 86 N.J. 619, 624–25, 432 A.2d 521 (1981)).

Here, Plaintiff failed to identify the resulting damages, a requisite showing to properly plead common law fraud. Significantly, Plaintiff does not even allege that the product that he personally purchased, and used, contained lead. Consequently, the Court dismisses Plaintiff’s claim of common-law fraud.

D. Plaintiff’s Breach of Unjust Enrichment Claim (Count VII)

Plaintiff states that “as a result of [Defendant’s] false and deceptive conduct ... [Defendant] became indebted to class members for the sums paid by class members ... for purchase of a misrepresented product.” (Compl.16). And retention of said sums “without reimbursement, would result in the unlawful, unjust and inequitable enrichment.” (*Id.*). Defendant disagrees and argues that because Plaintiff “failed to plead that the [p]roduct failed to function as advertised or that he was injured by the [p]roduct ... there was nothing unjust about [Defendant’s] accepting and retaining money in exchange for delivering the [p]roduct to [Plaintiff].” (Br.20).

The doctrine of unjust enrichment “rests on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another.” *Assocs. Comm. Corp. v. Wallia*, 211 N.J.Super. 231,

511 A.2d 709, 716 (N.J.Super.Ct.App.Div.1986) (citing *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 232, 234 (N.J.Super.Ct.App.Div.1966)). To establish “unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust.” *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519 (1994).

Here, Plaintiff’s allegations fail to support the claim of unjust enrichment. Even accepting all allegations as true, there is nothing in the record to suggest that Defendant’s retention of Plaintiff’s money is unjust. Plaintiff received the benefit of the product that he paid for and Defendant received the benefit of payment for said product. As such, the doctrine of unjust enrichment is inapposite here. Accordingly, the Court dismisses Plaintiff’s claim of unjust enrichment.

E. Plaintiff’s Breach of Express Warranty and Implied Warranty of Merchantability Claims (Counts VIII & IX)

*4 Plaintiff raises claims of breach of express and implied warranties. Specifically, Plaintiff alleges that he entered into a contract with Defendant for the purchase of the product, and in the contract, Defendant made express promises as to the purity of the product. (Compl.17). Additionally, Plaintiff claims that the implied warranty of merchantability was breached because the product “was not fit for the ordinary purpose for which it was intended to be used.” (*Id.* at 19, 641 A.2d 519). Defendant disagrees and argues that the warranty claims must be dismissed because “Plaintiff alleges no specific lead level in his product, and no actual injury from using the [p]roduct.” (Br.21).

Under New Jersey law, an express warranty is “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.” N.J. STAT. ANN. § 12A:2–313(1)(a). “The plaintiff in a warranty action need not establish the existence of a defect; the failure of the goods to perform as warranted is sufficient.” *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 98 N.J. 555, 586, 489 A.2d 660 (1985). Proof of causation is also required, but “mere failure of promised performance is enough without proof of any defect.” *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 343, 322 A.2d 440 (1974). To recover damages for breach of express warranty, plaintiffs must establish that such damages were reasonably foreseeable at the time that the contract was entered into. *Spring Motors Distribs., Inc.*, 98 N.J. at 579–80, 489 A.2d 660

2013 WL 2650611

(describing that damages for misrepresenting products comes from “society's interest in the performance of promises”).

An implied warranty “simply means that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold.” *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 370, 161 A.2d 69 (1960). To establish a breach of implied warranty, plaintiff must show “that the product was not reasonably fit for the ordinary purposes for which it was sold and such defect proximately caused injury to the ultimate consumer.” *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 134 N.J.Super. 328, 340 A.2d 687, 692 (N.J.Super. Ct. Law Div.1975).

Here, Plaintiff fails to make the necessary showing of damages required for both a breach of express warranty claim

and an implied warranty of merchantability claim. Plaintiff merely asserts that some of Defendant's product contained 1.7 micrograms of lead. As such, Plaintiff fails to establish what damages resulted from the product containing said lead. Consequently, Plaintiff's claims of breach of express and implied warranty are dismissed.

IV. CONCLUSION

For these reasons, the Court GRANTS Defendant's Motion to Dismiss without prejudice. An appropriate Order follows this Opinion.

All Citations

Not Reported in F.Supp.2d, 2013 WL 2650611

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 23



KeyCite Yellow Flag - Negative Treatment

Opinion Clarified on Denial of Reconsideration by [Horowitz v. AT&T Inc.](#), D.N.J., January 2, 2019

2018 WL 1942525

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Roy HOROWITZ, Linda Larson,
Kempton Pollard, Katherine Seaman,
and [Kathleen Sweeney](#), Plaintiffs,

v.

AT&T INC., AT&T Corp., AT&T Services, Inc.,
and AT&T Mobility Services LLC, Defendants.

Civil Action No. 3:17-cv-4827-BRM-LHG

|
Signed 04/25/2018

Attorneys and Law Firms

Emily Rose Derstine Friesen, [Susan M. Saint-Antoine](#), [Brian Charles Farrell](#), Console Mattiacci Law, LLC, Philadelphia, PA, [Stephen G. Console](#), Console Mattiacci Law, LLC, Moorestown, NJ, for Plaintiffs.

[Angelo Joseph Genova](#), Genova Burns LLC, Newark, NJ, [James Bucci](#), Genova Burns LLC, Camden, NJ, for Defendants.

OPINION[BRIAN R. MARTINOTTI](#), United States District Judge

*1 Before this Court are: (1) AT&T, Inc.'s ("INC")¹ Motion to Dismiss against Roy Horowitz ("Horowitz"), Linda Larson ("Larson"), Kempton Pollard ("Pollard"), Katherine Seaman ("Seaman"), and Kathleen Sweeney ("Sweeney," collectively "Plaintiffs") for lack of jurisdiction (ECF No. 21); (2) AT&T Services, Inc. ("SERVICES") and AT&T Mobility Services, LLC's ("MOBILITY") Motion to Dismiss Larson and Pollard's claims for lack of jurisdiction (ECF No. 23); and (3) AT&T Corp. ("CORP"), SERVICES, and MOBILITY'S Motion to Dismiss for failure to state a claim (ECF No. 22).² Plaintiffs oppose all motions. (ECF Nos. 41, 42, and 43.) Pursuant to [Federal Rule of Civil Procedure 78\(a\)](#), the Court heard oral argument on April 10, 2018. For the reasons set forth below, INC's Motion to Dismiss for lack

of jurisdiction is **DENIED**; SERVICES and MOBILITY'S Motion to Dismiss Larson and Pollard's claims for lack of jurisdiction is **GRANTED**; and CORP, SERVICE, and MOBILITY'S Motion to Dismiss for failure to state a claim is **GRANTED in part and DENIED in part**.

¹ Although at Oral Argument the Court stated it would refer to AT&T Inc. as AT&T, it has decided to refer to it as INC because Plaintiffs Complaint does not distinguish among the AT&T Defendants and instead refers to all Defendants collectively as AT&T. As articulated below, Plaintiffs argue all entities are a single entity, joint employers, or alter egos of one another. As such, the Court will only distinguish between Defendants when applicable.

² INC, CORP, SERVICES, and MOBILITY will collectively be referred to as Defendants.

I. BACKGROUND**A. Factual Background**

For the purposes of the motions to dismiss, the Court accepts the factual allegations in the Complaint as true and draws all inferences in the light most favorable to Plaintiffs. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). The Court also considers any "document *integral to or explicitly relied upon* in the complaint." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). This matter involves violations of the Age Discrimination in Employment Act ("ADEA") in which, it is alleged, Defendants engaged in a "company-wide plan" to replace the aging workforce in Defendants' corporations with a younger one by the year 2020 (the "2020 Scheme"), with a three-step "surplus" then termination and fraudulent release scheme. (*See* Compl. (ECF No. 1).)

1. The Parties

Horowitz is a citizen of the state of New Jersey. (*Id.* ¶ 1.) He was hired by AT&T in December 1995, and was employed at the company for more than 20 years before his termination effective June 21, 2016, at the age of 56. (*Id.* ¶ 141.) At the time of his termination, he worked in the Bedminster, New Jersey office and received his W-2 from CORP. (*Id.* ¶¶ 143-44.) From approximately 2014 until the time of his termination, he served as the Professional—Client Services Project Manager and reported to Peter

Marcinkowski (“Marcinkowski”), AT&T’s Senior Program Project Manager. (*Id.* ¶ 142.)

*2 Larson is a citizen of the state of Arizona. (*Id.* ¶ 3.) She was hired by AT&T in 1973, and was employed at the company for approximately 34 years before her termination effective March 7, 2016, at the age of 61. (*Id.* ¶ 100.) At the time of her termination, she worked “for AT&T from her home in Lake Havasu City, Arizona” and received her W–2 from SERVICES. (*Id.* ¶¶ 102–03.) From 2013 until the time of her termination, Larson served as the Manager of Sales Planning and reported to Glen Greenwell. (*Id.* ¶ 101.)

Pollard is a citizen of the state of Florida. (*Id.* ¶ 5.) He was hired by AT&T in May 2006, and was employed at the company for more than 10 years before his termination effective June 21, 2016, at the age of 69. (*Id.* ¶ 178.) At the time of his termination, Pollard worked for AT&T from his home in Bradenton, Florida and was assigned to an AT&T office in Tampa, Florida. (*Id.* ¶ 181.) He received his W–2 from SERVICES. (*Id.* ¶ 182.) From 2008 until the time of his termination, Pollard served as the Professional—Client Serves project Manager and reported to Marcinkowski. (*Id.* ¶ 179.)

Seaman is a citizen of the state of New Jersey. (*Id.* ¶ 7.) She was hired by AT&T in August 1986, and was employed at the company for more than 30 years before her termination effective March 27, 2017, at the age of 49. (*Id.* ¶ 255.) At the time of her termination, Seaman worked for AT&T in the Bedminster, New Jersey office and received her W–2 from SERVICES. (*Id.* ¶ 258–59.) From September 2004 until the time of her termination, she worked as a Director in marketing. (*Id.* ¶ 256.) Specifically, from January 2015 until her termination, she held the position of Director—Marketing Management in AT&T’s Entertainment Group and initially reported to Annette Isom, then Roger Hyde, then Craig Shirk, and ultimately David Banks. (*Id.* ¶ 257.)

Sweeney is a citizen of New Jersey. (*Id.* ¶ 9.) She was hired by AT&T in November 1997, and was employed at the company for more than 18 years before her termination effective July 22, 2016, at the age of 51. (*Id.* ¶ 216.) At the time of her termination, Sweeney worked for AT&T in King of Prussia, Pennsylvania, but travelled for work to field offices in various states, including New Jersey, and occasionally worked from her home in New Jersey. (*Id.* ¶ 219.) She received her W–2 from MOBILITY. (*Id.* ¶ 220.) From 2007 until the time of her termination, Sweeney served as the Director of Sales

(from January 2014 through April 2015, she held the position of Director of Sales Operations), and reported to Tiffany Baehman until 2016 and then Judy Cavalieri. (*Id.* ¶ 217.)

“[INC] is a Delaware corporation that is the parent company of several wholly-owned and controlled subsidiary corporations, including [SERVICES], MOBILITY, and [CORP].” (*Id.* ¶ 11.) It has its headquarters in Texas. (*Id.* at 1 (*see caption*)). CORP is a New York corporation with its principal place of business in Bedminster, New Jersey. (*Id.* ¶ 14.) CORP is duly registered to transact business in New Jersey, with a registered agent located in New Jersey for service of process. (*Id.*) SERVICES is a Delaware corporation. (*Id.* ¶ 15.) It is registered to transact business in New Jersey, with a registered agent located in New Jersey for service of process. (*Id.*) “It maintains several places of business located throughout the state of New Jersey, maintains systematic and continuous activity such that it is at home in New Jersey, and employs many people in the state of New Jersey.” (*Id.*) MOBILITY is a Delaware limited liability corporation. (*Id.* ¶ 16.) It is duly registered to transact business in New Jersey, with a registered agent in New Jersey for service of process. (*Id.*) “It maintains several places of business located throughout the state of New Jersey, maintains systematic and continuous activity such that it is at home in New Jersey, and employs many people in the state of New Jersey.” (*Id.*)

*3 Plaintiffs contend Defendants share “common ownership, management, administrative services, personnel, policies and employment practices.” (*Id.* ¶ 17.) Defendants hold themselves out to the public and their employees as a “family of companies” known as AT&T. (*Id.* ¶ 18.)

2. 2020 Scheme

Plaintiffs allege AT&T engaged in an intentional “pattern and practice of age discrimination adversely affecting [] Plaintiffs and similarly situated Older Workers.” (*Id.* ¶ 39–40.) AT&T allegedly came up with a corporate-wide plan to replace its older workforce with a younger one by 2020. (*Id.* ¶ 44.)

AT&T’s 2020 Scheme has allegedly been in effect since at least early 2013 and continues to this day. (*Id.* ¶ 53.) The 2020 Scheme operates in a three-step “surplus,” then termination, and fraudulent release scheme. (*Id.* ¶ 54.) Through a standard form and AT&T Surplus Notification Letter, AT&T

notifies certain employees that the company has been “evaluating certain business units within the AT&T family of companies. After a thorough and careful review, we have determined that the position which you currently hold will be eliminated. This is due to a reduction in positions within your level and organization. As a result of this decision, you will be placed on surplus status, effective the day following the date that appears at the top of this letter, and you may receive severance benefits if you meet the eligibility criteria.”

(*Id.* ¶ 57.) Plaintiffs claim the decisions as to who will be placed on surplus status are subjective and based on age discriminatory bias. (*Id.* ¶ 58.)

Employees selected for surplus had the opportunity to apply for alternative positions in AT&T by the end of the surplus period. (*Id.* ¶ 67.) However, at the conclusion of the surplus period, if an employee placed on surplus did not find an alternative position, their employment was terminated. (*Id.*) Plaintiffs allege “[t]he application and selection for available position process is infected with age bias.” (*Id.* ¶ 68.) “During the ‘surplus’ period, many employees who were notified of ‘surplus’ status, including those under age 40, secured available positions.” (*Id.* ¶ 77.)

After termination, the employees had an opportunity to receive a severance payment under the INC Severance Pay Plan if he or she executed the “GR&W–AT&T–Non–CA–GG–Amended September 2014” (the “General Release and Waiver”), which was presented to employees on the same day as the AT&T Surplus Notification Letter, as part of a standard uniform package. (*Id.* ¶¶ 62, 80.) “The General Release and Waiver purports to release all claims against AT&T with respect to the recipient’s employment and termination of employment, and to waive the right to be in or participate in a class, collective, or representative action on claims arising prior to signing, including under the ADEA.” (*Id.* ¶ 63.) The General Release and Waiver form was also accompanied by a standard form “stamped on the bottom as ‘Amended September 2014’ and entitled ‘AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) INFORMATION NOTICE UNDER THE OLDER WORKERS BENEFIT PROTECTION ACT’ (the “OWBPA Notice”). (*Id.* ¶ 64.)

Plaintiffs argue the General Release and Waiver is invalid and unenforceable as to rights and claims under the ADEA, contains misstatements of facts, is misleading, was not

knowingly and voluntarily signed, and failed to comply with the strict disclosure requirements of the OWBPA. (*Id.* ¶ 82.) The General Release and Waiver allegedly fails to comply with the OWBPA because, among other things, it does not contain information about the decisional unit involved, eligibility factors for participation in the INC Severance Pay Plan, time limits applicable to the INC Severance Pay Plan, the job titles and ages of the employees designated to participate in INC Severance Pay Plan, and job titles and ages of those who were not selected to participate in the INC Severance Pay Plan. (*Id.* ¶ 82(a).)

*4 All Plaintiffs allege they received an AT&T Surplus Notification Letter, General Release and Waiver, and OWMPA Notice prior to their termination. (*Id.* ¶¶ 109, 115, 116, 151, 153, 154, 189, 191, 192, 225, 227, 228, 265, 268, 269.) Moreover, all Plaintiffs applied for at least two open and available positions with AT&T for which they were qualified, but were not interviewed or selected for any position. (*Id.* ¶¶ 126, 127, 163, 201, 241, 280.) All Plaintiffs but Larson signed the General Release and Waiver. (*Id.* ¶¶ 131, 167, 205, 246, 284.)

B. Procedural Background

On June 29, 2017, Plaintiffs filed a Complaint against Defendants alleging: (1) a violation of the ADEA, based on disparate treatment; (2) a violation of the ADEA, based on disparate impact; and (3) a violation of the OWBPA. (*See* ECF No. 1.) On September 25, 2017, Defendants filed three motions: (1) INC filed a Motion to Dismiss for Lack of Jurisdiction; (2) SERVICES and MOBILITY filed a Motion to Dismiss for lack of jurisdiction as to Plaintiffs Larson and Pollard’s claims; and (3) CORP, SERVICES, and MOBILITY filed a Motion to Dismiss for failure to state a claim. (ECF Nos. 21–23.) Plaintiffs oppose all motions. (*See* ECF Nos. 41–43.)

II. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 12(b)(2)

On a motion to dismiss for lack of personal jurisdiction under [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), the plaintiff bears the burden of establishing the court’s jurisdiction over the defendant. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004). Although the plaintiff must ultimately prove personal jurisdiction by a preponderance of the evidence, such a showing is unnecessary at the early stages of litigation. *Mellon Bank (E.) PSFS, Nat. Ass’n v. Farino*, 960 F.2d 1217,

1223 (3d Cir. 1992). Instead, the plaintiff must “present[] a prima facie case for the exercise of personal jurisdiction by establishing with reasonable particularity sufficient contacts between the defendant and the forum state.” *Id.* at 1223 (citations omitted). Because a Rule 12(b)(2) motion “is inherently a matter which requires resolution of factual issues outside the pleadings,” the jurisdictional allegations may be supported with sworn affidavits or other documents. *Metcalf v. Renaissance Marine, Inc.*, 566 F.3d 324, 330 (3d Cir. 2009). Once the plaintiff meets his or her burden, the burden shifts to the defendant to establish the presence of other considerations that would render the exercise of personal jurisdiction unreasonable. *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 150 (3d Cir. 1992) (citation omitted).

B. Federal Rule of Civil Procedure 12(b)(6)

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court is “required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff].” *Phillips*, 515 F.3d at 228. “[A] complaint attacked by a ... motion to dismiss does not need detailed factual allegations.” *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). However, the Plaintiff’s “obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

*5 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.” *Id.* This “plausibility standard” requires the complaint allege “more than a sheer possibility that a defendant has acted unlawfully,” but it “is not akin to a ‘probability requirement.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Detailed factual allegations” are not required, but “more than an unadorned, the defendant-harmed-me accusation” must be pled; it must include “factual enhancements” and not just conclusory statements or a

recitation of the elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

“Determining whether a complaint states a plausible claim for relief [is] ... a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’ ” *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

While as a general rule, a court may not consider anything beyond the four corners of the complaint on a motion to dismiss pursuant to 12(b)(6), the Third Circuit has held “a court may consider certain narrowly defined types of material without converting the motion to dismiss [to one for summary judgment pursuant under Rule 56].” *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir.1999). Specifically, courts may consider any “ ‘document integral to or explicitly relied upon in the complaint.’ ” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426.

III. DECISION

A. Personal Jurisdiction Generally

“[A] federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state.” *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007) (quoting *Provident Nat’l Bank v. Cal. Fed. Sav. & Loan Ass’n*, 819 F.2d 434, 437 (3d Cir. 1987)). In New Jersey, “courts may exercise jurisdiction over a nonresident defendant to the uttermost limits permitted by the United States Constitution.” *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 589 (2010), *rev’d on other grounds sub nom., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). “Accordingly, in determining whether personal jurisdiction exists, we ask whether, under the Due Process Clause, the defendant has certain minimum contacts with [New Jersey] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *O’Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 316 (3d Cir. 2007).

Personal jurisdiction may be established through general jurisdiction or specific jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (noting that “opinions in the wake of the pathmarking *International Shoe* decision have differentiated

between general or all-purpose jurisdiction, and specific or case-linked jurisdiction”). “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile[.]” *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). With respect to a corporation, in *Daimler*, the Supreme Court emphasized that the general jurisdiction inquiry “is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ [but] whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.’” *Id.* at 761 (quoting *Goodyear*, 564 U.S. at 919). The Supreme Court explained that “only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there.” *Id.* at 760. For a corporate defendant, “the place of incorporation and principal place of business are paradigm[ic] ... bases for general jurisdiction.” *Id.* (internal citation omitted).

*6 *Daimler* also recognized the possibility that, in an “exceptional” case, “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.” *Id.* at 761 n.19. However, an approach that “approve[s] the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business ... is unacceptably grasping.” *Id.* at 761 (internal citation omitted). If general jurisdiction is established, a defendant can be sued in that jurisdiction on any matter. *Boswell v. Cable Servs. Co., Inc.*, No. 16-4498, 2017 WL 2815077, at *3 (D.N.J. June 29, 2017).

Specific jurisdiction may be established over a defendant where the defendant “has purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal citations omitted). More specifically, specific jurisdiction requires that: “(1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) the assertion of personal jurisdiction is reasonable and fair.” *WAG Acquisition, LLC v. Multi-Media, LLC*, No. 14-1661, 2015 WL 5310203, at *12 (D.N.J. Sept. 10, 2015) (citation omitted); *Shuker v. Smith & Nephew, PLC*, No. 16-3785, 2018 WL 1096185, at *14 (3d Cir. Mar. 1, 2018) (stating “what is necessary [for specific jurisdiction] is a deliberate targeting of the forum”) (citation omitted).

A court’s exercise of personal jurisdiction “requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (emphasis added). Additionally, due process requires that “maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); see also *O’Connor*, 496 F.3d at 316 (discussing the three-step process in determining personal jurisdiction). Importantly, “the defendant’s conduct and connection with the forum State [must be] such that he should reasonably anticipate being hauled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). “[A] plaintiff’s residence, by itself, is insufficient to establish personal jurisdiction” over a defendant. *Choi v. Damul Corp.*, No. 12-2440, 2014 WL 314669, at *7 (D.N.J. Jan. 27, 2014). “Once specific jurisdiction is established, a defendant can be sued in the jurisdiction only in the matter from which the jurisdiction arises.” *Boswell*, 2017 WL 2815077, at *3.

1. INC

INC argues the Court lacks personal jurisdiction over it because it is solely a holding company with no contacts in New Jersey. (ECF No. 21-1 at 3.) Specifically, it argues there is no general jurisdiction because its place of incorporation is Delaware, its principal place of business is located in Texas, and Plaintiffs do not allege exceptional circumstances to support the exercise of general jurisdiction over it. (*Id.* at 6.) In addition, INC argues its subsidiaries, CORP, SERVICES, and MOBILITY are not its alter ego. (*Id.* at 11-15.) Lastly, INC argues there is no basis for specific jurisdiction over it because it has no minimum contacts with New Jersey, has no employees or real estate in New Jersey, does not insure persons or property in New Jersey, is not registered to do business in New Jersey, and neither produces goods or services nor advertises in New Jersey. (*Id.* at 8.)

*7 Plaintiffs contend this Court has general jurisdiction over INC because INC has vast contacts in New Jersey and is a single-employer or joint employer with CORP, SERVICES, and MOBILITY, and its subsidiaries are its alter ego. (See ECF No. 42.) In the alternative, Plaintiffs argue this Court has specific jurisdiction over INC because it committed and/or directed the 2020 Scheme. (*Id.* at 8-22.)

The Court finds there is no basis for exercising general jurisdiction over INC. Indeed, Plaintiffs admit INC is a Delaware corporation with its principal place of business in Texas. (ECF No. 1 ¶ 11 and at 1 (the caption of the Complaint).) *Daimler*, 134 S. Ct. at 760 (stating “the place of incorporation and principal place of business are paradigm[m] ... bases for general jurisdiction”). Moreover, Plaintiffs do not otherwise allege any exceptional circumstances to support the exercise of general jurisdiction. *Id.* at 761 n.19 (recognizing the possibility that, in an “exceptional” case, “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State”). Plaintiffs do not allege that INC directly employed any individuals or directly maintained any business locations in New Jersey. Instead, it argues its subsidiaries hold principal places of business in New Jersey and employ people in New Jersey. (*Id.* ¶ 13.) Although Plaintiffs assert INC maintains systematic and continuous activity such that it is at home in New Jersey, this allegation is merely conclusory and unsupported by any factual allegations in the Complaint or affidavits.

The Court also finds there is no general jurisdiction based on a theory of “single employer,” “joint employer,” or alter ego of INC’s subsidiaries CORP, SERVICES, and MOBILITY. First, “single employer” or “joint employer” theories “and similar concepts are relevant for determining liability, but are not for determining whether a court may exercise personal jurisdiction over a party.” *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d 277, 328 (W.D. Pa. 2010), *aff’d*, 683 F.3d 462 (3d Cir. 2012) (“The court is persuaded by the latter group of decisions in which the courts recognized that the joint employer theory and similar concepts are relevant for determining liability, but are not for determining whether a court may exercise personal jurisdiction over a party.”); see *Moreau v. Air France*, 356 F.3d 942, 944 (9th Cir. 2004) (stating joint employment does not determine personal jurisdiction); *Campanelli v. Image First Unif. Rental Serv., Inc.*, No. 15–04456, 2016 WL 4729173, at *7 (N.D. Cal. Sept. 12, 2016) (“[B]asing personal jurisdiction on joint employer status ... appears to be the minority view.... Even if [defendant] were liable under a ‘joint employer’ theory, this does not establish that a separate, non-resident corporate entity without minimum contacts can be hailed into a California court.”); *E.E.O.C. v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 525–26 (S.D. Tex. 2012) (“The integrated enterprise theory ... is a

liability standard ... not a jurisdictional standard.”); *Heidbrink v. ThinkDirect Mktg. Grp., Inc.*, No. 14–1232, 2014 WL 3585698 at *4 (M.D. Fla. 2014) (“A joint employer theory is relevant to establish liability against a defendant under the FLSA; it is not relevant to establish specific jurisdiction.”); *Vogt v. Greenmarine Holding, LLC*, No. 1–0311, 2002 WL 534542, at *3 (N.D. Ga. Feb. 20, 2002) (“Plaintiffs argue that the proper test for personal jurisdiction is whether OMC and Defendants constitute a ‘single employer’ so as to be liable under [a statute]. The court finds, however, that it is improper to conflate an issue of subject matter jurisdiction with personal jurisdiction. Liability and jurisdiction are two separate inquiries.”).

*8 Second, Plaintiffs allege this Court has general jurisdiction over INC based on the fact that CORP, SERVICES, and MOBILITY, which are subsidiaries of INC, are subject to the general jurisdiction of this Court and are alter egos of INC. Courts in this District have applied the alter ego theory to cases of general jurisdiction. See *Mark IV Transp. & Logistics v. Lightning Logistics, Inc.*, 705 Fed.Appx. 103, 107 (3d Cir. 2017); *Bootay v. KBR, Inc.*, 437 Fed.Appx. 140, 143 (3d Cir. 2011); *Seltzer v. I.C. Optics, Ltd.*, 339 F. Supp. 2d 601, 609 (D.N.J. 2004). As such, the Court will apply the alter ego test in this matter.

“Whether the exercise of jurisdiction over a parent corporation is proper under the alter-ego theory depends upon the details of the unique relationship between the parent corporation and its subsidiary. The parent-subsidiary relationship itself is not sufficient to establish *in personam* jurisdiction over the parent entity.” *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d at 317–18 (citation omitted); see also *Lucas v. Gulf & W. Indus., Inc.*, 666 F.2d 800, 805–06 (3d Cir. 1981) (remarking on factors relevant for jurisdictional analysis between a parent and a subsidiary), *abrogated on other grounds*, *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046 (3d Cir. 1993); *Carfagno v. Ace, Ltd.*, No. 04–6184, 2005 WL 1523530, at *6 (D.N.J. June 28, 2005) (same). In New Jersey, a subsidiary will be deemed to be the alter ego or “mere instrumentality” of its parent if “the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent.” *State, Dep’t of Envtl. Prot. v. Ventron Corp.*, 468 A.2d 150, 164 (N.J. 1983) (citations omitted). “It is patently clear since *Ventron* that in New Jersey even the exercise of significant control by the parent over the subsidiary will not suffice to pierce the corporate veil.” *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 150 (3d Cir. 1988).

Courts consider factors such as: “(1) the level of capitalization of the subsidiary; (2) who the subsidiary does business with other than the parent; (3) the day-to-day involvement of the parent’s directors, officers and personnel with the subsidiary; and (4) the payment of the subsidiary’s salaries and expenses by the parent.” *Seltzer*, 339 F. Supp. 2d at 610; *Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 513 (D.N.J. 2008) (citations omitted) (listing the factors to consider as: “(1) whether the subsidiary is doing business in the forum that would otherwise be performed by the parent; (2) whether there is common ownership of the parent and a subsidiary; (3) whether there is financial dependency; and (4) whether the parent interferes with the subsidiary’s personnel, disregards the corporate formalities, and/or controls the subsidiary’s marketing and operational policies.”). Liability generally requires that the parent corporation “abused the privilege of incorporation by using the subsidiary to perpetuate a fraud or injustice, or otherwise to circumvent the law.” *Patent Incentives, Inc. v. Seiko Epson Corp.*, No. 88–1407, 1988 WL 92460, at *6 (D.N.J. Sept. 6, 1988), *aff’d*, 878 F.2d 1446 (Fed. Cir. 1989) (citing *Ventron*, 468 A.2d at 164).

A parent company’s domination or control of its subsidiary cannot be established by overlapping boards of directors. *See United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (“It is a well-established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do ‘change hats’ to represent the two corporations separately, despite their common ownership.”); *Leo v. Kerr–McGee*, No. 93–1107, 1996 WL 254054, at *6 (D.N.J. May 10, 1996) (“A significant degree of overlap between directors and officers of a parent and its subsidiary does not establish an alter ego relationship.”). There is a general presumption “that the directors are wearing their ‘subsidiary hats’ and not their ‘parent hats’ when acting for the subsidiary,” so dual office holding alone is not sufficient to establish liability. *Bestfoods*, 524 U.S. at 69 (citation omitted).

*9 The record does not support a finding that INC dominates over its subsidiaries in such a manner that the subsidiaries are mere conduits of INC. INC is purely a holding company, that conducts no business with the public; has no employees in New Jersey; no office or mailing address in New Jersey; does not own, lease, manage, or maintain any real property in New Jersey; is not an insurance company; does not pay income, property or franchise taxes to the state of New Jersey; does not engage in any advertising in New Jersey; and does not provide or place in the stream of commerce

in New Jersey any product. (See ECF No. 21–2.) As other courts have stated, a “holding company could simply hold another type of subsidiary.” *In re Enter. Rent–A–Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d at 324 (quoting *Action Mfg. Co., Inc. v. Simon Wrecking Co.*, 375 F. Supp. 2d 411, 422 (E.D. Pa. 2011)). Indeed, at least one other court in this circuit, when analyzing multiple factors in a similar situation involving a holding company, has concluded that in “an ordinary holding company/subsidiary relationship, not one of undue domination and control,” there is no alter ego relationship. *Arch v. Am. Tobacco Co.*, 984 F. Supp. 830, 837–38 (E.D. Pa. 1997). Plaintiffs have failed to plead: (1) financial dependency of either subsidiary on INC; (2) undercapitalization of any of INC’s subsidiaries; (3) INC paying the salaries and expenses of any INC subsidiary; (4) INC controlling the subsidiary’s marketing and operational policies; (5) facts demonstrating the entities share the same day-to-day operations; (6) share similar employees; or (7) evidence of INC’s every day involvement and control over any of its subsidiaries.

Instead, Plaintiffs rely on the fact that INC and its subsidiaries share the AT&T website, which has no separate pages or links devoted to any particular subsidiary; that INC and its subsidiaries all use @att.com email addresses; that INC and its subsidiaries share employment policies and codes of ethics; and that INC and its subsidiaries portray themselves as a single brand and to the public as the “AT&T family of companies.” (ECF No. 42 at 9.) However, courts have found that “common marketing image and joint use of trademark logs fail to render [entities as] alter ego[s].” *In re Enter. Rent–A–Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d at 323; *see Prescott v. LivaNova PLC*, No. 16–00472, 2017 U.S. Dist. LEXIS 95830, at *25–26, 2017 WL 2591270 (S.D. Iowa June 12, 2017) (granting a motion to dismiss where “[t]he companies share a common branding scheme, including a common email domain, but maintain completely separate day-to-day operations, employees, officers, and corporate structures”); *Gloria D. Wiseman v. ING Grp., N.V. et al.*, No. 16–07587, 2017 WL 4712417, at *13 (S.D.N.Y. Sept. 28, 2017) (finding that “the fact that ReliaStar personnel used voya.com email addresses or mention ReliaStar’s relationship to Voya is no more than a different form of the argument that the two identified under the same brand, which courts have found insufficient as a matter of law to establish alter egos”); *Patterson v. Home Depot, USA, Inc.*, 684 F. Supp. 2d 1170, 1179 (D. Ariz. 2010) (holding that “[t]he fact the two companies used the same logo and intellectual property pursuant to the licensing agreement [] does not

demonstrate that Krause–Werk was the alter ego of the other”); *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1301 (S.D. Cal. 2003) (holding that common trade name and logo, without more, is not a sufficient basis for establishing personal jurisdiction) (internal citations omitted). Moreover, a company being “portrayed as a single brand to the public ... does not demonstrate the necessary control by defendant parent over the subsidiaries.” *In re Enter. Rent–A–Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d at 323.

Accepting Plaintiffs’ position would extend the alter ego doctrine, such that entities utilizing the same brand, website, and policies would be imputed as alter egos, without demonstrating the subsidiaries ignored corporate formalities in day-to-day activities, the subsidiaries financially relied on INC, INC’s subsidiaries were undercapitalized, INC paid the salaries and expenses of any INC subsidiary, and the entities shared similar employees. Accordingly, the Court finds CORP, SERVICES, and MOBILITY are not alter egos of INC. As such, the Court lacks general jurisdiction over INC.

Third, Plaintiffs argue this Court has specific jurisdiction over INC because it initiated, directed, and benefited from the 2020 Scheme. (ECF No. 42 at 14–26.) The Court finds Plaintiffs have plead sufficient facts and submitted adequate evidence to establish specific jurisdiction as to INC at this stage of the litigation. “In ruling upon a motion to dismiss, courts must accept the plaintiff’s allegations as true and construe disputed facts in favor of the plaintiff.” *Machulsky v. Hall*, 210 F. Supp. 2d 531, 537 (D.N.J. 2002) (citing *Carteret Sav. Bank, F.A.*, 954 F.2d at 142 n.1).

*10 As stated above, specific jurisdiction requires t: “(1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) the assertion of personal jurisdiction is reasonable and fair.” *WAG Acquistion, LLC*, 2015 WL 5310203, at *12 (citation omitted). The General Release and Waiver directed at Plaintiffs, some of which are New Jersey residents (Larson, Sweeney, Seaman), offered an “[J]NC Severance Pay Plan” if the terminated employees signed the release. (ECF No. 16–6 at 8.) After termination, the employees had an opportunity to receive a severance payment under the INC Severance Pay Plan if he or she executed the General Release and Waiver, which was presented to employees on the same day as the AT&T Surplus Notification Letter, as part of a standard uniform package. (ECF No. 1 ¶¶ 62, 80.) In fact, the INC Severance Pay Plan is listed

in INC’s Form 5500, Annual Return/Report of Employee Benefit Plan. (ECF No. 42–12 at 21–26.) As such, Plaintiffs have established INC purposefully directed activities (the 2020 Scheme) at New Jersey residents and the claims in this matter clearly arise out of the 2020 Scheme, which included the INC Severance Pay Plan. Moreover, personal jurisdiction is reasonable and fair because INC should have anticipate being hauled into court due to its Severance Pay Plan. *World–Wide Volkswagen Corp.*, 444 U.S. at 297.

INC argues that it does not have any of the minimum contacts with New Jersey necessary for specific jurisdiction because

[INC] is a Delaware corporation with its principal place of business in Dallas, Texas. It is and has always been a holding company. It has no employees or real estate in New Jersey. It does not insure persons or property in New Jersey. It does not pay taxes in New Jersey. [INC] is not registered to do business in New Jersey and it neither produces goods or services nor advertises in New Jersey. Simply put, [INC] has no presence, operations, or contracts in this form.

(ECF No. 21–1 at 8.) However, this argument ignores the fact that INC purposefully directed its 2020 Scheme, Severance Pay Plan at residents of New Jersey and the claims in this matter arises out of those activities. As such, the Court finds at this time Plaintiffs have demonstrated specific jurisdiction over INC. Accordingly, INC’s Motion to Dismiss based on lack of personal jurisdiction is **DENIED**.

Lastly, INC argues Plaintiffs did not properly serve INC with the Complaint. (ECF No. 21–1 at 15–16.) Plaintiffs argue they properly served INC, and that assuming service was improper they timely addressed any defect. (ECF No. 42 at 29–30.) Because the ADEA “does not provide a means for service of process, a federal court may exercise personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state.” *Bane v. Netlink, Inc.*, 925 F.2d 637, 639 (3d Cir. 1991); *Swaim v. Moltan Co.*, 73 F.3d 711, 719 (7th Cir. 1996) (“The [ADEA] does not provide for nationwide service of process, and one must therefore resort to [state] law for service of process.”).

Under New Jersey law, personal service is the primary method of effecting service. See N.J. Ct. R. 4:4-4(a), 4:4-5(a). New Jersey Court Rules 4:4-3 and 4:4-4(a) prescribe the methods of effecting personal service within the state. Substitute or constructive service, however, is permitted when personal service within the state cannot be effected. See N.J. Ct. R. 4:4-4(b), 4:4-5. For *in personam* jurisdiction, New Jersey Court Rule 4:4-4(b) provides the methods of substitute or constructive service, such as personal service outside the state, simultaneous mailings by ordinary and certified (or registered) mail, and “as provided by court order, consistent with due process of law.” N.J. Ct. R. 4:4-4(b)(1), (b)(3). For *in rem* and *quasi in rem* jurisdiction, New Jersey Court Rule 4:4-5 provides the methods for personal, substitute, and constructive service, such as service by publication. Regardless of the type of action, substitute or constructive service requires a demonstration of due diligence that satisfies the requirements specified in New Jersey Court Rule 4:4-5(b). See N.J. Ct. R. 4:4-5(a); 4:4-4(b)(1) (cross-referencing Rule 4:4-5(b)); N.J. Ct. R. 4:4(b)(3) (noting that service by a court order consistent with due process is precluded “[i]f service can be made by any of the modes provided by this rule”). As such, service of process outside the State requires an “affidavit satisfying the requirements of R. 4:4-5(b) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule.” N.J. Ct. R. 4:4-4(b).

*11 On July 25, 2017, Plaintiffs served a Summons and Complaint on INC in Delaware. (ECF No. 4 and 11) Initially, Plaintiffs failed to attach an affidavit as required pursuant to New Jersey Court Rule 4:4-4(b). However, such defect has been timely addressed and cured on September 27, 2017. (Aff. of Inquiry (ECF No. 27)); see Fed. R. Civ. P. 4(m) (stating a defendant must be served within 90 days after the complaint is filed). As such, INC’s Motion to Dismiss on this basis is **DENIED**.

2. Larson and Pollard’s Claims Against SERVICES and MOBILITY

SERVICES and MOBILITY argue Larson and Pollard’s claims against them should be dismissed for lack of personal jurisdiction. (See ECF No. 23.) Plaintiffs contend this Court has jurisdiction over Larson and Pollard’s claims against SERVICES and MOBILITY because: (1) SERVICES and MOBILITY consented to general jurisdiction in New Jersey;

(2) SERVICES and MOBILITY purposefully directed their 2020 Scheme at New Jersey; and (3) SERVICES and MOBILITY are part of the “AT&T family of companies,” such that they are alter egos of INC and all AT&T entities are a single employer, and the “AT&T family of companies” purposefully directed their 2020 Scheme at New Jersey. (See ECF No. 43.) The Court will address these arguments in turn.

Plaintiffs claim the Court has general jurisdiction over SERVICES and MOBILITY by virtue of them having registered to do business in New Jersey and having registered agents in the state of New Jersey. (ECF No. 43 at 5–8.) This District is split on the issue of whether the mere fact that a corporation is registered to do business in New Jersey and appointed an agent to receive process subjects it to general jurisdiction in New Jersey.

In *Otsuka Pharm. Co. v. Mylan Inc.*, Chief Judge Jerome B. Simandle addressed the issue of whether a corporation’s registration to do business and appointment of a registered agent for service of process in New Jersey subjects the corporation to personal jurisdiction in New Jersey. 106 F. Supp. 3d 456, 467 (D.N.J. 2015). In relying on two Supreme Court cases from the first half of the twentieth century, prior to *Daimler*, Chief Judge Simandle concluded “a corporation’s appointment of an agent for service of process constitutes, under certain circumstances, consent to the forum’s personal jurisdiction.” *Id.* (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939); *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917)). He reasoned that “in appointing an agent, a foreign corporation ‘takes the risk of the construction that will be put upon the [registration] statute and the scope of the agency by the State Court.’” *Id.* at 468 (quoting *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213, 216 (1921)).

Chief Judge Simandle also relied on a decision from the Third Circuit, *Bane v. Netlink, Inc.*, where the Court found that “by registering to do business in Pennsylvania, the defendant purposefully availed itself of the privilege of conducting activities within the forum State, th[u]s invoking the benefits and protections of its laws.” *Otsuka Pharm.*, 106 F.3d at 468 (quoting *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991)). Chief Judge Simandle concluded that the Supreme Court’s decision in *Daimler* did not preclude jurisdiction through a corporation’s consent by means of registration and appointment of an agent for service of process. *Id.* Chief Judge Simandle reasoned that *Daimler* concerned non-consensual general jurisdiction over a corporation but did not

“cast any doubt on the continued vitality of consent-based jurisdiction.” *Id.* Therefore, he found that two of the defendant corporations in that matter consented to jurisdiction in New Jersey by means of registering to do business and appointing a registered agent. *Id.* at 470; see also *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 438 (D.N.J. 2015) (another opinion by Chief Judge Simandle finding that “acceptance of service by a defendant registered to do business in the state establishes personal jurisdiction”); *Sadler v. Hallsmith SYSCO Food Servs.*, No. 08–4423, 2009 WL 1096309, at *2 (D.N.J. Apr. 21, 2009) (“Because the Court finds that [the defendant corporation] consented to being sued in the courts of New Jersey, the Court need not engage in an analysis of [the defendant corporation’s] contacts with the state.”).

*12 However, in another decision from this District, Judge Madeline Cox Arleo reached the opposite conclusion. In *Display Works, LLC v. Bartley*, she found that a corporation did not consent to jurisdiction in New Jersey merely by registering to do business there and appointing an agent for service of process. 182 F. Supp. 3d 166, 179 (D.N.J. 2016). Judge Arleo had two primary reasons to support her conclusion. First, she distinguished the Third Circuit’s decision in *Bane*. Judge Arleo notes, in *Bane*, the Third Circuit was interpreting Pennsylvania’s registration statute, which provided that by registering to do business in Pennsylvania and designating an agent for service of process, a corporation consents to personal jurisdiction there. *Id.* at 173–75. Unlike the Pennsylvania registration statute, the New Jersey statute does not expressly state that a corporation consents to jurisdiction when it registers to do business in New Jersey and appoints an agent for service of process. *Id.* at 174–75. Therefore, Judge Arleo concluded that “*Bane* compels the Court to find that the New Jersey statutory scheme does not permit [general] jurisdiction by consent by virtue of registration to do business here or actually doing business here.” *Id.* at 175.

Second, Judge Arleo found that the early Supreme Court decisions relied upon by the court in *Otsuka Pharmaceutical* “developed from an outmoded way of thinking about jurisdiction” and were inconsistent with the Supreme Court’s recent decision in *Daimler*. *Id.* at 176–77. Judge Arleo reasoned that

[t]he sweeping interpretation that a state court gave to a routine registration statute and an

accompanying power of attorney that *Pennsylvania Fire* credited as a general consent has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the Court’s 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.

Id. at 178 (quoting *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016)). Therefore, Judge Arleo concluded that a corporation’s registration to do business in New Jersey and appointment of an agent for service of process in New Jersey does not subject the corporation to general personal jurisdiction in New Jersey. *Id.* at 179; see *Boswell*, 2017 WL 2815077, at *6 (concluding the defendant’s registration to do business in New Jersey did “not mean it consented to general jurisdiction in New Jersey”); *Kubin v. Orange Lake Country Club, Inc.*, No. 10–1643, 2010 WL 3981908, at *3 (D.N.J. Oct. 8, 2010) (“Filing a certificate to do business in New Jersey [is] insufficient to establish general jurisdiction, absent evidence that [defendant] was actually doing business in New Jersey.”); *Smith v. S & S Dundalk Eng’g Works, Ltd.*, 139 F. Supp. 2d 610, 620 (D.N.J. 2001) (same); *Atkinson & Mullen Travel, Inc. v. New York Apple Tours Inc.*, 48 U.S.P.Q.2d 1377, 1379 (D.N.J. 1998) (having a license to conduct business in New Jersey is not “in and of itself sufficient to establish continuous and substantial contacts”); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (qualification to do business in a state is “of no special weight” in evaluating general jurisdiction), *cert. denied*, 506 U.S. 1080 (1993); *Dutch Run–Mays Draft, LLC v. Wolf Block, LLP*, 164 A.3d 435, 444 (N.J. Super. Ct. App. Div. 2017) (“We cannot agree business registration rises to consent to submit to the general jurisdiction in the forum.”).

The Court finds Judge Arleo’s reasoning in *Display Works* persuasive. The Court agrees that *Bane* is distinguishable due to the differences in the Pennsylvania and New Jersey corporation registration statutes. Notably, the New Jersey Statute does not contain any express language to put a corporation on notice that by registering to do business in New Jersey, it is also consenting to personal jurisdiction in the state. See N.J.S.A. 14A:1–1 et seq.; *World–Wide Volkswagen*, 444 U.S. at 291 (“Due process requires that the defendant be given adequate notice of the suit and be subject to the

personal jurisdiction of the court.” (internal citation omitted)). Furthermore, the Court finds that consent by registration is inconsistent with *Daimler*. *Daimler* reiterated the principal from *Goodyear* that there is general jurisdiction over a corporation in its place of incorporation and its principal place of business. *Daimler*, 134 S. Ct. at 760. *Daimler* also advised that older decisions addressing general jurisdiction over a corporation should be afforded little weight. *Id.* at 761 n.18 (stating that cases “decided in the era dominated by *Pennoyer*’s territorial thinking should not attract heavy reliance today” (citation omitted)). Accordingly, the Court finds SERVICES and MOBILITY did not consent to personal jurisdiction by mere registration and appointment of an agent for service of process in the state of New Jersey.

*13 Because registration and appointment of an agent for service of process in the state of New Jersey does not provide for general jurisdiction, the question remains whether there is another basis for general jurisdiction as to SERVICES and MOBILITY. As previously stated, for a corporate defendant, “the place of incorporation and principal place of business are paradigm[m]... bases for general jurisdiction.” *Daimler*, 134 S. Ct. at 760 (internal citation omitted). *Daimler* also recognized the possibility that, in an “exceptional” case, “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.” *Id.* at 761 n.19. However, an approach that “approve[s] the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business ... is unacceptably grasping.” *Id.* at 761 (internal citation omitted).

Plaintiffs admit SERVICES and MOBILITY are Delaware corporations. (*Id.* ¶ 16.) Moreover, Plaintiffs acknowledge in the caption of the Complaint that SERVICES is headquartered in Texas and MOBILITY is headquartered in Georgia. (See ECF No. 1.) Plaintiffs do not allege in the Complaint that New Jersey is the principal place of business of SERVICES or MOBILITY. Instead, they contend SERVICES and MOBILITY maintain “several places of business located throughout the state of New Jersey, maintains systematic and continuous activity such that it is at home in New Jersey, and employs many people in the state of New Jersey.” (*Id.* ¶¶ 15–16.) However, this is not sufficient. Only in an “exceptional” case can “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render

the corporation at home in that State.” *Daimler*, 134 S. Ct. at 761 n.19. In *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1777–78 (2017), the Supreme Court found the California court lacked personal jurisdiction over a pharmaceutical company that engaged in business in California, maintained five research and laboratories in California, and employed hundreds of employees in California, and maintained a small state-government advocacy office in California. Accordingly, the Court finds SERVICES and MOBILITY are not subject to general jurisdiction in New Jersey.

The Court also finds SERVICES and MOBILITY are not subject to jurisdiction in New Jersey as to Larson and Pollard’s claims under the theories of single employer or alter ego. First, “single employer” or “joint employer” theories “and similar concepts are relevant for determining liability, but are not for determining whether a court may exercise personal jurisdiction over a party.” *In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d at 328. Furthermore, as determined above, INC is not the alter ego of its subsidiaries. Thus, the fact that the Court found it has jurisdiction over INC is irrelevant and does not implicate jurisdiction over SERVICES or MOBILITY.

Moreover, to the extent Plaintiffs argue SERVICES and MOBILITY are alter egos of CORP or vice versa and therefore subject to personal jurisdiction, SERVICES and MOBILITY are not alter egos of CORP, a New York corporation with its principal place of business in Bedminster, New Jersey. (ECF No. 1 ¶ 14.) The record does not support a finding that SERVICES or MOBILITY dominate over CORP or vice versa, in such a manner that CORP is a mere conduit of SERVICES or MOBILITY. There is no evidence in the record of CORP’s: (1) financial dependency of either SERVICES or MOBILITY; (2) undercapitalization of CORP; (3) SERVICES or MOBILITY paying the salaries and expenses of CORP; (4) SERVICES or MOBILITY controlling CORP’S marketing and operational policies; (5) evidence demonstrating the entities share the same day-to-day operations; (6) share similar employees; or (7) evidence of SERVICES or MOBILITY every day involvement and control over CORP. The fact CORP, SERVICES, and MOBILITY, use the same brand “AT & T”; the AT&T website has no separate pages or links devoted to any particular subsidiary; all entities use @att.com email addresses; CORP, SERVICES, and MOBILITY share employment policies and codes of ethics; and that CORP, SERVICES, and MOBILITY portray themselves as a single brand and to the public as the

“AT&T family of companies,” is not enough. (ECF No. 43 at 11–18, 23–24.) Courts have found that common marketing image, common branding, common email domain, and joint use of trademark logs, fail to render entities as alter egos if they maintain completely separate day-to-day activities. See *In re Enter. Rent–A–Car Wage & Hour Emp’t Practices Litig.*, 735 F. Supp. 2d at 323; see *Prescott*, 2017 U.S. Dist. LEXIS 95830, at *25–26, 2017 WL 2591270; *Gloria D. Wiseman*, 2017 WL 4712417, at *13; *Patterson*, 684 F. Supp. 2d at 1179; *Von Grabe*, 312 F. Supp. 2d at 1301. Thus, the fact the Court has jurisdiction over CORP is irrelevant and does not implicate jurisdiction over SERVICES or MOBILITY.

*14 Lastly, the Court finds SERVICES and MOBILITY are not subject to specific jurisdiction in New Jersey over Larson or Pollard’s claims. SERVICES and MOBILITY move to dismiss Larson and Pollard’s claims, arguing that *Bristol–Myers* bars their claims. (ECF No. 8–12.) Specifically, SERVICES and MOBILITY argue that even though they have contacts in New Jersey (business locations and employees in New Jersey), their contacts do not relate to Larson or Pollard and do not arise out of those contacts because neither Larson nor Pollard worked in New Jersey. (*Id.*) They further argue Larson and Pollard cannot “piggy-back” on the claims and jurisdiction of the other named plaintiffs where the Court has specific jurisdiction over their claims as to SERVICES and MOBILITY. (*Id.* at 10.)

Plaintiffs claim there is specific jurisdiction over SERVICES and MOBILITY because they have direct contacts with New Jersey and because they purposefully directed activities at New Jersey residents. (ECF No. 43 at 18–22.) Plaintiffs further argue that *Bristol–Myers* does not apply to bar Larson and Pollard’s claims because *Bristol–Myers* concerned a mass action asserting state claims in state court and is therefore inapposite to the federal class action claims asserted here. (ECF No. 43 at 25–26.)

Specific jurisdiction requires that: “(1) the defendant purposefully directed its activities at residents of the forum, (2) the claim arises out of or relates to those activities, and (3) the assertion of personal jurisdiction is reasonable and fair.” *WAG Acquisition, LLC*, 2015 WL 5310203, at *12 (citation omitted).

Bristol–Myers involved a Fourteenth Amendment due-process challenge to claims asserted by non-Californian plaintiffs in a mass civil action filed against Bristol–Myers in a California state court for injuries allegedly caused by

a drug called *Plavix*. *Bristol–Myers*, 137 S. Ct. at 1777–79, 1787, 1789. Bristol–Myers, a citizen of Delaware and New York, challenged the California Supreme Court’s application of a “sliding scale approach to specific jurisdiction,” under which it held that although general jurisdiction was lacking in California because Bristol–Myers did not: (1) develop *Plavix* in California, (2) create a marketing strategy for *Plavix* in California, (3) manufacture, label, or package *Plavix* in California, or (4) work on the regulatory approval of *Plavix* in California; and the nonresident plaintiffs did not allege that: (1) they obtained *Plavix* through California physicians or other California sources, (2) were injured by *Plavix* in California, or (3) were treated for their injuries in California, the California state court nevertheless had personal jurisdiction over Bristol–Myers as to the claims of the nonresident plaintiffs as well as the resident plaintiffs. *Id.* at 1778–79. The California court reasoned that because Bristol–Myers had “extensive contacts with California” it permitted the exercise of specific jurisdiction “based on a less direct connection between [Bristol–Myers’s] forum activities and plaintiffs’ claims than might otherwise be required.” *Id.* at 1778–79 (quoting *Bristol–Myers*, 377 P.3d at 887–89).

On appeal, the United States Supreme Court found the California rational amounted to a “loose and spurious form of general jurisdiction” and held that, because the California approach had allowed for claims to proceed against Bristol–Myers despite the lack of a connection between the forum and the specific claims at issue, the approach did not comport with “settled principles of personal jurisdiction” and exceeded due process limits. *Bristol–Myers*, 137 S. Ct. at 1781–83. However, the Supreme Court limited its decision; because “[its] decision concern[ed] the due process limits on the exercise of specific jurisdiction by a State, [it] le[ft] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.” *Id.* at 1783–84 (citing *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987)).

*15 Courts have found *Bristol–Myers* also resolved the question of whether, absent a connection between a state and the specific claims brought by a nonresident named class action plaintiff against a defendant not subject to general jurisdiction in that state, a court may nonetheless exercise specific jurisdiction over those claims because they are similar or identical to claims brought in the same case by a resident named plaintiff against the same defendant. First, while *Bristol–Myers* addressed state law claims, courts have found that nothing in *Bristol–Myers* suggests that it

does not apply to named plaintiffs in a federal putative class action. See *In re Dental Supplies Antitrust Litig.*, No. 16–696, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) (“The constitutional requirements of due process do[] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case.”); *Greene v. Mizuho Bank, Ltd.*, No. 14–1437, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017) (“Nothing in *Bristol–Myers* suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principal—that due process requires a connection between the forum and the specific claims at issue. That principle applies with equal force whether or not the plaintiff is a putative class representative.”) (citations omitted).

These same courts have also found that a court does not have specific jurisdiction over individual claims asserted by nonresident named plaintiffs because there is no connection between their claims and the corporation’s activities within the forum, even if those claims are similar or identical to claims brought in the same case by a resident named plaintiff against the same defendant. See *Sanchez v. Launch Tech. Workforce Sols., LLC*, No. 17–01904, 2018 WL 942963, at *1 (N.D. Ga. Feb. 14, 2018) (finding “individual members of a plaintiff class, *aside from named representatives*, need not satisfy the “minimum contacts” test in order for a [] forum court to exercise personal jurisdiction over them”) (emphasis added) (citation omitted); *Greene*, 2017 WL 7410565, at *4 (“[D]ue process requires a connection between the forum and the specific claims at issue. That principle applies with equal force whether or not the plaintiff is a putative class representative.”) (citations omitted); *Wenokur v. AXA Equitable Life Ins. Co.*, No. 17–00165, 2017 WL 4357916, at *4 (D. Ariz. Oct. 2, 2017) (finding it “lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class”); *Covington v. Janssen Pharm., Inc.*, No. 17–1588, 2017 WL 3433611, at *5 (E.D. Mo. Aug. 10, 2017) (finding that because “53 of the 54 total plaintiffs failed to allege that they ingested the drug in the state of Missouri or suffered from resulting injuries in Missouri. Instead, those 53 plaintiffs allege only that the defendants transacted business and committed torts in the State of Missouri. But those plaintiffs were not injured from the defendants’ contacts with the state of Missouri. Because the 53 plaintiffs’ claims do not arise out of the defendants’ contacts with the state of Missouri, this Court lacks specific personal jurisdiction over their claims”).

In an effort to distinguish *Bristol–Myers*, Plaintiffs rely on *Swamy v. Title Source, Inc.*, No. 17–01175, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017). However, *Swamy* is not inconsistent with *Bristol–Myers* or the cases cited above. In *Swamy*, a California resident brought a putative class action under the Fair Labor Standards Act (“FLSA”) on behalf of himself and others similarly situated, including nonresident employees of the defendant. *Id.* at *1–2. The defendant moved to dismiss the cases against the nonresident, putative opt-in plaintiffs for lack of personal jurisdiction. *Id.* at 1. The Court rejected the argument that *Bristol–Myers* precludes a court from exercising personal jurisdiction over the claims of *out-of-state opt-in plaintiffs in a collective action* proceeding under the FLSA. *Id.* at 2.

Here, in contrast to *Swamy*, Larson and Pollard are not nonresident, putative opt-in plaintiffs, instead they have affirmatively brought this putative class action as named plaintiffs. Therefore, there must be a connection between their claims and SERVICES and MOBILITY activities within New Jersey, even if Larson and Pollard’s claims are similar or identical to claims brought by the resident named plaintiffs. See *Sanchez*, No. 17–01904, 2018 WL 942963, at *1 (finding “individual members of a plaintiff class, *aside from named representatives*, need not satisfy the “minimum contacts” test in order for a [] forum court to exercise personal jurisdiction over them”) (emphasis added) (citation omitted); *Greene*, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017) (finding “that due process requires a connection between the forum and the specific claims at issue. That principle applies with equal force whether or not the plaintiff is a putative class representative”) (citations omitted); *Wenokur*, 2017 WL 4357916, at *4 (finding it “lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class”).

*16 While Plaintiffs allege SERVICES and MOBILITY have business locations and employees in New Jersey, they do not allege Larson or Pollard were one of those employees. In fact, Larson is a citizen of the state of Arizona and worked for “AT&T” from her home in Arizona (ECF No. 1 ¶¶ 3, 102–03) and Pollard is a citizen of the state of Florida and worked for “AT&T” from his home in Florida. (*Id.* ¶¶ 5, 181.) Both Plaintiffs received their W–2 from SERVICES, which is incorporated in Delaware and headquartered in Texas. (*Id.* ¶ 15.) Because Larson and Pollard’s claims relate to their employment, the facts giving rise to their claims

in this circumstance could not have arisen in New Jersey. For that reason, there is no specific jurisdiction as to their claims against SERVICES and MOBILITY. Accordingly, SERVICES and MOBILITY's Motion to Dismiss as to Larson and Pollard's claims is **GRANTED**.

B. CORP, SERVICES and MOBILITY's Motion to Dismiss Larson and Seaman's Claims

1. Whether Larson and Seaman Allege Facts Sufficient to Support a Collective Action

CORP, SERVICES and MOBILITY argue Larson and Seaman's class action claims should be dismissed for failure to "give rise to a plausible claim that any unlawful discriminatory practice has affected similarly situated individuals." (ECF No. 22-1 at 7.) Plaintiffs argue CORP, SERVICES, and MOBILITY's Motion to Dismiss is improper at this stage because Plaintiffs have not yet moved to certify the class and because they have sufficiently plead the necessary elements of an ADEA class claim. (ECF No. 41 at 5-6, 9-10.)

In most federal class actions, the issues of joinder among, and notice to, potential class members are governed by [Federal Rules of Civil Procedure 23](#). However, class actions brought under the ADEA are governed by Section 7(b) of the ADEA, [29 U.S.C. § 626\(b\)](#), which incorporates certain select provisions of the FLSA, [29 U.S.C. §§ 201 et seq.](#), to establish the "powers, remedies, and procedures" by which the ADEA is to be enforced. One of these provisions, [29 U.S.C. § 216\(b\)](#), provides for class actions as follows:

An action to recover the liability prescribed may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Therefore, ADEA class actions may only proceed under [29 U.S.C. § 216\(b\)](#), and not under [Rule 23](#). See, e.g., [Lusardi v. Xerox Corp.](#), 99 F.R.D. 89, 92 (D.N.J. 1983), *app. dismissed*, 747 F.2d 174 (3d Cir. 1984); [LaChapelle v. Owens-Illinois, Inc.](#), 513 F.2d 286, 289 (5th Cir. 1975). Section 216(b) creates an "opt-in" mechanism for class formation and [Rule 23](#) creates an "opt-out" mechanism, and, in the case of the ADEA, the incorporation of the former prohibits application of the latter. [Lusardi](#), 99 F.R.D. at 92, [LaChapelle](#), 513 F.2d at 289.

Pursuant to [§ 216\(b\)](#) an ADEA plaintiff may "maintain" a suit on behalf of itself and other employees once two conditions are met: (1) the named plaintiffs and the other employees must be "similarly situated;" and (2) the other employees must have filed written consents to join the action. [Sperling v. Hoffmann-La Roche, Inc.](#), 118 F.R.D. 392, 399 (D.N.J.), *aff'd in part, appeal dismissed in part sub nom.*, 862 F.2d 439 (3d Cir. 1988), *aff'd and remanded sub nom.*, 493 U.S. 165 (1989); [Lusardi](#), 99 F.R.D. at 91-92.

Due to the two-stage class certification process in ADEA class actions, there is disagreement among the district courts as to whether dismissal of ADEA collective action allegations under [Rule 12\(b\)\(6\)](#) is proper before a plaintiff has made a motion for conditional class certification under [Lusardi](#). A minority of district courts have held that a motion to dismiss is inappropriate to challenge the sufficiency of class allegations when the plaintiffs have not yet moved for conditional certification. [Barrett v. Forest Labs., Inc.](#), No. 12-5224, 2014 WL 4058683, at *9 (S.D.N.Y. Aug. 14, 2014); [Lang v. DirecTV, Inc.](#), 735 F. Supp. 2d 421, 434-36 (E.D. La. 2010). These courts reason that the "challenge on the pleadings [is an] end-run [around] the certification process," since the plaintiffs have not had the opportunity to develop the record. [Lang](#), 735 F. Supp. 2d at 435-36.

*17 The majority of courts have found that a [Rule 12\(b\)\(6\)](#) dismissal of class allegations is appropriate, even when the plaintiff has not yet filed a motion for conditional class certification. See [Zanders v. Wells Fargo Bank, N.A.](#), No. 14-00288, 2014 WL 5439298, at *12 (S.D. Iowa Oct. 28, 2014); [Dyer v. Lara's Trucks, Inc.](#), No. 12-1785, 2013 WL 609307, at *3 (N.D. Ga. Feb. 19, 2013); [Creech v. Holiday CVS, LLC](#), No. 11-46, 2012 WL 4483384, at *2-3 (M.D. La. Sept. 28, 2012). These courts reason that [Rule 12\(b\)\(6\)](#) requires a plaintiff to give the defendant fair notice of the putative class, which is a much different inquiry than the inquiry at the

conditional class certification stage. *Dyer*, 2013 WL 609307, at *3.

Decisions from this District “have made clear that dismissal of class allegations at this sta[g]e should be done rarely and that the better course is to deny such motion because the shape and form of a class action evolves only through the process of discovery.” *Oravsky v. Encompass Ins. Co.*, 804 F. Supp. 2d 228, 241 (D.N.J. 2011) (quoting *Myers v. MedQuist, Inc.*, No. 05–4608, 2006 WL 3751210, at *4 (D.N.J. Dec. 20, 2006) (citing *Gutierrez v. Johnson & Johnson, Inc.*, 2002 WL 34717245, *5 (D.N.J. 2002); *Abdallah v. Coca-Cola Co.*, No. 98–3679, 1999 WL 527835, *1–2 (N.D. Ga. July 16, 1999))); *Landsman & Funk PC v. Skinder–Strauss Assocs.*, 640 F.3d 72, 93 (3d Cir. 2011) (“[Only in a] rare [case does] the complaint itself demonstrate [] that the requirements for maintaining a class action have not been met.”) (other citations omitted).

While in some “rare” cases it may be appropriate pursuant to Rule 12(b)(6) to dismiss class pleadings that are entirely inadequate, this is not such a case. Although the Court is skeptical the facts will show that class resolution is appropriate in this case because Larson and Seaman do not allege that they and all putative collective members were employed by the same AT&T entity, worked in the same department, performed similar work, or had similar circumstances of employment, the Court does find the motion is premature at this stage. *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 537 (3d Cir. 2012) (stating that factors relevant to whether plaintiffs are similar situated include, but are not limited to “whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment”). Indeed, Larson and Seaman have at least alleged they and the potential opt-ins have been injured by a single policy, the 2020 Scheme, which targeted workers over the age of 40. (ECF No. 1 ¶¶ 39–40, 54–88.) Accordingly, CORP, SERVICES and MOBILITY’s Motion to Dismiss Larson and Seaman’s class action claims is **DENIED**.

2. Whether Seaman Waived her Right to Participate in a Collective Action

CORP, SERVICES, and MOBILITY argue Seaman waived her right to participate in a collective action because “she

signed an agreement for good and sufficient consideration that contains a waiver of her right to participate in a collective action.” (ECF No. 22–1 at 12.) Plaintiffs argue Seaman did not waive her right to participate in a collective action because the General Release and Waiver is invalid and unenforceable because it did not comply with the OWBPA and is part of a larger scheme to violate the ADEA. (ECF No. 41 at 17–18.)

*18 Congress amended the ADEA by passing the OWBPA in 1990. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998). The OWBPA provides: “An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary. [A] waiver may not be considered knowing and voluntary unless at a minimum” it satisfies certain enumerated requirements, including the three listed above. 29 U.S.C. § 626(f)(1) (emphasis added). An employee is considered not to have waived an ADEA claim unless the employer complies with the OWBPA statute. *Oubre*, 522 U.S. at 427. The statutory command of the OWBPA is clear, “[a]n employee ‘may not waive’ an ADEA claim unless the waiver or release satisfies the OWBPA’s requirements.” *Id.* at 426–27.

The policy of the OWBPA is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress’ policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: An employee “may not waive” an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids.

Id. at 427. Moreover, “[t]he text of the OWBPA forecloses the employer’s defense, notwithstanding how general contract principles would apply to non–ADEA claims.” *Id.*

Courts have interpreted the phrase “waive any right or claim” under § 626(f)(1) as referring narrowly to waiver of substantive ADEA rights or claims—not procedural rights such as a right to a jury trial or right to proceed as a class action. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *McLeod v. Gen. Mills, Inc.*, 856 F.3d 1160 (8th Cir. 2017). In *14 Penn Plaza LLC*, the Supreme Court addressed the meaning of “rights or claims” under § 626(f)(1)(C), which prohibits waiver of “rights or claims that may arise after the date the waiver is executed.” The Court held that an agreement to bring future claims in arbitration was not a waiver of “rights or claims,” “[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.” *14 Penn Plaza*, 556 U.S. at 265–66, 259 (clarifying that an “agreement to arbitrate ADEA claims” is not a waiver of “the ‘right’ referred to in § 626(f)(1)”). Therefore, *14 Penn Plaza* interprets § 626(f)(1)’s references to “right[s] or claim[s]” to mean substantive rights to be free from age discrimination, not procedural “rights” to pursue age discrimination claims in court. *McLeod*, 856 F.3d at 1165.

In *McLeod*, the Eighth Circuit held that § 626(f)’s “waiver” refers narrowly to waiver of substantive ADEA rights or claims—not, as the former employees argue, the “right” to a jury trial or the “right” to proceed in a class action.” *McLeod*, 856 F.3d at 1164. The court reasoned that § 216(b), incorporated by § 626(b), which states, “An action to recover ... liability ... may be maintained ... in any ... court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated,” only “authorizes employees to bring collective age discrimination actions [o]n behalf of ... themselves and other employees similarly situated.” *Id.* at 1165. “Standing alone, § 216(b) does not create a non-waivable substantive right; rather, its class-action authorization can be waived by a valid arbitration agreement.” *Id.* Authorizations of a class action does not create a “right.” *Id.* at 1166.

*19 Here, the General Release and Waiver contains four subsections: (1) Release and Waiver; (2) Non-Interference and Acknowledgement of Payments Received; (3) Class, Collective and Representative Action Waiver; and (4) Older Workers Benefit Protection Act Disclosures. (ECF No. 16–6 at 23–25.) The General Release and Waiver covers ADEA claims:

I understand that there are various local, state and federal laws that govern any employment relationship with the Participating Company and/or prohibit discrimination on the basis of age, color, race, gender, sexual orientation, marital status, national origin, mental or physical disability, religious affiliation or veteran status. Such laws include, but are not limited to, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. By signing this General Release and Waiver, I intend to release any claims I may have under these or any other laws with respect to my employment and to the termination of my employment with the Participating Company.

...

I expressly understand and agree that this is a General Release that, to the fullest extent permitted by law, waives surrenders, and extinguishes all claims that I have or may have against the Released Parties, including but not limited to claims under Title VII of the Civil rights Act of 1964 (title Vii), the Civil Rights Act of 1991, the Age Discrimination Act (ADEA) ... PROVIDED, HOWEVER, I am not waiving, releasing or giving up any rights I may have to challenge the knowing and voluntary nature of this General Release and Waiver under the Older Workers benefit Protection Act (OWBPA).

(*Id.* at 23–24.) The Class, Collective and Representative Action Waiver states:

Without limiting the generality of the forgoing, I agree that I will not bring, maintain or participate in any class action, collective action or representative action against any of the Companies which asserts, in whole or in part, any claim(s) which arose prior to the date I sign this Agreement, whether or not such claims are covered by this General Release and Waiver. I further agree that if I am included within a class, collective, or representative action, I will take all steps necessary to opt-out of the action

or refrain from opting in, as the case may be.

(*Id.* at 24.) Therefore, the General Release and Waiver clearly attempts to waive Plaintiffs' ADEA claims, and must comply with the OWBPA.

Even assuming, as the Court must for purposes of this Motion to Dismiss, that the General Release and Waiver did not satisfy the specific requirements of the OWBPA, Seaman only retains the right to bring an individual ADEA action against Defendants. The remaining portions of the General Release and Waiver remain enforceable, such as the Class, Collective and Representative Action Waiver. *See Oubre*, 522 U.S. at 427–28 (“Since Oubre’s release did not comply with the OWBPA’s stringent safeguards, it is unenforceable against her insofar as it purports to waive or release her ADEA claim.”); *Branker v. Pfizer, Inc.*, 981 F. Supp. 862, 867 (S.D.N.Y. 1997) (stating that noncompliance with the minimum requirements of the OWBPA would only “invalidate a release of those claims ... failure to comply with the OWBPA cannot invalidate release of ... claims under the NYCHRL and NYSHRL claims, as well as the claim of intentional infliction of emotional distress”). Because § 626(f)’s “waiver” refers only to waiver of substantive ADEA rights or claims—not the “right” to proceed in a class action, Seaman’s collective action allegations are dismissed because she waived her rights to pursue them.

*20 Plaintiffs reliance on *Oubre* and *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165 (1989) for the proposition that the class action provision in unenforceable is misplaced. In fact, in *Oubre*, the Supreme Court held that a waiver of substantive rights to bring an ADEA claim was invalid because it did not comply with the OWBPA’s waiver requirements. *Oubre*, 522 U.S. at 428. In *Hoffmann–La Roche*, the Supreme Court held that district courts have the discretion in ADEA actions to facilitate notice to potential plaintiffs’ and that plaintiffs can discover the names and addresses of discharged employees. *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. at 174. Neither decision found that the OWBPA’s waiver requirements applied to procedural rights.

Plaintiffs further argue the Court should not dismiss Seaman’s class action claims because the waiver was fraudulent and part of an illegal scheme. (ECF No. 41 at 25–26.) However, other than those bare bone allegations, Plaintiffs fail to articulate any facts demonstrating the remainder of the General Release

and Waiver was entered into involuntarily or unknowingly or was unconscionable. Accordingly, CORP, SERVICES, and MOBILITY’s Motion to Dismiss Seaman’s class action claims is **GRANTED**. As such, Larson may proceed with her class action claims, but Seaman may only proceed individually.

3. Declaratory Judgment that Defendants Violated the OWBPA (Count III)

CORP, SERVICES and MOBILITY argue Count III of the Complaint, declaratory judgment stating that Defendants violated the OWBPA by failing to procure a valid release of Plaintiffs’ ADEA claims should be dismissed because the OWBPA does not authorize an independent cause of action. (ECF No. 22–1 at 13.) In the alternative, they argue the Court should dismiss Count III for lack of standing because no Article III case or controversy arises when a plaintiff seeks a declaratory judgment as to the validity of a defendant that a defendant may or may not use. (ECF No. 45 at 10.) Plaintiffs claim “aggrieved individuals have the right to seek equitable relief in the form of a declaratory judgment and related injunction regarding violations of the OWBPA.” (ECF No. 41 at 12.)

At least one Court in this District has determined that “[u]nder the OWBPA, Plaintiffs are entitled to no ‘affirmative relief, other than *declaratory or injunctive* relief to negate the validity of the waiver, as it applies to an ADEA claim.’” *Al–Farook v. Marina Dist. Dev. Co., LLC*, No. 13–138, 2013 WL 6177933, at *3 (D.N.J. Nov. 25, 2013) (emphasis added) (quoting *Whitehead v. Oklahoma Gas & Elec. Co.*, 187 F.3d 1184, 1191 (10th Cir. 1999); accord *Krane v. Capital One Servs.*, 314 F. Supp. 2d 589, 609–10 (E.D. Va. 2004)). Here, Plaintiffs seek declaratory relief stating the OWBPA was violated. The Court agrees with this District’s precedent and will not delve into the statutory construction arguments articulated by CORP, SERVICES, and MOBILITY in their brief and at oral argument. (*See* ECF No. 22–1 at 14.) To the extent Plaintiffs seek anything other than a declaratory judgment and seek secondary relief, including attorney’s fees and various other legal and equitable remedies, they are not entitled to such. *Al–Farook*, 2013 WL 6177933, at *3. They are only entitled to “declaratory or injunctive relief to negate the validity of the waiver, as it applies to an ADEA claim.” *Id.* Nevertheless, this argument is irrelevant because the Court lacks jurisdiction over Count III.

The Court finds it lacks jurisdiction over Count III because there is no Article III case or controversy. “Article III of the Constitution limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies.’ ” *Lance v. Coffman*, 549 U.S. 437, 439 (2007). “Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). “The standing inquiry focuses on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.” *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 360 (3d Cir. 2014) (citing *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

*21 Article III “standing consists of three elements.” *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). To establish standing, “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.* “The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.” *Id.* (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)).

As in *Spokeo*, “[t]his case primarily concerns injury in fact, the ‘[f]irst and foremost’ of standing’s three elements.” *Id.* (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 103 (1998)). “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ ” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). “For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’ ” *Id.* (citations omitted). “Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be ‘concrete.’ ” *Id.* “A ‘concrete’ injury must be ‘de facto’; that is, it must actually exist.” *Id.* (explaining that “[w]hen we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term—‘real,’ and not ‘abstract’ ”). “Concreteness, therefore, is quite different from particularization.” *Id.*

In *McLeod*, thirty-three plaintiffs who signed releases requested declaratory judgment that the releases were not knowing and voluntary, even though the employer had not threatened or attempted to enforce the ADEA waiver. *McLeod*, 856 F.3d at 1163, 1166–67. The court held:

An Article III case or controversy may exist where a private party

threatens an enforcement action that would cause an imminent injury. Here, though, the former employees do not plead that General Mills threatens any enforcement of the ADEA claim waiver, let alone enforcement that would cause them imminent injury. Instead, they request a declaration of their rights under a hypothetical set of facts. They want to know their legal rights if, in the future, General Mills asserts that the waivers of their substantive ADEA rights were “knowing and voluntary” under § 626(f)(3).

It further concluded “[n]o Article III case or controversy arises when plaintiffs seek ‘a declaratory judgment as to the validity of a defense’ that a defendants ‘may, or may not, raise’ in a future proceeding.” *Id.* at 1167 (quoting *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998)).

Here, much like the case in *McLeod*, Plaintiffs do not plead that CORP, SERVICES, and MOBILITY threaten enforcement of the ADEA claim waiver. They too request a declaration of their rights under a hypothetical set of facts, as if CORP, SERVICES, and MOBILITY invoked the defense. As such, the Court does not have jurisdiction over Plaintiffs’ declaratory judgment claims. Accordingly, CORP, SERVICES, and MOBILITY’s Motion to Dismiss Count III of the Complaint is **GRANTED**.

4. Collective Disparate Impact Claim (Count II)

CORP, SERVICES, and MOBILITY argue Plaintiffs’ collective disparate impact claim should be dismissed because they do not identify a specific, facially neutral practice or policy. (ECF No. 22–1 at 17–21.) Plaintiffs argue they can proceed under a disparate impact or disparate treatment theory because the Complaint alleges a specific facially neutral policy. (ECF No. 41 at 27.)

*22 A plaintiff’s initial burden is heavier under a disparate impact theory than it is under a disparate treatment theory. *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 120 (3d Cir.), cert. denied, 464 U.S. 937 (1983); *Bratek—v. TD Bank, N.A.*, No. 11–3049, 2012 WL 603299, at *6 (D.N.J. Feb. 22, 2012)

(citing *Cherchi v. Mobil Oil Corp.*, 693 F. Supp. 156, 166 (D.N.J. 1988) *aff'd*, 865 F.2d 249 (3d Cir. 1988)). “To state a prima facie case for disparate impact under the ADEA, a plaintiff must (1) identify a specific, facially neutral policy, and (2) proffer statistical evidence that the policy caused a significant age-based disparity.” *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 69 (3d Cir. 2017) (citing *NAACP v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 476–77 (3d Cir. 2011)). If a plaintiff establish a prima facie case, “an employer can defend by arguing that the challenged practice was based on ‘reasonable factors other than age’—commonly referred to as the ‘RFOA’ defense.” *Id.* (citing 29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.7).

Although a plaintiff need not establish discriminatory motive or intent under a disparate impact theory, proof of actual discrimination is a necessary element. Plaintiffs must show that a facially neutral standard resulted in a significantly discriminatory pattern or impact. *Bryant v. Int’l Sch. Sers., Inc.*, 675 F.2d 562, 572 (3d Cir. 1982) (citations omitted). To plead a disparate impact claim under the ADEA, “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” *Smith v. City of Jackson Miss.*, 544 U.S. 228, 241 (2005) (internal citations omitted). Moreover, the plaintiff must show that the “facially neutral employment practice had a significantly discriminatory impact.” *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). Statistical evidence of this impact “must be limited in scope in accordance with [Federal Rule of Civil Procedure] 26(b)(1) and tied to the allegations of plaintiff’s complaint.” *Kresefky v. Panasonic Commc’ns & Sys. Co.*, 169 F.R.D. 54, 66 (D.N.J. 1996). Although

there is no ‘rigid mathematical formula’ courts can mandate or apply to determine whether plaintiffs have established a prima facie case ... a plaintiff will typically have to demonstrate that the disparity in impact is sufficiently large that it is highly unlikely to have occurred at random, and to do so by using one of several tests of statistical significance.

Petruska v. Reckitt Benckiser, LLC, No. 14–03663, 2015 WL 9582142, at *3 (D.N.J. Dec. 29, 2015) (quoting *Stagi v. Nat’l R.R. Passenger Corp.*, 391 Fed.Appx. 133, 137 (3d Cir. 2010) (internal citations omitted)).

Here, Plaintiffs fail to identify a specific, *facially neutral policy*. Instead, they plead Defendants implemented an intentionally bias 2020 Scheme. (See ECF No. 1 ¶ 42 (“AT&T maintains a corporate culture of age discrimination that emanates from the highest levels of the company.”); ¶ 51 (“As part of its company-wide ‘2020’ plan to transform its aging workforce, AT&T has for several years conducted vast involuntary group terminations with the intent and effect of eliminating older workers from its workforce.”); ¶ 56 (“AT&T’s three-step ‘surplus,’ then termination and fraudulent release scheme is infected with age bias.”).) Courts have held that such allegations amount to a claim for disparate treatment—not disparate impact. See *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 115 (2d Cir. 1992) (stating that “allowing the disparate impact doctrine to be invoked as [the plaintiff] proposes would simply provide a means to circumvent the subject intent requirement in any disparate treatment case.”); *Zawacki v. Realogy Corp.*, 628 F. Supp. 2d 274, 281 (D. Conn. 2009) (“Plaintiff alleges that the Defendant’s procedure in conducting the RIFs were nothing more than a cover for behind-the-scenes, intentional dissemination against its older employees. There is no allegation of a facially neutral practice or policy that fell more harshly on the protected group.”). As such, “where the employment practices support the Plaintiff’s disparate impact claims are the employment practices supporting the disparate treatment claims,” they should be dismissed because “it provides a means for the Plaintiff to avoid establish the subjective intent requirement for her disparate treatment claims.” *Zawacki*, 628 F. Supp. 2d at 281 n.4. Accordingly, CORP, SERVICES, and MOBILITY’s Motion to Dismiss Count II of the Complaint as it applies to collective disparate impact is **GRANTED**.

IV. CONCLUSION

*23 For the reasons set forth above: (1) INC’s Motion to Dismiss for lack of jurisdiction is **DENIED**; (2) SERVICES and MOBILITY’s Motion to Dismiss Larson and Pollard’s claims for lack of jurisdiction is **GRANTED**; (3) and CORP, SERVICES, and MOBILITY’s Motion to Dismiss for failure to state a claim is **DENIED** as to the class action claims and **GRANTED** as to all other requests.

Horowitz v. AT & T Inc., Not Reported in Fed. Supp. (2018)

2018 WL 1942525, 2018 Fair Empl.Prac.Cas. (BNA) 148,214

All Citations

Not Reported in Fed. Supp., 2018 WL 1942525, 2018 Fair
Empl.Prac.Cas. (BNA) 148,214

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 24

2017 WL 3971912



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [Debernardis v. IQ Formulations, LLC](#), 11th Cir.(Fla.), November 14, 2019

2017 WL 3971912

Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

Daniel HUBERT, individually and on behalf
of all others similarly situated, Plaintiff,

v.

GENERAL NUTRITION
CORPORATION, Defendant.

2:15-cv-01391

|
Signed 09/08/2017

Attorneys and Law Firms

[D. Aaron Rihn](#), Robert Peirce & Associates, P.C., Pittsburgh, PA, [Gregory F. Coleman](#), [Lisa A. White](#), [Mark E. Silvey](#), Greg Coleman Law PC, Knoxville, TN, [Arthur Stock](#), [Shanon J. Carson](#), Berger & Montague, P.C., Philadelphia, PA, [Jennifer S. Goldstein](#), Whitfield Bryson & Mason, Washington, DC, for Plaintiff.

[Amy B. Alderfer](#), [Brett Nicole Taylor](#), [Cozen O'Connor](#), Los Angeles, CA, [Paul K. Leary, Jr.](#), [Mark E. Utke](#), [Cozen O'Connor](#), Philadelphia, PA, for Defendant.

OPINION

[Mark R. Hornak](#), United States District Judge

*1 Presently before the Court is a motion by Defendant General Nutrition Corporation (“GNC” or “Defendant”) to dismiss the First Amended Consolidated Class Action Complaint (the “Amended Complaint”) filed by Plaintiff Daniel Hubert, individually and on behalf of similarly situated individuals (ECF No. 39) pursuant to [Federal Rules of Civil Procedure 12\(b\)\(1\) and 12\(b\)\(6\)](#) (the “Motion to Dismiss”) (ECF No. 48). In this prospective class action litigation, Plaintiff Hubert alleges that he and other consumers (“Plaintiffs”) purchased supplements sold by GNC with false and misleading labeling in violation of the Magnuson-Moss Warranty Act, [15 U.S.C. § 2301, et seq.](#), and the consumer fraud protection laws of numerous states.¹ Plaintiffs further assert that GNC breached implied warranties, engaged in

negligent misrepresentation and unjustly enriched itself to the detriment of consumers. Defendant has moved to dismiss the Amended Complaint for lack of subject matter jurisdiction and for failure to state a claim. For the reasons set forth below, Defendant’s Motion to Dismiss for lack of subject matter jurisdiction will be granted, and the Amended Complaint will be dismissed, without prejudice.² Because the Court finds that Plaintiffs lack standing to bring this case, it need not address Defendant’s other theories.

¹ Plaintiffs allege that GNC violated the following state laws: Arkansas’s Deceptive Trade Practice Act, [Ark. Code Ann. § 4-88-101, et seq.](#); California’s Unfair Competition Law, [Cal. Bus. & Prof. Code § 17200, et seq.](#); California’s Consumer Legal Remedies Act, [Cal. Civ. Code § 1750, et seq.](#); California’s False Advertising Law, [Cal. Bus. & Prof. Code § 17500, et seq.](#); Florida’s Deceptive and Unfair Trade Practices Act, [Fla. Stat. § 501.201, et seq.](#); Iowa’s Private Right of Action for Consumer Frauds Act, Iowa Code Ch. 714H; Michigan’s Consumer Protection Act, [Mich. Comp. Laws Ann. § 445.901, et seq.](#); Minnesota’s Unlawful Trade Practices Act, [Minn. Stat. Ann. § 325D.09, et seq.](#); Minnesota’s Uniform Deceptive Trade Practices Act, [Minn. Stat. Ann. § 325D.43, et seq.](#); Minnesota’s Consumer Fraud Act, [Minn. Stat. Ann. § 325F.68, et seq.](#); Minnesota’s False Statement in Advertising Act, [Minn. Stat. Ann. § 325F.67](#); Minnesota’s Private Attorney General Statute, [Minn. Stat. Ann. § 8.31, et seq.](#); New York’s General Business Law, [N.Y. Gen. Bus. Law § 349](#); New Hampshire’s Consumer Protection Act, [N.H. Rev. Stat. Ann. § 358-A, et seq.](#); Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, [73 P.S. § 201-1, et seq.](#); and Texas’ Deceptive Trade Practices-Consumer Protection Act, [Tex. Bus. & Com. Code Ann. § 17.41, et seq.](#)

² In view of the Court’s ruling granting the Motion to Dismiss for lack of subject matter jurisdiction, Defendant’s Request for Judicial Notice (ECF No. 49-5) and Plaintiffs’ Motion to Strike Declaration of Stephen Cherry (ECF No. 59) will be denied as moot.

I. BACKGROUND

2017 WL 3971912

GNC, which is headquartered in Pittsburgh, Pennsylvania, is the largest global specialty retailer of nutritional supplements. Am. Compl. ¶¶ 25, 36. Plaintiffs allege that GNC marketed and sold supplements manufactured by third party vendors, which allegedly contained picamilon, BMPEA or acacia rigidula, despite having known that these substances are not dietary ingredients.³ Id. ¶¶ 3, 4, 38. The supplements at issue here are primarily weight-loss and sports nutrition supplements available as powders and liquids. Id. ¶ 27.

³ Picamilon is a synthetic chemical which is used as a prescription drug in Russia, but it is not approved as a drug in the United States, BMPEA is an amphetamine-like chemical that is not found in nature, acacia rigidula is an herb or other botanical, and both BMPEA and acacia rigidula allegedly have no history of safe use. Am. Compl. ¶¶ 4, 39, 48, 66.

*2 Plaintiffs aver that federal and state law place primary responsibility for the safety of dietary supplements,⁴ as well as truthful labeling and advertising, on supplement manufacturers and distributors such as GNC. Am. Compl. ¶ 28. According to Plaintiffs, GNC sold products with false and misleading labeling, and it failed to disclose material facts about the dangers of ingesting picamilon, BMPEA and acacia rigidula. Id. ¶ 5. Plaintiffs claim that they were “hoodwinked” into purchasing supplements containing these substances and would not have done so if GNC had disclosed that they contained mislabeled ingredients which purportedly pose serious health risks and are not marketable as dietary supplements. Id. ¶¶ 6, 24.

⁴ A dietary supplement is a product intended to supplement the diet that contains one or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an amino acid; or a combination thereof. Am. Compl. ¶ 29. A dietary ingredient that was not previously marketed in the United States prior to October 14, 1994, is considered a “new dietary ingredient” (“NDI”). Id. ¶ 30. A manufacturer is required to notify the FDA if it intends to market a supplement that contains a NDI. Id. ¶ 31. If the FDA does not comment within 75 days after the NDI submission, the ingredient may be used in dietary supplements. Id.

Regarding picamilon, Plaintiffs allege that Jennifer Jakel (“Jakel”), who was GNC’s Senior Project Manager for

Technical Research, reviewed documents translated from Russian indicating that it is a “derivative of gamma-amino-butyric acid and nicotinic acid.” Am. Compl. ¶ 43. In 2007, Jakel made a notation stating “[n]o NDI that I could find,” suggesting that a NDI submission was not tendered to the Food and Drug Administration (“FDA”) for picamilon. Id. ¶¶ 31, 44. Again in April 2014, Jakel wrote “still no NDI found.” Id. ¶ 44.

Subsequently, on September 28, 2015, Dr. Cara Welch of the FDA issued a declaration stating that “picamilon does not qualify as a dietary ingredient” under the Food, Drug and Cosmetic Act (the “FDC Act”). Am. Compl. ¶ 40. Plaintiffs allege that GNC continued to sell dietary supplements containing picamilon until September 21, 2015, despite having known since 2007 that it was not a dietary ingredient. Id. ¶¶ 44, 46.

Plaintiffs additionally claim that GNC has been aware since the fall of 2013 that some dietary supplements labeled as containing acacia rigidula actually contained BMPEA. Am. Compl. ¶¶ 52. Ms. Jakel supposedly was notified in November 2013 of a study by FDA researchers which revealed that many dietary supplements purportedly containing acacia rigidula actually contained BMPEA, despite no testing to show that BMPEA was safe for humans (hereinafter, “the FDA Study”). Id. ¶¶ 49, 52. Subsequently, Jakel allegedly emailed a *USA Today* article about the FDA Study to approximately 100 recipients at GNC. Id. ¶ 52.

Plaintiffs allege that despite knowing of the FDA Study, GNC continued to sell supplements containing acacia rigidula, without testing them to determine whether they were adulterated with BMPEA. Am. Compl. ¶¶ 55. However, in April 2015, when the FDA formally announced that BMPEA did not meet the definition of a dietary ingredient, GNC stopped selling products containing BMPEA. Id. ¶ 60.

Concerning acacia rigidula, Plaintiffs allege that the FDA warned six manufacturers in March 2016, that it is a new dietary ingredient which lacks evidence of safe use and therefore could not be lawfully sold in the United States. Am. Compl. ¶ 67. Plaintiffs allege that GNC did not provide the FDA with the required pre-market notification showing a history of acacia rigidula’s safe use, yet it was openly found on labels of supplements offered for sale at GNC. Id. ¶¶ 70, 72.

2017 WL 3971912

*3 Plaintiffs aver that despite GNC's alleged knowledge regarding picamilon, BMPEA and acacia rigidula, GNC sold products containing those substances which were supplied by third-party vendors. Am. Compl. ¶ 78. Plaintiffs claim that GNC exercised significant control over the third-party products it sold by reviewing and pre-approving labels, warnings, packaging and advertising. *Id.* ¶¶ 73, 74. In addition, third-party vendors could not alter approved formulas, labels or advertising without GNC's permission. *Id.* ¶ 74. By controlling the product labels of third party vendors, Plaintiffs allege that GNC misrepresented that supplements containing picamilon, BMPEA and acacia rigidula were safe for consumers and legal to sell. *Id.* ¶ 79. According to Plaintiffs, it is irrelevant that GNC received guarantees from third-party vendors that products containing those substances complied with legal requirements because GNC knew or should have known that they were not safe and could not be lawfully sold. *Id.* ¶¶ 75, 76.

In sum, Plaintiffs allege that picamilon, BMPEA and acacia rigidula were listed on the labels of a variety of supplements available for sale at GNC, including products that they purchased. Am. Compl. ¶¶ 47, 65, 72. Plaintiffs claim that through this labeling, GNC misrepresented that those substances were safe and could be legally sold in the United States. *Id.* As a result, Plaintiffs assert that they purchased supplements they otherwise would not have purchased, paid more for supplements than they otherwise would have paid and have been subjected to unreasonable safety risks. *Id.* ¶¶ 6, 24, 81.

II. STANDARD OF REVIEW

Under *Fed.R.Civ.P. 12(b)(1)*, "a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim." *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012). "A motion to dismiss for want of standing is ... properly brought pursuant to *Rule 12(b)(1)*, because standing is a jurisdictional matter." *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007).

In evaluating a challenge to subject matter jurisdiction under *Rule 12(b)(1)*, a court first must determine whether the movant presents a facial or a factual attack. See *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016). The distinction is important because it determines how the complaint must be reviewed. See *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack "challenges subject matter jurisdiction without disputing the facts alleged in the complaint, and it requires the court

to 'consider the allegations of the complaint as true.' " *Davis*, 824 F.3d at 346 (citation omitted). A factual challenge "attacks the factual allegations underlying the complaint's assertion of jurisdiction, either through the filing of an answer or 'otherwise present[ing] competing facts.'" *Id.* (citation omitted). Here, GNC makes a facial challenge because it has not disputed the validity of Plaintiffs' factual claims in its Motion to Dismiss. In essence, GNC contends that the allegations of the Amended Complaint, even accepted as true, are insufficient to establish Plaintiffs' Article III standing.

In considering a facial challenge to standing, courts are to apply the same standard as on review of a *Rule 12(b)(6)* motion for failure to state a claim. See *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 n.1 (3d Cir. 2006) (explaining "that the standard is the same when considering a facial attack under *Rule 12(b)(1)* or a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*") (citation omitted). Consequently, the court is to "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff [has standing]." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (citation omitted). Nonetheless, "[t]hreadbare recitals of the elements of [standing], supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "[t]o survive a motion to dismiss [for lack of standing], a complaint must contain sufficient factual matter" that would establish standing if accepted as true. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. DISCUSSION

*4 GNC argues that the Amended Complaint must be dismissed for lack of standing because Plaintiffs have not sufficiently pled the essential element of injury-in-fact. According to GNC, Plaintiffs simply allege that they purchased the supplements, but do not allege that they actually consumed them or suffered any adverse health consequences from them. GNC points out that any apprehension Plaintiffs may have about possible future injury is insufficient to establish injury-in-fact.

Plaintiffs respond that they have suffered an economic injury, which suffices to establish injury-in-fact for standing purposes. Plaintiffs contend that they incurred economic injury because they purchased products with false, misleading and inaccurate labeling, which omitted information material to their purchases.

GNC counters that the gravamen of the Amended Complaint involves picamilon, BMPEA and acacia rigidula purportedly endangering the health of consumers. GNC contends that despite the emphasis on the alleged health dangers posed by those substances, Plaintiffs attempt to shift the focus to economic injury in order to establish an injury-in-fact for standing purposes. Even so, GNC urges that Plaintiffs have not sufficiently pled the element of injury-in-fact because they do not allege they purchased the supplements after the FDA issued warning letters.

For reasons explained below, the Court agrees that an economic injury can qualify as an injury-in-fact for standing purposes, but concludes that Plaintiffs have not adequately alleged that they suffered an injury-in-fact in this case. Therefore, the Amended Complaint must be dismissed for lack of standing.

A. Article III Standing

Article III of the Constitution limits the scope of federal judicial power to the adjudication of “cases” or “controversies.” U.S. Const., art. III, § 2. “The courts have developed several justiciability doctrines to enforce the case-or-controversy requirement, and perhaps the most important of these doctrines is the requirement that a litigant have standing to invoke the power of a federal court.” *In re Schering Plough*, 678 F.3d at 244 (internal quotations and citation omitted). “[T]he standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

It is well established that the “irreducible constitutional minimum” of standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). The plaintiff, as the party invoking federal jurisdiction, bears the burden to establish standing. *Lujan*, 504 U.S. at 561. At the pleading stage, the plaintiff must “clearly ... allege facts demonstrating” each element. *Spokeo*, 136 S.Ct. at 1547 (quoting *Warth*, 422 U.S. at 518).

Although there are three required elements of constitutional standing, the Third Circuit has emphasized that “the injury-in-fact element is often determinative.” *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir. 2009); see also *Spokeo*, 136 S.Ct. at 1547 (observing that injury-in-fact is the “[f]irst and foremost” of standing’s three elements) (citation omitted). To establish injury-in-fact, a plaintiff must show that he suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. Although “[i]njury-in-fact is not Mount Everest,” *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005), the complaint still must “clearly and specifically set forth facts sufficient to satisfy” Article III standing requirements. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

*5 The Third Circuit has explained that “[w]hile it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.” *Danvers Motor*, 432 F.3d at 291. Indeed, “[m]onetary harm is a classic form of injury-in-fact.” *Id.* at 293 (citation omitted). However, allegations of “possible future injury” are insufficient to satisfy the requirements of Article III. *Whitmore*, 495 U.S. at 158; *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011).

B. Plaintiffs Have Not Established That They Suffered an Injury-in-Fact, Thus They Lack Standing.

Plaintiffs are correct that economic injury can suffice to establish injury-in-fact for standing purposes. However, the question here is whether Plaintiffs have suffered an economic injury. The Court concludes that the Amended Complaint does not adequately plead facts that establish they have; consequently, Plaintiffs have not established that they suffered an injury-in-fact.

1. Analysis of Injury-In-Fact

The Court’s standing analysis is informed by precedent from courts within this Circuit that have evaluated whether the plaintiff suffered an injury-in-fact in cases where, as here, it was alleged the product at issue contained a dangerous substance that was unknown to the consumer or the product label contained alleged misrepresentations.⁵

⁵ The Court is cognizant that Plaintiffs cite cases from other jurisdictions to support their position

2017 WL 3971912

that they have suffered an economic injury. See Plaintiffs' Resp. in Opp'n (ECF No. 61 at 6, n.3). As stated, however, the Court relies on the precedent from the Third Circuit discussed herein to assess whether the Plaintiffs have sufficiently established an injury-in-fact for standing purposes.

First, in [Koronthaly v. L'Oreal USA, Inc.](#), 374 Fed.Appx. 257 (3d Cir. 2010), our Court of Appeals affirmed a district court's dismissal for lack of standing in a case where the plaintiff purchased lipstick that contained lead, which was not disclosed on the packaging or the product, and the plaintiff claimed she would not have purchased the lipstick had she known about the lead. In finding no standing, the Third Circuit deemed it significant that the plaintiff conceded she suffered no adverse health consequences from using the lipstick, and her subjective allegation that trace amounts of lead in the lipstick were unacceptable to her was not an injury-in-fact. *Id.* at 259. Further, to the extent the plaintiff claimed that the injury-in-fact was the loss of the "benefit of the bargain," the Third Circuit explained that she mistakenly relied on contract law. *Id.* Because the plaintiff's lipstick purchases were not made pursuant to a contract, she could not have been denied the benefit of any bargain. *Id.* The Third Circuit concluded that "[a]bsent any allegation that [the plaintiff] received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably expect, [she] has not demonstrated a concrete injury-in-fact." *Id.*

In [Young v. Johnson & Johnson](#), Civil Action No. 11-4580, 2012 WL 1372286 (D.N.J. Apr. 19, 2012), the district court determined that the plaintiff lacked standing in a case involving the alleged misrepresentation of the nutritional content and health benefits of Benecol, a butter/margarine substitute. The court found that the plaintiff did not sufficiently plead an injury-in-fact because he merely alleged that he purchased Benecol fairly regularly during a five-year period, but he did not allege that he actually consumed it or that he suffered any adverse health effects from it. *Id.* at *3. In addition, the court found unavailing the plaintiff's contention that he satisfied the injury-in-fact requirement based on allegations that he was deprived of the "benefit of the bargain," received an inferior product and paid a premium price because he believed Benecol was healthy, when in fact it was not. *Id.* at *4. In finding no economic injury, the court explained that the plaintiff's purchases of Benecol were not made pursuant to a contract and he did not allege how he paid a premium for it or received a product that did not deliver

the advertised benefits. *Id.* (citing [Koronthaly](#), 374 Fed.Appx. 259).

*6 In both [James v. Johnson & Johnson Consumer Cos., Inc.](#), Civil No. 10-cv-03049, 2011 WL 198026 (D.N.J. Jan. 20, 2011) and [Medley v. Johnson & Johnson Consumer Cos., Inc.](#), Civil No. 10-cv-02291, 2011 WL 159674 (D.N.J. Jan. 18, 2011), the district court accepted the plaintiffs' contention that economic injury suffices to confer standing, but found that they could not clear the threshold requirement for showing an economic injury. The cases involved ten plaintiffs who alleged Johnson & Johnson violated the FDA's ban on methyl chloride in cosmetic products because its baby shampoo contained that substance. The economic injury for which the plaintiffs sought redress was the price they paid for the shampoo, which the court noted they apparently used in bathing their children without adverse health reactions. *Id.* at *2. The court accepted as true the plaintiffs' allegation that had they known the true nature of the baby shampoo, they would not have purchased it or allowed their children to be exposed to it, but determined that economic damages did not follow as a consequence. *Id.* The court concluded that once the shampoo had been used, there was no economic injury for the plaintiffs to complain of and the fear of future injury is insufficient to confer standing. *Id.* The court observed that the plaintiffs received the benefit of their bargain so long as there were no adverse health effects and the shampoo worked as intended, meaning that it cleansed the children's hair without producing irritation, and nothing in the complaint suggested otherwise. *Id.* As such, the court found that the plaintiffs did not demonstrate that they suffered an injury-in-fact.

Likewise, in [Estrada v. Johnson & Johnson](#), Civil Action No. 16-7492, 2017 WL 2999026 (D.N.J. July 14, 2017), the court found that the plaintiff did not suffer an injury-in-fact and therefore lacked standing. In that case, the plaintiff asserted California state law consumer-fraud claims against Johnson & Johnson, claiming that it had been aware since at least 1982 of studies associating talcum powder with an elevated risk of ovarian cancer for women, yet failed to disclose that risk to consumers and continued to market baby powder as safe despite knowledge of the risk. As a result of Johnson & Johnson's misrepresentations and omissions, the plaintiff claimed to have suffered an economic injury based on three theories: (1) benefit of the bargain; (2) alternative product; and (3) premium price. *Id.* at * 6.

First, the plaintiff claimed that she did not receive the benefit of her bargain because she purchased baby powder under the

2017 WL 3971912

belief that it was safe, but she would not have done so had she known that using baby powder in the genital area could lead to an increased risk of developing ovarian cancer. Estrada, 2017 WL 2999026, at *6. The court ultimately found that the plaintiff did not suffer an economic injury-in-fact based on a benefit of the bargain theory. Id. at *13. The court noted that the plaintiff's claim was similar to those alleged by the consumers in Koronthaly, James and Medley: she alleged that she used baby powder; it was effective for its intended uses of eliminating friction and absorbing excess moisture; she was not physically injured; Johnson & Johnson failed to list enough warnings about an alleged increased risk of ovarian cancer associated with baby powder use; and she would like her money back. Id. at *9. However, the court found that absent a plausible allegation of adverse health consequences from using baby powder or that it failed to perform satisfactorily for its intended use, the plaintiff could not claim that she was denied the benefit of her bargain.⁶ Id. (citing Koronthaly, 374 Fed.Appx. at 259; James, 2011 WL 198026, at *2). The court held that the plaintiff's benefit of the bargain theory, based on Johnson & Johnson's alleged omissions, was an insufficient basis to find that she suffered an injury-in-fact. Id. at *9, 13. If the plaintiff wanted to file an amended complaint to reassert a benefit of the bargain theory, the court required that she point to an affirmative legal duty on Johnson & Johnson's part to disclose the facts that allegedly were omitted. Id. at *9.

⁶ The Estrada court distinguished cases cited by the plaintiff which recognized standing on a benefit of the bargain theory of economic harm, explaining that the plaintiffs in those cases did not receive the benefit of their bargain because either: (1) they received a defective product; or (2) they pled facts sufficient for the court to conclude that they were induced into purchasing the product at issue based on a specific misrepresentation made by the defendants. See Estrada, 2017 WL 2999026, at *9-*11 (citations omitted). Unlike the consumers in those cases, the plaintiff in Estrada did not sufficiently allege that she was induced into purchasing baby powder based on specific misrepresentations made by Johnson & Johnson on its website, or on the product's label or advertisements. Id. at *11.

*7 Next, the Estrada court found that the plaintiff did not establish that she suffered an injury-in-fact under an alternative product theory of economic harm. Estrada, 2017

WL 2999026, at *14. The court recognized that injury-in-fact exists where a consumer alleges that, absent the defendant's omissions or misrepresentations, she would have purchased a cheaper alternative product. Id. at *13 (citations omitted). Although the plaintiff alleged she would have purchased an alternative cornstarch-based powder had she known of the increased cancer risk purportedly associated with baby powder, she did not allege that an alternative product would have been cheaper than baby powder. Id. at *14.

Finally, the Estrada court found that the plaintiff's premium price theory of economic harm did not sufficiently establish that she suffered an injury-in-fact. Estrada, 2017 WL 2999026, at *15. In premium price cases, a plaintiff alleges that the defendant's omissions or misrepresentations caused her to overpay for a product. Id. (citations omitted). Under that theory, the plaintiff claimed that as a result of Johnson & Johnson's omissions and misrepresentations, it was able to sell baby powder for more than it otherwise would have if consumers had been properly informed about the safety risks. The court determined that the plaintiff's "threadbare" allegation that she purchased baby powder at a premium, without any supporting factual allegations, was insufficient to establish an injury-in-fact. Id. It was significant in the court's analysis that the plaintiff did not allege that Johnson & Johnson advertised baby powder as superior to other products, nor did she identify any comparable, cheaper products to show that baby powder was sold at a premium price. Id.

2. The Amended Complaint Fails to Adequately Plead That Plaintiffs Suffered an Economic Injury-In-Fact.

In view of the foregoing authority, Plaintiffs here do not sufficiently allege that they suffered an economic injury to satisfy the injury-in-fact element of standing. At the outset, Plaintiffs allege that GNC sold supplements with false and misleading labeling and otherwise failed to disclose material facts about the dangers of ingesting picamilon, BMPEA and acacia rigidula. Am. Compl. ¶ 5. Plaintiffs then allege that they were hoodwinked into purchasing the supplements and would not have done so if GNC had disclosed that they contained mislabeled ingredients which supposedly pose serious health risks or were unlawful. Id. ¶¶ 6, 24. As a result of GNC's practices, Plaintiffs claim that they purchased supplements they otherwise would not have purchased, paid more for supplements than they otherwise would have paid⁷ and have been subjected to unreasonable safety risks. Id. ¶ 81. Based on these allegations, Plaintiffs apparently attempt

2017 WL 3971912

to assert two theories of economic injury: (1) they did not receive the benefit of their bargain; and (2) they paid a premium price for the supplements.⁸

7 In connection with Plaintiffs' various state law claims, Plaintiffs allege generally throughout the Amended Complaint that they purchased supplements from GNC that they otherwise would not have, or would not have paid as much for them as they did. See Am. Compl. ¶¶ 144, 154, 162, 172, 180, 213, 223, 232, 241, 259, 273, 279 and 282.

8 We note that the Amended Complaint contains no allegations that Plaintiffs would have purchased a cheaper, alternative product absent GNC's alleged omissions or misrepresentations, thus injury-in-fact cannot be established under an alternative product theory of economic injury. Further, to the extent that Plaintiffs urge that they have standing based upon concerns of health problems that have yet to occur, see Am. Compl. ¶ 81 (alleging that "[a]s a result of GNC's practices, Plaintiffs ... have been subjected to unreasonable safety risks"), apprehension concerning possible future injury is insufficient to establish injury-in-fact. [Whitmore](#), 495 U.S. at 158; [Reilly](#), 664 F.3d at 42.

*8 First, Plaintiffs' premium price allegations do not sufficiently establish that they suffered an economic injury. Although Plaintiffs broadly aver that GNC's alleged omissions and misrepresentations caused them to pay more for supplements than they otherwise would have paid, that "threadbare" allegation, without any supporting factual allegations, is insufficient to establish an injury-in-fact. See [Estrada](#), 2017 WL 2999026, at *15 ("threadbare" allegation that the plaintiff purchased a product at a premium, without factual support, was insufficient to establish injury-in-fact); [Young](#), 2012 WL 1372286, at *4 (finding no injury-in-fact where, *inter alia*, the plaintiff did not set forth allegations as to how he paid a premium price for the product). As in [Estrada](#), the Court finds it significant that Plaintiffs do not allege GNC advertised the supplements they purchased as superior to other products, nor do Plaintiffs identify any comparable, cheaper products to show that the supplements they purchased from GNC were sold at a premium price. See [Estrada](#), 2017 WL 2999026, at *15.

Next, Plaintiffs' allegation that they did not receive the benefit of their bargain when they purchased the supplements does not suffice to establish that they suffered an economic

injury-in-fact. As stated, Plaintiffs allege that they paid money for the supplements that, absent GNC's alleged omissions and misrepresentations, they otherwise would not have paid. See Am. Compl. ¶¶ 6, 24, 81; see *supra* n. 7. Although Plaintiffs do not allege that they consumed the supplements,⁹ they certainly do not claim they suffered any adverse health consequences from them. Furthermore, Plaintiffs do not allege that the supplements at issue, which are "primarily weight-loss and sports-nutrition supplements," see Am. Compl. ¶ 27, failed to work for their intended purpose or did not deliver the advertised benefits.

9 Plaintiffs simply allege that they purchased the supplements on various occasions between 2011 and 2015. See Am. Compl. ¶¶ 11-22. However, in view of the fact that a number of Plaintiffs purchased supplements on multiple occasions over a period of months or years, see *id.* ¶¶ 11-13, 15, 17-21, it is logical to infer that they must have consumed the supplements. Indeed, it is highly unlikely that a consumer would make multiple purchases of items that he never used in the first place.

The Amended Complaint presents some of the same concerns as in [Koronthaly](#), [Young](#), [James](#), [Medley](#) and [Estrada](#), which ultimately led the courts to find that the plaintiffs in those cases did not suffer an injury-in-fact. As observed in [Koronthaly](#) and [Young](#), Plaintiffs' purchases of the supplements were not made pursuant to a contract, thus they could not have been denied the benefit of any bargain. Beyond that, as in [Koronthaly](#), [Young](#), [James](#), [Medley](#) and [Estrada](#), Plaintiffs have not alleged that the supplements failed to work for their intended purpose of weight loss and/or sports nutrition, and there is no allegation that Plaintiffs' health was adversely affected.

While we accept as true Plaintiffs' allegation that they would not have purchased the supplements had they known the supplements purportedly contained dangerous ingredients, economic damages do not necessarily follow as a consequence. To the extent Plaintiffs consumed the supplements, see *supra*, n. 9, once they were used, there would be no economic injury for Plaintiffs to complain of and apprehension concerning future health consequences is insufficient to establish an injury-in-fact. See [James](#), 2011 WL 198026, at *2; [Medley](#), 2011 WL 159674, at *2. As in [James](#) and [Medley](#), Plaintiffs would have received the benefit of their bargain so long as the supplements worked

2017 WL 3971912

as intended, meaning they provided weight-loss and sports nutrition benefits, and they produced no adverse health effects. See id. Nothing in the Amended Complaint suggests this was not the case.

Plaintiffs appear to base their benefit of the bargain theory upon GNC's alleged omissions and misrepresentations, claiming that GNC sold products with false and misleading labeling, and it otherwise failed to disclose material facts about the dangers of ingesting picamilon, BMPEA and acacia rigidula. See Am. Compl. ¶ 5. However, Plaintiffs do not allege what material facts GNC failed to disclose about the dangers of ingesting those substances or whether GNC had a duty to do so. Thus, the Court cannot conclude that Plaintiffs did not receive the benefit of their bargain based on alleged omissions by GNC. See Estrada, 2017 WL 2999026, at *6 (the plaintiff could not assert a benefit of the bargain theory of economic harm based on an omission where she failed to allege that the defendant was under a duty to disclose the omitted fact).

*9 In addition, the Court finds that Plaintiffs were not deprived of the benefit of their bargain based on alleged misrepresentations by GNC. As observed in Estrada, courts have found that a plaintiff did not receive the benefit of the bargain in cases where sufficient facts were pled for the court to conclude that the plaintiff was induced into purchasing the product at issue by a *specific* misrepresentation made by the defendant. See Estrada, 2017 WL 2999026, at *9–*11 (citations omitted). Unlike those cases, the plaintiff in Estrada did not sufficiently allege that she was induced into purchasing baby powder based on specific misrepresentations made by Johnson & Johnson on its website or on the product's label or advertisements. Id. at *11. Rather, the plaintiff simply alleged that she read the label prior to purchasing baby powder and in reliance on the label, she believed that baby powder was safe. Id. at *12.

Likewise, here, Plaintiffs fail to allege that they were induced into purchasing the supplements based on *specific* misrepresentations made by GNC. Plaintiffs allege that picamilon, BMPEA and acacia rigidula were “openly found” on the labels of various supplements available for sale at GNC; thus, through labeling, GNC misrepresented that the products were safe. See Am. Compl. ¶¶ 47, 65, 72, 79. Although Plaintiffs do not specifically allege it, they suggest that they read the labels on the supplements and believed they were safe. As in Estrada, that is insufficient, particularly in view of the fact that Plaintiffs do not otherwise allege they

were induced into purchasing the supplements by any specific statements on the labels.

In sum, the Court is well-aware that “[i]njury in fact is not Mount Everest,” Danvers Motor, 432 F.3d at 294, but, for the reasons explained herein, we conclude that Plaintiffs have not sufficiently alleged that they suffered an economic injury to satisfy the injury-in-fact element. Therefore, Plaintiffs have failed to establish that they have standing to bring the present action. Because Plaintiffs do not have standing, the Amended Complaint will be dismissed for lack of subject matter jurisdiction. Absent subject matter jurisdiction, the Court is without authority to rule on the remaining merit-based arguments.¹⁰ ACLU-NJ v. Township of Wall, 246 F.3d 258, 261 (3d Cir. 2001) (“If plaintiffs do not possess Article III standing, ... the District Court ... lack[s] subject matter jurisdiction to address the merits of plaintiffs' case.”).

10 Although the Court is not empowered to address GNC's arguments for dismissal under Rule 12(b)(6), and expresses no opinion on the merits of that motion, we note the possibility that GNC's preemption claim could be premature. “[F]ederal preemption is an affirmative defense on which the defendant bears the burden of proof.” In re Asbestos Prods. Liab. Litig., 822 F.3d 125, 133 n.6 (3d Cir. 2016). The Third Circuit has explained that “[t]his allocation of the burden of proof suggests that a motion under Rule 12(c) for judgment on the pleadings is a more appropriate procedural vehicle for dismissing cases on preemption grounds, instead of a motion under Rule 12(b)(6), except for cases in which preemption is manifest in the complaint itself.” Id. (citations omitted). As stated, the Court expresses no opinion at this juncture as to whether this is a case in which preemption is manifest in the complaint itself, but simply raises the issue for the parties' consideration at the appropriate time.

IV. CONCLUSION

Rule 15(a)(2) provides that leave to amend should be freely given “when justice so requires.” Fed.R.Civ.P. 15(a)(2). Therefore, to the extent that Plaintiffs wish to file a second amended complaint to cure the deficiencies discussed herein, they will be granted leave to do so within 30 days from the date of this decision.

2017 WL 3971912

***10** Accordingly, the Motion to Dismiss filed by GNC as to Plaintiffs' lack of standing will be granted, and the Amended Complaint will be dismissed without prejudice at this time.

An appropriate order will be entered.

All Citations

Not Reported in Fed. Supp., 2017 WL 3971912

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 25

2018 WL 4356638



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Products Liability Litigation](#), D.Md., August 5, 2019

2018 WL 4356638

Only the Westlaw citation is currently available.

United States District Court, D. Arizona.

IN RE: BARD IVC FILTERS
PRODUCTS LIABILITY LITIGATION,

[Lisa Hyde](#) and Mark E. Hyde,
a married couple, Plaintiffs,

v.

C. R. Bard, Inc., a New Jersey corporation;
and Bard Peripheral Vascular, Inc.,
an Arizona corporation, Defendants.

No. MDL 15-02641-PHX-DGC

|

No. CV-16-00893-PHX-DGC

|

Signed September 11, 2018

|

Filed 09/12/2018

ORDER[David G. Campbell](#), Senior United States District Judge

*1 The case brought by Plaintiffs Lisa and Mark Hyde is set for a bellwether jury trial on September 18, 2018. During the final pretrial conference held on September 6, 2018, it became clear that the parties disagree on whether Plaintiffs' negligence per se claim is impliedly preempted under 21 U.S.C. § 337(a). The issue was raised and briefed by the parties in their proposed final pretrial order and jury instructions. Docs. 12388 at 8-12, 12438 at 54-61. The Court asked the parties during the pretrial conference whether they required further briefing and whether they wished to have this issue resolved before trial. Counsel for both sides stated that no further briefing was needed and that a ruling before trial would be helpful.

For the reasons stated below, the Court finds that the negligence per se claim is preempted. This conclusion is purely legal – it is not affected by the evidence that would be presented at trial. As a result, the Court concludes that it should enter judgment on this claim before trial under

Rule 56 of the Federal Rules of Civil Procedure. Although decisions under that rule normally are made in response to a formal motion for summary judgment, the rule makes clear that the Court may enter summary judgment *sua sponte*, provided the parties are notified of the Court's intention to make a dispositive decision and have an opportunity to respond. See Fed. R. Civ. P. 56(f); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (“district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence”). In this instance, the question is purely one of law, the parties have been fully heard, and the parties seek a decision before trial. Such a decision will enable the parties to allocate their time and evidence to the issues to be considered by the jury.¹

¹

Another approach would be to treat this issue as a motion by Defendants for judgment as a matter of law under Rule 50. Although the standard for deciding such a motion is the same as the standard under Rule 56, the Ninth Circuit has held that a Rule 50 motion cannot be made before trial. See *McSherry v. City of Long Beach*, 423 F.3d 1015, 1019-22 (9th Cir. 2005). The Court accordingly will enter judgment under Rule 56.

I. Background.

Plaintiff Lisa Hyde received a Bard IVC filter implant in 2011. In 2014, she learned that the filter had tilted, perforated the IVC wall, and fractured. The filter and fractured limbs were removed three months later.

Mrs. Hyde and her husband assert various claims. Doc. 364; Doc. 1, Case No. CV-16-00893. Applying Wisconsin law, the Court granted summary judgment to Defendants on several claims. Doc. 12007. Plaintiffs continue to assert claims for strict liability design defect (Count III), negligent design (Count IV), negligence per se (Count IX), loss of consortium (Count XV), and punitive damages. *Id.* at 19.²

²

Defendants have explained that they did not seek summary judgment on the negligence per se claim because they did not know the basis for the claim until the parties prepared the proposed final pretrial order.

II. Discussion.

2018 WL 4356638

*2 Under Wisconsin law, negligence per se is a form of negligence that results from violation of a statute. *See Friederichs v. Huebner*, 329 N.W.2d 890, 917 (Wis. 1983). For the violation of a safety statute to constitute negligence per se, the plaintiff “must show: (1) the harm inflicted was the type the statute was designed to prevent; (2) the person injured was within the class of persons sought to be protected; and (3) there is some expression of legislative intent that the statute become a basis for the imposition of civil liability.” *Tatur v. Solsrud*, 498 N.W.2d 232, 235 (D. Wis. 1993) (citing *Walker v. Bignell*, 301 N.W.2d 447, 454 (Wis. 1981)).

Plaintiffs do not allege violation of a Wisconsin statute as part of their negligence per se claim. Rather, they contend that Defendants violated various provisions of the Food, Drug, and Cosmetic Act (“FDCA”), 21 U.S.C. § 301 *et seq.*, and related federal regulations, in designing the Bard filter. Docs. 12388 at 8-9 (final pretrial order), 12400 at 4-7 (trial brief), 12438 at 54-59 (proposed jury instructions). Specifically, Plaintiffs allege violations of 21 U.S.C. §§ 321, 331, and 352, and 21 C.F.R. §§ 803, 806.1, 820.100, 820.198, and 820.250. *Id.*; *see* Doc. 364 ¶ 231.

As noted above, the third element of Wisconsin’s negligence per se claim requires “some expression of legislative intent that the statute become a basis for the imposition of civil liability.” *Tatur*, 498 N.W.2d at 235. As other courts have recognized, however, “[f]ar from containing an expression that FDA regulations are intended to form the basis for civil liability, the [FDCA] expresses the opposite intention.” *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 954 (W.D. Wis. 1998). Under § 337(a), “[v]iolations of the FDA are enforceable only by the United States.” *Id.* “The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions.” *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349 n.4 (2001). Thus, “a private litigant cannot bring a state-law claim against a defendant when the state-law claim is in substance (even if not in form) a claim for violating the FDCA – that is, when the state claim would not exist if the FDCA did not exist.” *Leonard v. Medtronic, Inc.*, No. 1:10-CV-03787-JEC, 2011 WL 3652311, at *7 (N.D. Ga. Aug. 19, 2011) (citation omitted); *see Ellis v. C. R. Bard, Inc.*, 311 F.3d 1272, 1284 n.10 (11th Cir. 2002) (noting that under § 337(a) “no private right of action exists for a violation of the FDCA”).

In *Buckman*, the Supreme Court held that a state law claim that a defendant made fraudulent statements to the FDA,

in violation of the FDCA, was impliedly preempted by § 337(a) because the claim “exist[ed] solely by virtue” of FDCA requirements and therefore “would not be relying on traditional state tort law which had predated the [FDCA].” 531 U.S. at 353. The same is true here. Plaintiffs’ “claim of negligence per se would not exist prior to the enactment of the FDCA ... because the claim only alleges violation of that law.” *Leonard*, 2011 WL 3652311, at *8. As in *Buckman*, Plaintiffs’ “negligence per se claim (or, more appropriately characterized, [their] negligence claim based solely on violations of ... FDA regulations) is impliedly preempted by the FDCA.” *Grant v. Corin Grp. PLC*, No. 3:15-CV-169-CAB-BLM, 2016 WL 4447523, at *4 (S.D. Cal. Jan. 15, 2016); *see Connelly v. St. Jude Med., Inc.*, No. 5:17-cv-02005-EJD, 2017 WL 3619612, at *5 (N.D. Cal. Aug. 23, 2017) (negligence per se claim preempted where it was “based entirely on violations of the FDCA and its implementing regulations”); *Hafer v. Medtronic, Inc.*, 99 F. Supp. 3d 844, 862 (W.D. Tenn. 2015) (“If Plaintiffs claim negligence based solely on Defendants’ failure to comply with federal law or solely on illegal off-label promotion (i.e. negligence per se), Plaintiffs’ claims are impliedly preempted under *Buckman*.”); *Dunbar v. Medtronic, Inc.*, No. CV 14-01529-RGK AJWX, 2014 WL 3056026, at *6 (C.D. Cal. June 25, 2014) (“[A] negligence per se claim alleging violation of the FDCA is nothing more than a private right of action under the FDCA for damages. Since the latter is not available as a result of § 337(a), the Court finds that the former is preempted as well.”); *McClelland v. Medtronic, Inc.*, 944 F. Supp. 2d 1193, 1200 (M.D. Fla. 2013) (“Plaintiff’s attempt to recast a claim for violation of the FDCA as a state-law negligence claim is impliedly barred by § 337(a).”); *Franklin v. Medtronic, Inc.*, No. 09-cv-02301-REB-KMT, 2010 WL 2543579, at *8 (D. Colo. May 12, 2010) (“[T]o the extent that Plaintiff seeks to ground her negligence per se ... claim[] on allegations that Defendant violated the FDCA – namely, by selling a misbranded and adulterated product – these claims are impliedly preempted pursuant to 21 U.S.C. § 337(a).”); *Talley v. Danek Med., Inc.*, 7 F. Supp. 2d 725, 731 (E.D. Va. 1998) (“[T]he FDCA expressly prohibits the bringing of a private cause of action under the Act. To allow a state negligence per se action based upon alleged violations of the FDCA would defeat the purpose of that prohibition.”).

*3 Plaintiffs’ citation of *Garross v. Medtronic, Inc.*, 77 F. Supp. 3d 809, 816 (E.D. Wis. 2015), is not persuasive. Doc. 12388 at 9-10. The plaintiff in that case did not bring a negligence per se claim, but instead asserted traditional common law torts such as design defect, failure to warn, and

2018 WL 4356638

negligence. *Garross*, 77 F. Supp. 3d at 813. Those claims were not impliedly preempted under *Buckman* “because none of them [arose] solely from a violation of federal law; rather, each [arose] from an independent, well-recognized duty owed under state law.” *Id.* at 816; see also *Hoffmann v. Wis. Elec. Power Co.*, 664 N.W.2d 55, 62 (Wis. 2003) (noting that “the enactment of safety statutes ... does not abolish the duty arising under common-law negligence”). In this case, Plaintiffs retain and will assert at trial a common law negligent design claim; that claim is not affected by this ruling.

Plaintiffs cite cases holding that violations of FDCA regulations may support negligence per se claims in Wisconsin. Doc. 12388 at 9-10 (citing *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961, 964 (E.D. Wis. 1981) (pre-*Buckman* decision holding that violation of federal regulation for prescription drug labeling supported negligence per se claim under Wisconsin law); *Marvin v. Zydus Pharms. (USA) Inc.*, 203 F. Supp. 3d 985, 992 (W.D. Wis. 2016) (finding that plaintiffs may bring a negligence per se claim under Wisconsin law based on a violation of federal medication guide regulations); Doc. 12400 at 13 (citing *Kurer v. Parke, Davis & Co.*, 679 N.W.2d 867, 874 (Wis. Ct. App.

2004) (“In Wisconsin, violations of the FDA regulations may constitute negligence per se.”)). But these cases are squarely at odds with § 337(a). The plain language of that section and the *Buckman* decision indicate that such claims fail. See *Dunbar*, 2014 WL 3056026, at *6. Even if state law recognizes the claims, federal law preempts them. See *Perez v. Nidek Co.*, 711 F.3d 1109, 1120 (9th Cir. 2013) (finding state law claim preempted where the plaintiff was not suing under state law for conduct that happens to violate the FDCA, but instead is suing solely “because the conduct violates the FDCA.”) (emphasis in original). This Court reached the same conclusion in previous bellwether cases. See Docs. 8874 at 14-18, 10404 at 14-17 (finding negligence per se claims impliedly preempted in the Booker and Jones bellwether cases).

IT IS ORDERED that judgment is entered in favor of Defendants on Plaintiffs' negligence per se claim (Count IX).

All Citations

Not Reported in Fed. Supp., 2018 WL 4356638

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 26

2009 WL 2433468

United States District Court, S.D. West Virginia.

In re DIGITEK PRODUCTS

LIABILITY LITIGATION.

This Order Relates to All Cases.

MDL No. 2:08-md-01968.

|

Aug. 3, 2009.

**PRETRIAL ORDER # 33 (Memorandum
Opinion and Order re Motions to Dismiss)**

JOSEPH R. GOODWIN, Chief Judge.

*1 Pending are the motions to dismiss filed by Mylan Inc., Mylan Pharmaceuticals Inc., Mylan Bertek Pharmaceuticals Inc., and UDL Laboratories, Inc. ("Mylan Defendants") relating to Counts One, Two and Three of the Master Consolidated Complaint ("master complaint") [Docket 100] and the motions to dismiss filed by all Defendants relating to Counts Five and Eighteen [Docket 102 and 105]. For the reasons that follow, I **DENY** the Mylan Defendants' motion to dismiss Count One and Defendants' motion to dismiss Count Five. I also **DENY WITHOUT PREJUDICE** the Mylan Defendants' motion to dismiss Counts Two and Three and Defendants' motion to dismiss Count Eighteen.

I.

Defendants Actavis Totowa, LLC ("Actavis Totowa"), Mylan Bertek Pharmaceuticals, Inc., and UDL Laboratories, Inc., are citizens respectively of New Jersey, Delaware, Texas, and Illinois. Defendants Actavis, Inc., and Actavis Elizabeth, Inc., are citizens of Delaware. Plaintiffs allege those defendants manufactured, marketed, tested, promoted, sold and/or distributed Digitek® ("Digitek®" or "Digoxin" interchangeably). Defendants Mylan, Inc., and Mylan Pharmaceuticals, Inc., are respectively citizens of Pennsylvania and West Virginia. Plaintiffs allege those defendants marketed, promoted, sold and/or distributed Digoxin. Mylan Pharmaceuticals, Inc., is also alleged to have distributed Digitek® (Digoxin) through its affiliates, Mylan Bertek Pharmaceuticals, Inc. and UDL Laboratories, Inc..

Digitek® is the brand-name of a cardiac glycoside, a compound affecting the myocardium of the heart. The drug is widely used to treat various heart conditions, including atrial fibrillation, atrial flutter, and heart failure that are uncontrolled by other medications. The United States Food and Drug Administration ("FDA") approved the drug with a certain level of the active ingredient, in the following dosages: (1) Digitek® (Digoxin tablets, USP) 0.125mg, and (b) Digitek® (Digoxin tablets, USP) 0.250 mg. The approved quantities are important because Digitek® has a narrow therapeutic index. Specifically, there is a limited margin between effectiveness and toxicity. An excessive dose of the active ingredient can cause result in serious health problems and death.

The plaintiffs allege that some of the Digitek® at issue in this action was, among other things, designed and manufactured at a plant in Little Falls, New Jersey ("Little Falls facility"), owned by one or more of the defendants. On or about August 15, 2006, the FDA issued a letter warning to the defendants through Actavis Totowa, LLC, for failing to file periodic safety reports from the Little Falls facility ("August 2006 Warning Letter"). The FDA cautioned that the defendants, through Actavis Totowa, LLC, had violated federal adverse medical event reporting obligations, marketed drugs without proper clearance, and caused at least twenty-six (26) adverse drug experiences ("ADEs") by failing to submit periodic safety reports. The August 2006 Warning Letter also noted an FDA inspection in early 2006 that revealed six potentially serious and unexpected adverse drug events dating back to 1999 for products, including Digoxin, that were not properly reported to the agency. The plaintiffs additionally allege that the defendants, through Actavis Totowa, LLC, were alerted that they were (1) not properly investigating serious and unexpected ADEs, (2) not adequately reviewing ADE information, (3) failing to develop proper procedures for surveillance, receipt, evaluation and reporting of ADEs, and (4) failing to file periodic safety reports which resulted in the twenty-six (26) unreported ADEs.

*2 On or about February 1, 2007, the FDA issued a Revised Warning Letter to the defendants through Actavis Totowa ("Revised Warning Letter"). It cited "significant deviations from the current Good Manufacturing Practice ['cGMP'] regulations." This likely accounts for the plaintiffs' allegation that the defendants' manufacturing, production, testing and inspection processes did not meet the then-current cGMP regulations found in 21 C.F.R. §§ 210 and 211. The cGMP regulations describe the methods, controls, equipment,

2009 WL 2433468, 74 Fed.R.Serv.3d 116

and facilities that must be in place for drug manufacturing operations. The regulations serve to ensure consumer safety and a drug's consistency with its purported identity, strength, quality, and purity.

The plaintiffs allege that the deviations resulted in the adulteration of drugs manufactured by the defendants, and were observed by the FDA, during inspections on July 10 and August 10, 2006. According to the FDA's Revised Warning Letter:

Significant deficiencies were found in the operations of your firm's quality control unit, and as a result there is no assurance that many drug products manufactured and released into interstate commerce by your firm have the identity, strength, quality and purity that they purport to possess.

(Master Compl. ¶ 29).

On August 10, 2006, the deviations were presented to Actavis Totowa on an FDA-483 ("List of Inspections").

The Revised Warning Letter also cited deficiencies in the operations of the quality control unit, which included instances where the unit failed to adequately investigate and resolve laboratory deviations and out-of-specification test results for drug products. Specifically, according to the Revised Warning Letter:

Our investigators observed numerous instances where the quality control unit failed to adequately investigate and resolve laboratory deviations and out-of-specification test results involving drug products that ultimately were released for distribution into interstate commerce. Additionally, our investigators uncovered out-of-specification test results in laboratory raw data that were not documented in laboratory notebooks, and found that products were released based on retesting

without any justification for discarding the initial out-of-specification test results.

(Master Compl. ¶ 31).

The Revised Warning Letter also stated that analysts did not always document the preparation and testing of samples at the time they were performed:

Master and batch production and control records were found to be deficient in that they did not include complete procedures for documenting the collection of samples. Although your firm's procedures require the collection of in-process blend uniformity samples of three times the weight of finished product tablets or capsules, master production records do not require, and batch records do not contain, documentation that the samples are being collected accordingly.

(Master Compl. ¶ 32).

*3 The FDA also cited a failure to assure the accuracy of the input and outputs from a system used to run the [high-performance liquid chromatography](#) testing during drug analysis. Other deficiencies cited by the FDA in the Revised Warning Letter include: (1) a failure of the quality control unit to recognize that some tablets did not meet in-process specifications; (2) inconsistent documentation of failures to meet in-process specifications during tablet compression operations and failure to show that process deviations were promptly corrected to avoid releasing out of specification tablets; (3) a lack of adequate procedures for conducting bulk product holding time studies; (4) a failure to identify and control rejected in-process materials; (5) inadequate qualification of select equipment; and (5) a failure to establish and follow written procedures for maintaining manufacturing equipment.

An example found in the Revised Warning Letter provides as follows concerning Actavis Totowa's manufacturing processes:

Your firm's cleaning validation studies were found to be inadequate and, as a result, there was no assurance that equipment is adequately cleaned between the manufacture of different drug products. [21 CFR 211.67(b)] For example: a) Cleaning validation was performed for the process trains without evaluating for sample recovery for numerous products, including: ... Digoxin Tablets, USP, 0.25mg.

[W]e are concerned about the quality of drug products that have been released from your facility under the serious lack of cGMP controls found during the inspection. Your response provides no assurance that the records and conditions of manufacture and testing of each such lot of drug products released and marketed by your firm will be evaluated to assure that the released drug products have their appropriate identity, strength, quality and purity.

(Master Compl. ¶ 35).

As a result of the inspection findings, the defendants, through Actavis Totowa, were allotted 15 working days to provide a written listing of all unexpired, released lots of finished drug products associated with any out-of-specification test results during manufacture. Additionally, the FDA ordered a description of the actions taken to ensure that lots were suitable for release.

A Class I Recall of a drug is instituted only when “there is a reasonable probability that the use or exposure to a violative product will cause serious adverse health consequences or death.” On or about April 25, 2008, the FDA announced a Class I Recall of all lots of Bertek and UDL Laboratories Digitek® (Digoxin) (“recalled Digitek® (Digoxin)”). The Class I recall stated as follows:

Digitek (Digoxin Tablets, USP): Audience: Cardiologists, family physicians, pharmacists, other healthcare professionals, patients [Posted 04/28/2008] Actavis Totowa LLC notified healthcare professionals of a Class I nationwide recall of all strengths of Digitek, a drug used to treat heart failure and abnormal heart rhythms.

*4 The products are distributed by Mylan Pharmaceuticals Inc., under a “Bertek” label and by UDL Laboratories, Inc. under a “UDL” label—The product is being recalled due to the possibility that tablets with

double the appropriate thickness may contain twice the approved level of active ingredient. The existence of double strength tablets poses a risk of digitalis toxicity in patients with renal failure. Digitalis toxicity can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability and bradycardia. Several reports of illnesses and injuries have been reported. Patients should contact their healthcare professional with questions. [April 25, 2008—Press Release—Actavis Totowa, LLC]

(Master Compl. ¶ 38).

The plaintiffs allege that the Recalled Digitek® (Digoxin) is an adulterated drug. They also contend that its label and packaging are misbranded. The defendants are charged with having failed to inform the medical community and the public, including the plaintiffs, of the following material items:

1. How many and which lots of Digitek® (Digoxin) contained amounts of unapproved Digoxin;
2. How long the defendants manufactured and produced the recalled Digitek ® ... and how long the adulterated drug was supplied, sold, distributed, and released into the stream of commerce;
3. How many reports of illness and injuries have been received; and
4. The nature and extent of the reports of illness and injuries that were received.

The plaintiffs allege that these failures are consistent with the safety violations which led the FDA to issue the August 2006 Warning Letter and their failure to satisfy the cGMP regulations, including:

1. Deviating, without written justification, from their own written specifications, test procedures, and laboratory mechanisms, 21 C.F.R. § 211.160(a);
2. Failing to establish the accuracy, specificity, and reproducibility of the test methods they employed, 21 C.F.R. § 211.165(d);
3. Maintaining incomplete laboratory records of all testing data, 21 C.F.R. § 211.194(a)(4);
4. Failing to verify the suitability of all testing methods used under actual conditions of use, 21 C.F.R. § 211.194(a)(2);

5. Failing to investigate unexplained out-of-specification testing results for drugs, 21 C.F.R. § 211.192;
6. Failing to follow the defendants' own written stability testing program, 21 C.F.R. § 211.166(a);
7. Failing to record and justify deviations from the defendants' own written production and process control procedures, 21 C.F.R. § 211.100(b) 12
8. Failing to examine and test samples to ensure that in-process materials conform to their specifications, 21 C.F.R. § 211.110(b);
9. Failing to follow defendant's own written quality control procedures, 21 C.F.R. § 211.22(d);
10. Failing to ensure that all data was reviewed and laboratory deviations were fully investigated and resolved prior to the release of drugs into commercial distribution, 21 C.F.R. § 211.22(a);
- *5 11. Failing to have laboratory controls sufficient to ensure that components, in-process materials, and finished drug products have the appropriate standards of identify, strength, quality, and purity and conform to their written specifications, 21 C.F.R. § 211.160(b); and
12. Failing to reject products that do not meet established standards or specifications and any other relevant quality control criteria, 21 C.F.R. § 211.165(f).

Noting the “serious manufacturing practice, quality assurance and product safety issues with the production of Digitek® ... as well as other products produced, manufactured, tested, marketed, distributed and sold or otherwise placed into the stream of commerce by Defendants[.]” the plaintiffs further allege that the Class—I recall for all-lots, all-doses of Digitek® bearing the defendants' labels resulted in the stoppage of production lines and the shuttering of the Little Falls plant.

The plaintiffs charge that the defendants, during the events outlined above, have “repeatedly emphasized their reputations for quality manufacturing in publically available corporate documents and corporate run websites ... and under-reported, underestimated and/or downplayed the serious dangers and the defective nature of Digitek® ...” (Master Compl. ¶¶ 46–47). The plaintiffs further allege that the defendants “have a history of [(1)] releasing drug products for public consumption that have been adulterated or

misbranded ... [(2)] ... failing reliably to establish the identity, strength, quality and purity of drug products they release for public consumption ... [and (3)] failing adequately to investigate and document test results on their drug products. (*Id.* at 48–50).

The plaintiffs' factual allegations conclude with the following representations concerning the defendants' omissions:

The defendants are drug companies, that upon information and belief, engaged in the marketing, design, development, manufacture, production, processing, compounding, formulating, testing, sale, labeling, packaging, dosing, advertising, promotion, supplying, releasing and/or distribution of Digitek® ... tablets with amounts of the active ingredient that was not consistent among Digitek® ... tablets and amounts of the active ingredient that was inconsistent with the dose on the Digitek® ... label.... At all times relevant to this action, Defendants knew, and/or had reason to know that the recalled Digitek® ... tablets were not safe for the patients for whom the drug was prescribed because inconsistent or excess doses of Digoxin can cause serious medical problems, Digoxin overdose, Digitalis toxicity and, in certain patients, catastrophic injuries and death.... Defendants failed to adequately warn users of the defective drug of its unreasonably dangerous characteristics due to the inconsistent and/or excess levels of active ingredient the drug contained.

*6 (*Id.* at 51–53).

The filing of various civil actions in state and federal courts across the country followed the recall, in which plaintiffs claimed injuries from alleged exposure to defectively manufactured Digitek®. On August 13, 2008, the Judicial Panel on Multidistrict Litigation entered an order establishing a multidistrict litigation (“MDL”) proceeding in this District

consolidating federal Digitek® related actions for joint case management. In Pre-trial Order # 10, dated January 29, 2009, the court directed the filing of a Master Complaint. The

Master Complaint filed on February, 9, 2009, alleges the following claims:

Count One:	Failure to Warn and Instruct	Count Eleven:	Constructive Fraud
Count Two:	Manufacturing Defect	Count Twelve:	Violation of the WVCCPA
Count Three:	Design Defect	Count Thirteen:	Other UTPA Violations
Count Four:	Negligence	Count Fourteen:	Wrongful Death
Count Five:	Negligence per Se	Count Fifteen:	Survival Action
Count Six:	Breach of Implied Warranty	Count Sixteen:	Medical Monitoring
Count Seven:	Breach of Express Warranty	Count Seventeen:	Unjust Enrichment
Count Eight:	Negligent Misrepresentation	Count Eighteen:	Medicare MSP Liability
Count Nine:	Intentional Misrepresentation	Count Nineteen:	Loss of Consortium
Count Ten:	Fraud		

At the conclusion of Counts One, Two and Three, the plaintiffs allege that “[a]s a direct and proximate result of Defendants’ acts and omissions, Plaintiffs have sustained severe physical injuries and/or death, severe emotional distress, mental anguish, economic losses and other damages for which they are entitled to compensatory and equitable damages and declaratory relief in an amount to be proven at trial.” (Master Compl. at ¶¶ 65, 73, and 81. Count Five alleges that “[a]s a direct and proximate result of Defendants’ negligent, reckless, willful, wanton and grossly negligent acts and omissions” the same types of losses occurred. (*Id.* at 97). Count Eighteen, previously quoted in full, contains allegations of personal injury claims and “expenditures resulting from their injuries suffered in connection with the recalled Digitek (Digoxin).” (*Id.* at 175).

On April 20, 2009, the Mylan Defendants moved to dismiss Counts One, Two and Three, and all of the defendants moved to dismiss Counts Five and Eighteen. Responses were received on May 19, 2009 and replies on June 2, 2009.

II.

A. Governing Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleader provide “a short and plain statement of the claim showing ... entitle[ment] to relief.” Fed.R.Civ.P. 8(a)(2); *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007). Rule 12(b)(6) correspondingly permits a defendant to challenge a complaint when it “fail[s] to state a claim upon which relief can be granted ...” Fed.R.Civ.P. 12(b)(6).

The required “short and plain statement” must provide “ ‘fair notice of what the ... claim is and the grounds upon which it rests.’ ” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *overruled on other grounds*, *Twombly*, 127 S.Ct. at 1969)); *see also Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir.2007). Additionally, the showing of an “entitlement to relief” amounts to “more than labels and conclusions....” *Twombly*, 127 S.Ct. at 1965. It is now settled that “a formulaic recitation of the elements of a cause of action will not do.” *Id.*; *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir.2008).

*7 The complaint need not, however, “make a case” against a defendant or even “forecast evidence sufficient to prove an element” of the claim. *Chao v. Rivendell Woods, Inc.*,

415 F.3d 342, 349 (4th Cir.2005) (quoting *Iodice v. United States*, 289 F.3d 270, 281 (4th Cir.2002)). Instead, the opening pleading need only contain “[f]actual allegations ... [sufficient] to raise a right to relief above the speculative level.” *Twombly*, 127 S.Ct. at 1965; *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (noting the opening pleading “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”). Stated another way, the complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974; *Giarratano*, 521 F.3d at 302. The recent decision in *Iqbal* provides some guidance concerning the plausibility requirement:

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. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” “

Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.... Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not “show[n]”-“that the pleader is entitled to relief.”

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 129 S.Ct. at 1949–50 (citations omitted).

As noted in *Iqbal*, the Supreme Court has consistently interpreted the Rule 12(b)(6) standard to require a district

court to “ ‘accept as true all of the factual allegations contained in the complaint’ ” *Erickson*, 127 S.Ct. at 2200 (quoting *Twombly*, 127 S.Ct. at 1965); see also *South Carolina Dept. of Health And Environmental Control v. Commerce and Industry Ins. Co.*, 372 F.3d 245, 255 (4th Cir.2004) (quoting *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir.2002)). The court is additionally required to “draw[] all reasonable ... inferences from those facts in the plaintiff’s favor” *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999).

*8 As a further overlay to this deferential standard, MDL courts have observed generally that a “master complaint should not be given the same effect as an ordinary complaint. Instead, it should be considered as only an administrative device to aid efficiency and economy.” See *In re Propulsid Products Liability Litig.*, 208 F.R.D. 133, 142 (E.D.La.2002); see also *In re Vioxx Products Liability Litig.*, 239 F.R.D. 450, 454 (E.D.La.2006) (noting that a master complaint is simply “an administrative device used to aid efficiency and economy and, thus, should not be given the status of an ordinary complaint.”); *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 56 (D.N.J.2009) (“In the absence of ... consent, the majority of courts treat consolidated complaints filed in multi-district litigations as a procedural device rather than a substantive pleading with the power to alter the choice of law rules applicable to the plaintiffs’ claims.”); *Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 489 F.Supp.2d 932, 936 (D.C.Minn.2007) (“The transfer under [28 U.S.C.] § 1407, even after the filing of an amended complaint, is only a change in courtrooms. Consolidation of a master complaint is merely a procedural device designed to promote judicial economy, and, as such, it does not affect the rights of the parties in separate suits.”).

The administrative nature of a master complaint and its focus on facilitating management of the litigation, as opposed to being a primary operative pleading, has been considered in analyzing the motions to dismiss. Since it is uncertain how a master complaint should be treated when it is challenged via Rule 12(b)(6), the document has been read and construed at this point in the litigation in light of its procedural purpose.

B. Count One—Failure to Warn

The Mylan defendants claim it has not been alleged that they, as distributors, knew or had reason to know of the existence of a manufacturing defect prior to the recall. The Mylan Defendants further contend that they cannot be held liable for a failure to warn because there are no instructions or warnings

that could have made Digitek® safe for consumers under the alleged circumstances.

The Mylan defendants are correct that the master complaint lacks detailed factual allegations respecting their specific knowledge of a manufacturing defect. It does allege though that all of the defendants knew generally of a manufacturing defect and that they failed to act. Paragraphs 51–53, quoted above, are illustrative. (*See, e.g.*, ¶¶ 54–63).¹ The plaintiffs contend in the master complaint that, among other alleged misdeeds, (1) the Mylan defendants were involved in multiple cases of adverse drug events, (2) a number of these potentially serious and unexpected events were related to products including Digoxin, (3) Digoxin was the subject of multiple advisory letters from the FDA, foregoing an ultimate recall of Digitek®, which would have been directed, at least in part, to the Mylan defendants, and (4) the Mylan defendants failed to appropriately inform the medical community and the public, including the plaintiffs, of (a) how many and which lots of Digitek® contained amounts of unapproved Digoxin, (b) how long the recalled Digitek® was manufactured, produced, supplied, sold, distributed, and released into the stream of commerce, and (c) the number, nature and extent of the reports of illness and injuries that had been received.

¹ The Mylan Defendants rely upon *Bryson v. Gonzales*, 534 F.3d 1282 (10th Cir.2008), for the proposition that a generic allegation aimed at multiple defendants does not allege facts sufficient to give notice or establish a plausible right to recovery. The decision in *Bryson* involved a pleading by an inmate convicted of sexual assault who spent 19 years in jail until exonerated by DNA evidence. He sued a host of officials, including a police chemist, a district attorney, and a former police chief, alleging that they falsely procured his original conviction and then prevented him from obtaining access to the DNA evidence. Among other factors readily distinguishing *Bryson* from this action is the court of appeals' observation that follows:

“In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual

capacities. Therefore it is particularly important in such circumstances that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.”

Id. at 1290 (citation and quoted authority omitted).

*9 In the Count One the plaintiffs further outline that (1) Digitek® was in an unsafe, defective and inherently dangerous condition which was unreasonably dangerous to its users; (2) the labeling, packaging and warnings were insufficient to alert consumers, including the plaintiffs, of the dangerous risks and reactions associated with the recalled Digitek®; (3) the plaintiffs are alleged to be in a class of persons that the defendants, including Mylan defendants, should have been considered to be subject to harm caused by Digitek®'s defective nature; (4) the defendants knew, or should have known, through quality control procedures, testing, adverse event reporting or otherwise that Digitek® was in a defective condition and the label, warnings, and dosage information provided with the recalled Digitek® were not accurate and (5) the defendants failed to provide adequate and timely warnings or instructions regarding Digitek®. (Master Compl. at ¶¶ 57–61). Also pled is the Mylan defendants' default on its continuing duty to warn the plaintiffs of the dangers associated with the recalled Digitek® and the assertion that if they had done so, the plaintiffs would not have used it. (*Id.* at 63–64).

In applying *Twombly's* plausibility standard, each of these factual allegations is treated as entirely accurate, however true or misguided a fact finder might ultimately find them to be. Plaintiffs allege and infer that as distributors of the drug which was, at least in part, the subject of the FDA warning letters and the eventual recall, it is plausible the Mylan Defendants knew or had reason to know of the alleged manufacturing defects, and then failed to appropriately warn and instruct the plaintiffs. Additionally, the Mylan Defendants concede that a party may be held liable for failure to warn even if it only has “constructive knowledge” of a product's defective nature.

(See, e.g., Memo. in Supp. of Mot. to Dis. Cts. One, Two, and Three at 3).

Accordingly, the Master Complaint provides the Mylan Defendants adequate notice of the claims pled against them and, accepting the associated factual allegations as true, a plausible claim for relief is alleged in Count One. I **DENY** the Mylan Defendants' motion to dismiss Count One.²

² The Mylan Defendants assert in the alternative that no instructions or warnings could have made Digitek® safe under the circumstances. They appear to contend that if it is impossible to cure a potential defect, such as double thickness tablets mistakenly created, which cannot be rendered reasonably safe for consumers through adequate warnings, that the Mylan defendants should be exonerated as a matter of law as to Count One. No case law is cited for the proposition and Defendants did not further address the argument in their reply. I do not deem this contention to warrant dismissal of Count One at this early stage. Discovery will better illuminate the timing and substance of the knowledge possessed by the Mylan defendants, and the adequacy of any warnings they should have offered in light of those considerations.

C. Counts Two and Three—Product Liability—Manufacturing and Design Defect

The Mylan defendants next assert that Counts Two and Three should be dismissed because distributors that did not participate in a product's design or manufacture cannot be held liable for defects that arose in the product at those two stages of the manufacturing process. Plaintiffs contend that the law is to the contrary in a majority of jurisdictions. Both parties rely upon case law not dealing with allegations of a defective prescription drug. The entirety of the briefing on the point spans just a few pages.

The *Restatement (Third) of Torts* speaks to the liability of manufacturer and distributor defendants involved in the production and sale of defective prescription drugs. Section 6(e) provides as follows:

***10** (e) A retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device if:

(1) at the time of sale or other distribution the drug or medical device contains a manufacturing defect as defined in § 2(a); or

(2) at or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

Restatement (Third) of Torts: Prod. Liab. § 6 (1998). The commentary to *section 6(e)* provides as follows:

h. Liability of retail seller of prescription drugs and medical devices for defective designs and defects due to inadequate instructions or warnings. The rule governing most products imposes liability on wholesalers and retailers for selling a defectively designed product, or one without adequate instructions or warnings, even though they have exercised reasonable care in marketing the product. See § 1, Comment e, and § 2, Comment o. Courts have refused to apply this general rule to nonmanufacturing retail sellers of prescription drugs and medical devices and, instead, have adopted the rule stated in Subsection (e). That rule subjects retailers to liability only if the product contains a manufacturing defect or if the retailer fails to exercise reasonable care in connection with distribution of the drug or medical device. In so limiting the liability of intermediary parties, courts have held that they should be permitted to rely on the special expertise of manufacturers, prescribing and treating health-care providers, and governmental regulatory agencies. They have also emphasized the needs of medical patients to have ready access to prescription drugs at reasonable prices.

Restatement (Third) of Torts: Prod. Liab. § 6 (1998) (comment.).

The Restatement approach casts doubt on a non-manufacturing party's liability for design defects, at least where that down-the-line entity is not negligent. See 1 David G. Owen *et al.*, *Madden & Owen on Products Liability* § 5:12 (3d ed.2009) (noting section “6(e) provides that retail sellers are subject only to negligence liability for selling such products containing design or warnings defects.”); see 3 J.D. Lee & Barry Lindahl, *Modern Tort Law: Liability and Litigation* § 27:45 (2d ed.2009). At the same time, the Restatement approach has not been uniformly accepted. See 5 Roxanne Barton *et al.*, *Litigating Tort Cases* § 60:23 (2009) (“Indeed, the Wisconsin court declined to adopt the new

Restatement, noting that the new provision had been the subject of controversy, and that it had even been referred to by various commentators as ‘a wish list from manufacturing America’ and a vehicle for tort reform.”).

The unsettled and apparently complex nature of the law of the fifty states aside, a different issue also precludes dismissal at this juncture. The Mylan defendants contend that “[p]laintiffs are aware that [the] Mylan Defendants did not participate in the design or manufacture of Digitek®.” (Defs.’ Memo. in Supp. at 6). At the same time, they candidly concede that the matter is “not always consistently pleaded....” *Id.* The exact relationship between the defendants, their knowledge of material events, the timing of their receipt of that knowledge, and the impact those fact intensive questions may have on the application of the unsettled, governing law all counsel in favor of allowing the challenged Counts to proceed to discovery.

*11 At the conclusion of that process, the parties may brief the matter anew at summary judgment, supported by a multi-state survey of the governing law. I can then best determine whether the matter is suitable for coordinated resolution. Accordingly, I **DENY** without prejudice the Mylan Defendants’ motion to dismiss Counts Two and Three.

D. Count Five—Negligence Per Se

Count Five alleges a claim for negligence *per se*. Plaintiffs cite the Federal Food, Drug and Cosmetic Act (“FDCA”), 21 U.S.C. § 301, along with unstated “related amendments, codes and federal regulations provided there under, and other applicable laws, statutes, and regulations” as the legislatively imposed standard of care supporting their negligence *per se* claim (Master Compl. ¶ 91). After alleging that they reside within the class of individuals that the FDCA and the other unnamed “statutes and regulations” are designed to protect, they further contend as follows

Defendants’ acts constitute an adulteration and misbranding as defined by the ... [FDCA] and the regulations promulgated there from and constitutes a breach of duty under the theory of negligence *per se*.

Defendants’ manufacturing, production, testing and inspection processes are not good manufacturing processes in violation of the ... [FDCA] and the regulations promulgated therefrom and constitutes a breach of duty under the theory of negligence *per se*.

The acts and omissions set forth above, demonstrate that Defendants failed to meet the standard of care set by the applicable statutes and regulations, which were intended for the benefit of individuals such as Plaintiffs making Defendants negligent *per se*.

(Master Compl. ¶¶ 92–95).

The defendants initially moved to dismiss Count Five as an improper private FDCA enforcement action. In their response, Plaintiffs concede a private right of action does not exist under the FDCA. They clarified, however, that Count Five was solely based in negligence, with the FDCA merely serving as one component of the violations of law in which they claim defendants engaged. In reply, the defendants persist in asserting the claim fails as a matter of law.

The analysis is controlled by *Talley v. Danek Medical, Inc.*, 179 F.3d 154 (4th Cir.1999). In *Talley*, plaintiff had a medical device implanted. She asserted that the device was used for a purpose not approved by the FDA. The district court dismissed the action at summary judgment. Plaintiff asserted on appeal that genuine issues of material fact remained over whether defendant “violated the ... [FDCA] and that a violation of the FDCA constitutes negligence *per se* in Virginia.” *Id.* The court of appeals, in an opinion authored by Judge Niemeyer, first discussed generally the nature of a negligence *per se* claim:

[I]n negligence *per se* cases, the courts “adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation.”

*12 An example illustrates the doctrine’s application. If the statutory speed limit on a road is 35 m.p.h. and the defendant drives 40 m.p.h., causing him to collide with the plaintiff pedestrian and to injure her, the plaintiff may establish the breach element of her negligence claim *by pointing to the violation of the speed limit*. The defendant is barred from putting on evidence, specific to his situation, that driving at 40 mph. on that particular road was reasonable because *the “violation of the statute constitutes conclusive evidence of negligence.”*

Id. at 158.

The decision in *Talley* also observes that the negligence *per se* doctrine “is not a magic transforming formula that automatically creates a private right of action for the civil enforcement, in tort law, of every statute.” *Id.* Instead, the

claim substitutes a standard of care created by the legislature for one that would otherwise be created by the common law. There are also limits placed on the doctrine to assure that it does not become a means to practically create private rights of action for statutory violations. The decision in *Talley* recognizes at least two means for “cabin[ing]” the doctrine:

First, not all statutory provisions dictate a standard of care, and therefore not all statutory violations can provide a basis for establishing negligence *per se*. Second, even when a statutory provision does specify a standard of care, a plaintiff must still prove the additional elements of duty, proximate causation, and injury to establish liability.

Id. at 159. A statute will be deemed not to define a standard of care where it only imposes an administrative requirement, “such as the [mandate] to obtain a license or to file a report to support a regulatory scheme....” *Id.*

The plaintiff in *Talley* asserted a violation of 21 U.S.C. § 360e(a), which requires premarket approval for certain medical devices.³ As noted, she asserted that premarket approval had not occurred because the implanted device was used in a manner not approved by the FDA. The court of appeals explained why her theory could not support a negligence *per se* claim:

³ Coincidentally, the plaintiff, as in this case, relied as well upon 21 U.S.C. § 331(a), which provides as follows:

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any ... drug ... that is adulterated or misbranded. *Id.* The court of appeals does not appear to have separately discussed the suitability of this subsection to support a negligence *per se* claim.

Breach of the requirement not to misbrand a surgical nail[, as in the case of *Orthopedic Equipment Co. v. Eutsler*, 276 F.2d 455 (4th Cir.1960),] is similar to a breach of a speed

limit; each violates a specific and substantive standard of care that is intended to protect others. The holding in *Eutsler*; however, does not establish the principle that the simple failure to obtain approval of a device from the FDA, standing alone, can support a negligence *per se* claim. The administrative requirement that a given device be approved by the FDA before being marketed—as opposed to a specific substantive requirement that a device be safe and effective—is only a tool to facilitate administration of the underlying regulatory scheme. Because it lacks any independent substantive content, it does not impose a standard of care, the breach of which could form the basis of a negligence *per se* claim. Its breach is analogous to the failure to have a drivers license.

*13 *Id.* at 161.

Unlike the mandate of section 360e(a), and the circumstances in *Talley*, Count Five, and section 331(a), speak to the breach of a clear cut statutory prohibition. Specifically, Congress has commanded drug manufacturers not to deliver in interstate commerce any misbranded drug. Plaintiffs have, in addition to other violations, specifically alleged misbranding. The statutory directive found in section 331(a) is not unlike the unadorned legislative prohibition on exceeding a certain speed on an interstate highway. The analogy is, in light of the analysis in *Talley*, fatal to defendants' Rule 12(b)(6) challenge to Count Five. Accordingly, I **DENY** the defendants' motion to dismiss Count Five.

E. Count Eighteen—Medicare Secondary Payer Act

The defendants assert that Count Eighteen fails to state a claim because (1) it lacks an allegation that plaintiffs are a “primary plan[,]” and (2) defendants have no responsibility for any Medicare payments to the plaintiffs. Aside from an additional paragraph incorporating prior allegations, the entirety of Count Eighteen reads as follows:

In addition to their own personal injury claims, Plaintiffs, whose medical care costs arising from Digitek® (Digoxin) were paid in whole or in part by Medicare, bring this cause of action pursuant to the private cause of action provisions of the Medicare as Secondary Payer Statute [(“MSP”) 42 U.S.C. § 1395y(b)(3)(A)] to recover “double damages” of all Medicare expenditures resulting from

their injuries suffered in connection with the recalled [Digitek® \(Digoxin\)](#).

(Master Compl. ¶ 175).

The United States Court of Appeals for the First Circuit recently explained the nature and workings of the MSP:

Prior to 1980, Medicare generally paid for medical services whether or not the Medicare beneficiary also was covered by another health plan. The MSP statute, which was enacted in 1980 to reduce federal health care costs, makes Medicare the secondary payer for medical services provided to Medicare beneficiaries whenever payment is available from another primary payer.

To that end, the MSP statute prohibits Medicare from making any payment to a beneficiary for medical expenses if “payment has been made, or can reasonably be expected to be made promptly (as determined in accordance with regulations) under ... an automobile or liability insurance policy or plan (including a self-insured plan) or under no-fault insurance.” Should Medicare determine that the primary insurer has not paid and that no prompt payment reasonably can be expected from the primary insurer, however, Medicare may pay the beneficiary up front, but such payment is conditioned on Medicare's right to reimbursement in the event that a primary plan later pays or is found responsible for payment of the item or service.

To facilitate recovery of these conditional payments, the MSP ... creates a private cause of action with double recovery to encourage private parties to bring actions to enforce Medicare's rights....

**14 United Seniors Ass'n, Inc. v. Philip Morris USA*, 500 F.3d 19, 21–22 (1st Cir.2007).

The Defendants primarily assert that their responsibility for any Medicare monies expended to treat plaintiffs must be judicially fixed before the MSP private right of action ripens, meaning Count Eighteen is premature. Plaintiffs assert that they are entitled to establish defendants liability under the MSP in the same action that would serve as the predicate to MSP liability. In the alternative, plaintiffs ask the court to bifurcate Count Eighteen until such time, if ever, that defendants' liability for plaintiffs' injuries is established.

To the extent it is not unanimous, the overwhelming weight of the case law has adopted the defendants' position. The United States Court of Appeals for the Eleventh Circuit recently observed as follows:

Our conclusion that [section 1395y\(b\)\(3\)](#) does not create a private cause of action against alleged—as opposed to proved—tortfeasors whose responsibility for payment of medical costs has not been previously established is supported by three additional considerations. First, Plaintiffs' proposed interpretation of [section 1395y\(b\)\(3\)\(A\)](#) would drastically expand federal court jurisdiction by creating a federal forum to litigate any state tort claim in which a business entity allegedly injured a Medicare beneficiary, without regard to diversity of citizenship or amount in controversy. Second, under Plaintiffs' interpretation, an alleged tortfeasor that is sued under the MSP (instead of under state tort law) could not contest liability without risking the penalty of double damages: defendants would have no opportunity to reimburse Medicare after responsibility was established but before the penalty attached. Third, Plaintiffs' proposed interpretation would allow individuals acting as private attorney generals to litigate the state tort liability of a defendant towards thousands of Medicare beneficiaries—as a predicate to showing MSP liability—without complying with class action requirements. We are confident that, if Congress intended such radical innovations in jurisdiction, federal-state relations, and tort liability, it would have more clearly expressed its intent.

Glover v. Liggett Group, Inc., 459 F.3d 1304, 1309 (11th Cir.2006); see also, e.g., *Mason v. American Tobacco Co.*,

346 F.3d 36, 43 (2nd Cir.2003)(observing that “[D]efendants are clearly correct when they assert that ‘the trigger for bringing a MSP claim is not the pendency of a disputed tort claim, but the established obligation to pay medical costs pursuant to a pre-existing arrangement to provide insurance benefits.’ ”); *National Committee to Preserve Social Sec. and Medicare v. Philip Morris USA Inc.*, 601 F.Supp.2d 505, 509 (E.D.N.Y.2009) (“Little discussion is required, as the weight of authority is entirely with defendants. Indeed, each of the federal courts to have considered the questions raised here has rejected plaintiffs’ view of the ... [MSP].”).

*15 The precise issue raised by the defendants has, however, recently been presented for decision to the United States Court of Appeals for the Fourth Circuit in *Bio-Medical Applications of N.C., Inc. v. Brooks Food Group, Inc.*, No. 08–1819 (4th Cir. Jul. 29, 2008). Oral argument is scheduled for September 22, 2009. Pending the decision in Brooks Food Group, I **DENY WITHOUT PREJUDICE** defendants’ motion to dismiss Count Eighteen.

III.

Based upon the foregoing analysis, I(1) **DENY** the Mylan Defendants’ motion to dismiss Count One and Defendants’

motion to dismiss Count Five, and (2) **DENY WITHOUT PREJUDICE** the Mylan Defendants’ motion to dismiss Counts Two and Three and Defendants’ motion to dismiss Count Eighteen.

The court **DIRECTS** the Clerk to file a copy of this memorandum opinion and order in 2:08–md–1968 which shall apply to each member Digitek-related case previously transferred to, removed to, or filed in this district, which includes counsel in all members cases up to and including civil action number 2–09–cv–875. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court’s website at www.wvsc.uscourts.gov.

All Citations

Not Reported in F.Supp.2d, 2009 WL 2433468, 74 Fed.R.Serv.3d 116

TAB 27

2011 WL 5903623



KeyCite Yellow Flag - Negative Treatment

Distinguished by *Halperin v. Merck, Sharpe & Dohme Corp.*, N.D.Ill., April 10, 2012

2011 WL 5903623

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

In re FOSAMAX (ALENDRONATE SODIUM)
PRODUCTS LIABILITY LITIGATION (NO. II).

Relates to All Actions.

MDL No. 2243.

|

Civ. No. 08-008 (GEB-LHG).

|

Nov. 21, 2011.

MEMORANDUM OPINION

BROWN, Chief Judge.

*1 This matter comes before the Court upon Defendants' Teva Pharmaceuticals USA, Inc., Barr Pharmaceuticals, LLC, Barr Laboratories, Inc., Mylan, Inc., Mylan Pharmaceuticals, Inc., and Apotex Corporation (collectively the "Generic Defendants"), and Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., and Watson Pharmaceuticals Inc. on behalf of and formally known as Cobalt Pharmaceuticals Company and Sun Pharmaceuticals (collectively "Watson Defendants") Motion for Judgment on the Pleadings. (Doc. No. 251.) Plaintiffs oppose the motion. (Doc. No. 296.) The Court has considered the parties' submissions and decided the matter without oral argument pursuant to [Federal Rule of Civil Procedure 78](#). For the reasons set forth on the record during the Court's November 14, 2011 conference and as set forth below, the Court grants in part and denies in part the motion.

I. BACKGROUND

The following facts are taken as true for purposes of deciding the instant motion. Plaintiffs in this case were prescribed [Fosamax](#) and its generic equivalent [alendronate](#) sodium, an oral medication for the treatment of [osteoporosis](#) and [Paget's disease](#). The United States Food and Drug Administration ("FDA") approved Merck & Co. Inc.'s ("Merck") new drug application ("NDA") for [Fosamax](#) in September 1995. (Murphy Compl. ¶ 32.) Teva Pharmaceuticals developed the

generic form [alendronate](#) sodium, and FDA approved its abbreviated new drug application ("ANDA") on February 6, 2008. (*Id.* at ¶ 33.) In the following years, each of the Generic Defendants received approval for and/or marketed [alendronate](#) sodium.¹

¹ Plaintiffs allege that Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc. are not generic manufacturers. Watson counters that it has only sold generic Fosamax and asks the Court to take judicial notice of the "Approved Drug Products with Therapeutic Equivalence Evaluations," listing Watson as a generic manufacturer. However, as the Court stated during its November 14, 2011 ruling, the Court must take Plaintiffs' allegations as true. It would be inappropriate under the standard of [Fed.R.Civ.P. 12\(c\)](#) to make a factual determination otherwise. Consequently, the Court's reasoning and conclusions in this opinion as to the Generic Defendants are exclusive of the Watson Defendants.

[Alendronate](#) sodium is in a class of drugs known as bisphosphonates, which are indicated for several conditions including the treatment and prevention of [osteoporosis](#) in post-menopausal woman, treatment of increased bone mass in men, treatment of glucocorticoid-induced [osteoporosis](#) in men and women, and treatment of [Paget's disease](#) in men and women. (*Id.* at ¶¶ 35–36.) In patients with [osteoporosis](#), the loss of live bone tissue causes the bones to become brittle, fragile, and therefore susceptible to fracture. (*Id.* at ¶ 37.) [Osteoporosis](#) can occur due to a decrease in vitamin D and estrogen, a reason why post-menopausal women are at an increased risk to develop the condition. (*Id.*)

With respect to estrogen-deprived patients specifically, there may be an increase in the number of osteoclasts, which are a type of bone cell that remove the mineralized matrix of the bone. (*Id.* at ¶ 38.) In healthy patients, another type of bone cell called an osteoblast balances osteoclast activity by building up bone tissue. (*Id.*) [Alendronate](#) sodium binds tightly to bone tissue, working to decrease the number of osteoclasts and thereby lessen bone breakdown. Consequently, the drug also increases bone mineralization. (*Id.* at ¶ 41.)

Plaintiffs claim that the result of decreased osteoclast activity is a compromised blood supply to the affected area, causing bone death or "[osteonecrosis](#)." (*Id.* at ¶ 45.) There are

2011 WL 5903623

two frequent locations in which Plaintiffs maintain that [osteonecrosis](#) may develop. (*Id.* at ¶ 47.) The first is the jaw. (*Id.* at ¶ 45.) A minor injury or disease in the jaw may turn into a non-healing [wound](#) because the bones making up the jaw are unable to mend properly. (*Id.* ¶ at 51.) FDA has received numerous reports of [osteonecrosis of the jaw](#) among users of [alendronate](#) sodium and recommended in January 2005 that Merck amend the labeling for [Fosamax](#) to warn of this risk. (*Id.* at ¶¶ 56, 58–60.) In July of 2005, Merck changed the [Fosamax](#) “precautions” section of the label to include reference to the reports of [osteonecrosis of the jaw](#) associated with a number of activities, including taking [Fosamax](#). (*Id.* at ¶¶ 60, 62.) Plaintiffs point out that the “warning” section of the [Fosamax](#) label was not changed and they charge Merck with failing to affirmatively warn patients of the increased risk of [osteonecrosis of the jaw](#) associated with [Fosamax](#) use.² (*Id.* at ¶ 61.)

² The harm associated with osteonecrosis of the jaw in patients who were prescribed Fosamax is currently the subject of another MDL in U.S. District Court for the Southern District of New York—*Boles v. Merck & Co.*, Case No. 06–9455.

*2 The second location for [osteonecrosis](#) is in the femur. (*Id.* at ¶ 69.) Three studies published in 2005, 2009, and early 2010 found and expressed concern regarding non-spinal fractures, including in the subtrochanteric area of the femur (just below the hip), in patients on long-term [alendronate](#) therapy. (*Id.* at ¶¶ 70,–72.) FDA issued a Safety Announcement on March 10, 2010 concerning potential adverse side effects associated with [Fosamax](#). (*Id.* at ¶ 73.) But FDA concluded in this announcement that it did not believe there was enough data to support a clear causal link between bisphosphonates use and femur fractures. (*Id.* at ¶ 75.) It did, however, state that it was working with the American Society of Bone and Mineral Research Subtrochanteric [Femoral Fracture](#) Task Force to gather information on the issue. (*Id.* at ¶ 76.) The Task Force issued its report in September 2010, finding evidence of a relationship between long-term bisphosphonate use and [femoral fractures](#). (*Id.* at ¶ 77.) But the report stopped short of concluding that there was a causal association. (*Id.*)

Nonetheless, FDA issued another Safety Announcement on October 13, 2010 with regard to bisphosphonates, including [Fosamax](#). (*Id.* at ¶ 78.) FDA announced that information about the risk of fractures in patients who take bisphosphonates for [osteoporosis](#) would be included in the “indications and usage” section of the labeling and in Medication Guides. (*Id.*

at ¶ 79.) The most-recent [Fosamax](#) label “warning” section, amended on January 25, 2011, contains no information about the risk, but the “precautions” section reports that “[a]typical, low-energy, or low trauma fractures of the femoral shaft have been reported in bisphosphonates-treated patients,” but that “[c]ausality has not been established.” (*Id.* at ¶¶ 80–83.)

On February 23, 2011, less than two months after Merck updated the Fosomax label, the Journal of the American Medical Association published a study, finding that, among older women, bisphosphonate treatment for longer than 5 years was associated with an increased risk of subtrochanteric or femoral shaft fractures. (*Id.* at ¶ 85.)

Plaintiffs allege injuries caused from the use of [alendronate](#) sodium.³ Plaintiffs claim that as a result of Generic Defendants' claims regarding the safety and efficacy of [alendronate](#) sodium, they were prescribed and used the drug long-term. Each alleges that as a direct and proximate cause of using [alendronate](#) sodium, they suffered fractures of the femur (sometimes both femurs), requiring hospitalization, surgery, and/or rehabilitation. As a result, the Plaintiffs claim significant harm; physical injury; enduring pain and suffering; bodily impairment; an increased risk of future [osteonecrosis of the jaw](#) and femur; risk of future hospitalizations, surgeries, and rehabilitation; mental anguish; emotional distress; and economic losses. Had Plaintiffs or their health-care-providers been made aware of unreasonable risks that Generic Defendants knew or should have known about, they would have not used or have been prescribed [alendronate](#) sodium.

³ Claims against Merck, Sharp & Dohme, Corp. arising out of the ingestion of branded-drug, Fosomax, are not at issue in this motion and not affected by the Court's conclusions.

*3 Accordingly, Plaintiffs brought suit in a variety of courts and venues. Merck moved for centralization of the actions, and on May 25, 2011, the United States Judicial Panel on Multidistrict Litigation ordered that outside actions and actions in the District of New Jersey be transferred here for coordinated and consolidated pretrial proceedings. (*See* Doc. No. 30.) Plaintiffs brought numerous causes of action arising under state law, which the Court categorizes into the following legal claims against the Generic Defendants:

- Defective Manufacturing;
- Defective Design;

2011 WL 5903623

- Failure to Warn;
- Negligence;
- Fraud, Misrepresentation, Failure to Conform to Representation;
- Negligent Misrepresentation;
- Breach of Express Warranty;
- Breach of Implied Warranty;
- Violation of Consumer Protection Laws;
- Restitution; and
- Loss of Consortium.

Generic Defendants now move for Judgment on the Pleadings under [Federal Rule of Civil Procedure 12\(c\)](#) on the basis that all of Plaintiffs' claims against them are preempted by federal law.

II. DISCUSSION

A. Standard of Review

A motion for judgment on the pleadings under [Federal Rule of Civil Procedure 12\(c\)](#) is governed by the same standard as a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). *Turbe v. Virgin Islands*, 938 F.2d 427, 428 (3d Cir.1991). A motion to dismiss under 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that the plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

A complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 570). The plausibility standard requires that “the plaintiff plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged” and demands “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). Although a court must accept as true all factual allegations in a complaint, that tenet is “inapplicable to legal conclusions,” and “[a] pleading that

offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ ” *Id.* (citing *Twombly*, 550 U.S. at 555); see also *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008). In evaluating a motion to dismiss, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. See *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.1993).

B. Law of Preemption

*4 The Supremacy Clause states that federal law “shall be the supreme Law of the Land ... and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Implied preemption, the type of preemption at issue in this motion, occurs when it is “impossible for a private party to comply with both state and federal requirements.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995). In other words, when state law requires what federal law forbids, state law must give way. See *Wyeth v. Levine*, 555 U.S. 555, 583, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009).

In *PLIVA v. Mensing*, — U.S. —, 131 S.Ct. 2567, 180 L.Ed.2d 580 (2011) (“*Mensing*”), plaintiffs brought state failure-to-warn claims against several generic manufacturers of the drug *metoclopramide*. *Mensing*, 131 S.Ct. at 2573. Plaintiffs contended that the generic manufacturers failed to change *metoclopramide* labeling to adequately warn of the risk of a severe *neurological disorder* called tardive dyskinesia, in violation of state tort law. *Id.* The state tort laws applicable in the case required manufacturers that are “or should be aware of [their] product's danger to label that product in a way that renders it reasonably safe.” *Id.* at 2573. Consequently, the parties in *Mensing* agreed that manufacturers may be under a duty to change labeling to warn of dangers in order to comply with state law. *Id.*

On the other hand, under the Federal Food, Drug, and Cosmetic Act (“FDCA”) ⁴, the Court found that generic manufacturers have a federal duty of “sameness” to, at all times, insure that the label for the generic drug is identical to the label adorning the corresponding reference-listed drug. *Id.* at 2575. The plaintiffs insisted that there were several ways the generic manufacturers could have provided *metoclopramide* warnings to patients and prescribing physicians. First, plaintiffs argued that FDA's

2011 WL 5903623

“changes-being-effected” (CBE) process allowed generics manufacturers to add or strengthen warnings or precautions. *Id.* The Court, however, disagreed, concluding that the generic manufacturers may use the CBE process only to update their label to match the reference-listed drug's labeling. *Id.* In fact, had a generic manufacturer unilaterally changed its label through the CBE process, it would have been in violation of its duty of sameness. *Id.*

4 Because “all relevant events” in *Mensing* predated the Food and Drug Administration Amendments Act (FDAAA), the Court stated that “it expressed no view on the impact of the 2007 Act.” *Mensing*, 131 S.Ct. at 2574. Because events giving rise to the alleged injuries in this case occurred before and after 2007, this opinion will determine whether the FDAAA has any effect on the preemption analysis.

Second, the plaintiffs argued that the generic metoclopramide manufacturers should have sent “dear health care professional” (also known as “dear doctor”) letters to inform prescribing physicians of new or additional warnings. But again, the Court found this avenue unavailable to generics manufacturers because dear doctor letters are considered by the FDA to be “labeling” and must be “consistent with and not contrary to [the drug's] labeling.” *Id.* at 2576; see also 21 C.F.R. 201.100(d)(1). Therefore, if a generics manufacturer were to send a dear doctor letter containing new or additional warning information, it would violate the duty of sameness and misleadingly suggest a difference between the generic and corresponding branded drug. *Mensing*, 131 S.Ct. at 2576.

*5 Third, the plaintiffs maintained that the generic manufacturers could have proposed stronger labels to the FDA. If FDA agreed, the agency “would have worked with the brand-name manufacturer to create a new label for both the brand-name and the generic drug.” *Id.* The Court, however, concluded that even if a generic manufacturer has a duty to ask the FDA for assistance in changing the label, the request would not satisfy the state law duty. *Id.* at 2578. While the generic manufacturer “might eventually have been able to accomplish under federal law what state law requires,” it could not independently do so. *Id.*

Accordingly, the Court held “that when a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.” *Id.* at 2581. As a result, the *Mensing* plaintiffs' state failure-to-warn

claims were preempted “because it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal law duty to keep the label the same.” *Id.* at 2587.

In this case, the Generic Defendants move for judgment on the pleadings arguing that federal drug regulations preempt all of Plaintiffs' state law claims. Specifically, they contend that the Supreme Court's decision in *Mensing* requires that all state law claims arising from allegedly defective alendronate sodium labeling be dismissed because it is impossible to comply with both federal drug regulations and state tort and statutory duties. Defendants insist that failure to adequately warn is at the heart of each of Plaintiffs' claims, and thus, Defendants conclude that all must be dismissed. The Court will analyze each of Plaintiffs' claims in turn.

C. Application

1. Defective Manufacturing

The defective manufacturing claims must be dismissed. Plaintiffs merely recite the elements for this claim stating that the alendronate sodium “placed in the stream of commerce by Defendants was defective in its manufacture and construction ... in that it deviated from product specification such that it was unreasonably dangerous to an ordinary user or consumer...” (Brown Compl. at ¶ 115; Murphy Compl. at ¶ 111.) But Plaintiffs provide no sort of factual allegations supporting this cause of action. In fact, the complaints are dedicated to alleging that alendronate sodium labeling and formulation (i.e., the design), not the manufacturing, are defective and dangerous. Therefore, Plaintiffs have provided no “more than a sheer possibility” that Generic Defendants defectively manufactured alendronate sodium. *Iqbal*, 129 S.Ct. at 1949. And this “formulaic recitation of the elements of a cause of action will not do.” *Id.* (citing *Twombly*, 550 U.S. at 555). Consequently, the Court need not even reach the question of preemption to conclude that Plaintiffs' defective manufacturing claims must be dismissed.

2. Defective Design

*6 Plaintiffs' claims alleging defective design are preempted. The Supreme Court found that that a generic drug is “designed to be a copy of a reference listed drug” and must be “identical in active ingredients, safety, and efficacy.” *Mensing*, 131 S.Ct. at 2574 n. 2; see also 21 U.S.C. § 355(j)(2)(A) (requirements for an ANDA). To gain admittance to the market, a generic must demonstrate pharmaceutical

2011 WL 5903623

equivalence and bioequivalence. *Id.* at § 355(j)(2)(A)(i)-(iii). Important here, an ANDA must also demonstrate that the “active ingredient of the new drug is the same as that of the listed drug.” *Id.* § 355(j)(2)(A)(ii)(I). Hence, the “duty of sameness” also applies in the context of generic drug design. *Mensing* stands for the principle that a federal duty of sameness arising out of FDA’s regulatory requirements preempts any conflicting tort duty arising under state law. *Mensing*, 131 S.Ct. at 2577–78.

Here, plaintiffs allege that Generic Defendants’ alendronate sodium should have been designed differently to comply with state tort law. Plaintiffs allege that bisphosphonates are a class of drug, of which alendronate sodium is a member, that have a demonstrated link to bone fractures. (Murphy Compl. at ¶ 85.) Thus, generic Fosamax was defectively designed because its active ingredient was “unreasonably dangerous,” “defective,” and that there “was both technical and economic feasibility ... of using an alternative design or formulation.” (*Id.* at ¶¶ 116, 124.) But “[i]t was not lawful under federal law for the Manufacturers to do what state law required of them,” *Mensing* 131 S.Ct. at 2577, because FDA requires generic Fosamax to have the same active ingredient as Fosamax (alendronate sodium). Therefore, Plaintiffs’ design claims are preempted.

3. Failure to Warn

Plaintiffs’ claims of failure to warn are squarely preempted by *Mensing*. The essence of Plaintiffs’ claim is that the alendronate sodium labeling was insufficient and that Generic Defendants failed to satisfy their state law duty to provide accurate warning of the risks of osteonecrosis associated with long-term use. (See, e.g., Murphy Compl. ¶¶ 81, 87, 101, 132; Brown Compl. ¶¶ 129, 130). Necessarily, under Plaintiffs’ theory, the Generic Defendants should have altered the alendronate sodium label to provide new, different, and stronger warnings. According to Plaintiffs, the Generic Defendants had knowledge of the dangerous side effects that could result from long-term alendronate sodium use but gave no warning of these side effects, all while concealing their knowledge of them. (Brown Compl. at ¶ 89, 93.)

But if the Generic Defendants “had independently changed their labels to satisfy their state-law duty, they would have violated federal law.” *Mensing*, 131 S.Ct. at 2578. Federal drug regulations “demand that generic drug labels be the same at all times as the corresponding brand-name drug labels.” *Id.* The Generic Defendants could not alter the labeling without action by the FDA or manufacturer of the

corresponding reference-listed drug.⁵ See *id.* at 2575–76. Plaintiffs’ insistence that Generic Defendants could have brought safety information to Merck misses the point. (See Pl.’s Opp Br. At 16; Doc. No. 296.) Even if Generic Defendants had bypassed the FDA and taken their safety information to Merck directly, they would still be unable to change alendronate sodium labeling themselves. Alteration of the generic label ultimately depends on the actions of a third party, something the Generic Defendants have no control over. See *Mensing*, 131 S.Ct. at 2579 (“We can often imagine that a third party or the Federal Government *might* do something that makes it lawful for a private party to accomplish under federal law what state law requires of it.”). But if “conjectures suffice to prevent” impossibility preemption, “it is unclear when ... the *Supremacy Clause* would have any force.” *Id.* (emphasis in original).

5 Plaintiffs insist that Generic Defendants could have simply removed alendronate sodium from the market. Whatever the merit of that contention, it is essentially a re-argument of *Mensing*. The Supreme Court unequivocally held that failure-to-warn claims against generic drug manufacturers are preempted by federal law. To accept Plaintiffs’ argument that Generic Defendants could have simply stopped marketing alendronate sodium, this Court would have to directly contravene binding law.

*7 Contrary to Plaintiffs’ assertions, the Food and Drug Administration Amendments Act (“FDAAA”) does not change this analysis. First, nothing in FDAAA alters *Mensing*’s analysis of the viability of sending Dear Doctor Letters. Specifically, FDA regulations still require that letters be “consistent with and not contrary to such approved or permitted labeling.” 21 C.F.R. 201.100(d)(1). Thus, Generic Defendants could not, without violating federal law, advise prescribing physicians of warning information different from that provided in the FDA-approved label. Second, FDAAA did not change the fact that the Generic Defendants still cannot unilaterally change their alendronate sodium labels. Under the amendments, once FDA “becomes aware of new safety information” that it “believes should be included in the labeling” of a drug, FDA must notify the reference-listed drug manufacturer. 21 U.S.C. § 355(o)(4)(A). Then the manufacturer must propose a change to the label reflecting the new safety information and the FDA must act upon this proposal. *Id.* § 355(a)(4)(B)-(C). Importantly, under this section, if the manufacturer of the branded drug is still

marketing the drug, as is the case here, FDA must first approach that manufacturer. *Id.* § 355(a)(4)(A). Only if the branded drug is no longer being marketed can the FDA require a generic manufacturer to propose a change. *Id.* And even if the Generic Defendants were to notify FDA of “new safety information,” there is no guarantee that the branded drug’s labeling would ultimately be changed. *See id.* § 355(o)(4)(C). Accordingly, the *Mensing* analysis is not affected by FDAAA because the Generic Manufacturers are still unable to unilaterally change drug labeling “without special permission and assistance, which is dependent on the exercise of judgment by a federal agency.” *Mensing*, 131 S.Ct. at 2581.

Plaintiffs advance several other theories as to why the failure-to-warn claims are not preempted. In their opposition brief, Plaintiffs argue that failure to update generic labeling to reflect labeling changes made to Fosamax are not preempted. Plaintiffs cite FDA Guidance that urges generic manufacturers to promptly implement labeling changes made by the corresponding branded drug. (Pl.’s Ex. F, “FDA, Guidance for Industry: Revising ANDA Labeling Following Revision of RLD Labeling” (2000)). Failure timely update generic labeling, one district court found, affects the *Mensing* preemption analysis. *See Fisher v. Pelstring*, No. 09-cv-00252, 2011 U.S. Dist. LEXIS 116162, 2011 WL 4552464 (D.S.C. Sept. 30, 2011). But in this case, Plaintiffs offer only pure conjecture to support the theory that Generic Defendants failed to promptly update alendronate sodium labeling. In their brief, Plaintiffs point out that defendants in the metoclopramide litigation admitted to lagging behind in label updates and that, in this case, the “failure of some or all Defendants to timely strengthen their warnings ... could have directly resulted in the prescription of Defendants’ alendronate sodium to Plaintiffs.” (Pl.’s Opp. Br. at 11–12; Doc. No. 296.) While there have been several updates to the Fosamax labeling, neither Plaintiffs’ briefing nor pleadings provide any facts to plausibly support the theory that Generic Defendants failed to update their labeling. That a failure to timely update alendronate sodium labeling “could have occurred” is nothing “more than a sheer possibility” and is not “sufficient to state a claim for relief.” *See Iqbal*, 129 S.Ct. at 1949.

*8 Finally, Plaintiffs’ brief advances the theory that Generic Defendants failed to effectively communicate warnings because they did not send Dear Doctor letters “highlighting” or “explaining” warning information. But Plaintiffs did not plead this claim, and instead raise it now only in their briefing. Plaintiffs plead only that the warnings were deficient

for failing to disclose of risks not already in alendronate sodium labeling. In other words, Plaintiffs’ pleadings only claim that the drug’s labeling was insufficient in substance; they do not “give fair notice” of any claim that what was in the labeling was sufficient but needed to be more effectively communicated. (Brown Compl. at ¶¶ 71–89.) Indeed, Plaintiffs’ complaints are entirely devoted to asserting that the Generic Defendants knew of the risk of osteonecrosis and bone damage but failed to include such information in alendronate sodium labeling. Thus, the gravamen of the failure-to-warn claims is that the alendronate sodium labeling should have been changed to include stronger warnings—a claim that is plainly preempted by federal law under *Mensing*.

4. Negligence

Plaintiffs’ negligence claims are also preempted. Plaintiffs allege that the Generic Defendants “failed to exercise ordinary care in the design, formulation, manufacture, sale, testing, quality assurance, quality control, labeling, marketing, promotion and distribution” of alendronate sodium. (Brown Compl. at ¶ 136.) First, an allegation that the labeling, marketing, and promotion failed to live up to a standard of ordinary care is preempted by *Mensing* for the reasons explained in the Court’s analysis of the failure-to-warn claims. This aspect of the negligence claim necessarily supposes that state law required Generic Defendants to have altered alendronate sodium labeling in order to conform to a standard of ordinary care, but *Mensing* held that because federal law imposes a “duty to keep the label the same,” it is impossible for manufacturers “to comply with both their state-law duty” and federal law. *Mensing*, 131 S.Ct. at 2587.

Second, Plaintiffs’ allegation of failure to exercise ordinary care in the design, testing, and manufacture fail for the reasons explain in this opinion’s analysis of the design and manufacturing defect claim sections. There is no factual support for the manufacturing defect claim. Additionally, *Mensing* demonstrates that a state tort duty requiring generic manufacturers to violate a federal duty of sameness is preempted. Here, Plaintiffs’ negligence claim necessarily alleges that Generic Defendants should have changed the active ingredient in its generic Fosomax, but such action is barred by FDA’s ANDA requirements. Thus, this state law claim is preempted.

5. Breach of Implied Warranty

The breach of implied warranty claims are preempted. Plaintiffs state that Generic Defendants “impliedly warranted

2011 WL 5903623

[alendronate sodium] to be of merchantable quality, fitness, and safe for such use” but that the drug “was not of merchantable quality” because it was “unreasonably dangerous.” (Brown Compl. at ¶¶ 150–52.) Because this cause of action is reliant on the argument that alendronate sodium should have been designed differently, it fails for the reasons explained in the Court’s analysis of the design defect claims. Pursuant to FDA’s equivalence requirements of generic drugs, the Generic Defendants could not have changed the generic drug’s active ingredient to be different from the active ingredient in Fosamax. But the breach of implied warranty claim necessarily alleges that manufacturers should have changed alendronate sodium’s design. This would be in violation of the federal duty of sameness, and therefore, this claim is preempted.

6. Breach of Express Warranty, Fraud, Misrepresentation, Failure to Conform to Representation, Negligent Misrepresentation, and Violation of Consumer Protection Statutes

*9 These claims are preempted because the gravamen of these allegations is the insufficiency of alendronate sodium labeling. Each of these claims alleges that the Generic Defendants made false statements or representations that alendronate sodium was safe and effective for the treatment of osteoporosis. Throughout their complaints, Plaintiffs attack the accuracy of the alendronate sodium labeling. “Defendants’ representations regarding the character and quality of [alendronate sodium] were untrue.” (Brown Compl. at ¶ 159.) Further, Plaintiffs state that “Defendants describe and represent that their Product has characteristics that simply do not conform to reality.” (*Id.* at ¶ 143.) The claims plead that the Generic Defendants should have changed or omitted the allegedly inaccurate or insufficient labeling information. *See Fisher v. Pelstring*, No. 09–cv–0252, 2011 U.S. Dist. LEXIS 116162, *14, 2011 WL 4552464 (D. S.C. September 30, 2011) (finding that plaintiff’s breach of express warranty claim against generic drug manufacturer was preempted by *Mensing*).

But federal drug regulations forbid a generics manufacturer from unilaterally changing, omitting, or strengthening drug labeling. *See Mensing*, 131 S.Ct. at 2578 (“[S]tate law imposed on the Manufacturers a duty to attach a safer label to their generic [drug]. Federal law however, demanded that generic drug labels be the same at all times as the corresponding brand-name drug labels.”). Here, the Generic Defendants under federal law cannot unilaterally change or update their alendronate sodium labels and simultaneously conform to a state law duty that requires them to change those labels. Therefore, the federal duty of sameness conflicts with and consequently preempts the Plaintiffs’ claims of breach of express warranty, fraud, misrepresentation, failure to conform to representation, negligent misrepresentation, and violation of consumer protection statutes.

7. Plaintiffs’ Remaining Claims

Because judgment on the pleadings is granted in favor of Generic Defendants on Plaintiffs’ state tort claims, including fraud and intentional wrongdoing, Plaintiffs’ requests for restitution and claims of loss of consortium must also be dismissed. Both restitution and loss of consortium are dependent on the survival of Plaintiffs’ state tort claims. However, *Mensing* preempts the state tort claims against Generic Defendants. Thus, Plaintiffs will not be able to recover restitution from Generic Defendants absent claims of fraud or intentional wrongdoing, nor can loss of consortium survive as a derivative claim.

III. CONCLUSION

For the reasons above, the Court grants the motion for judgment on the pleadings in favor of Generic Defendants as to Plaintiffs’ state law claims. The Court denies the motion for judgment on the pleadings by the Watson Defendants. An appropriate order is filed herewith.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5903623

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 28

2015 WL 3619584

2015 WL 3619584
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

In re GENERAL MOTORS LLC
IGNITION SWITCH LITIGATION.
This Document Relates to all Actions.

Nos. 14–MD–2543 (JMF), 14–MC–2543 (JMF).
|
Signed June 10, 2015.

OPINION AND ORDER

JESSE M. FURMAN, District Judge.

*1 This opinion addresses a thorny—and somewhat unsettled—issue in multi-district litigation (“MDL”): the effect of a consolidated complaint, brought on behalf of a putative class, on the underlying complaints of those not named in the consolidated complaint. It arises in the context of an MDL pending before this Court, relating to defects in the ignition switches and other features of certain General Motors vehicles and associated recalls. In complex MDLs like this one, involving hundreds of individual complaints and thousands of plaintiffs, consolidated complaints can be critical case management tools, helping to organize and clarify what claims and defenses are being pursued, thereby enabling the parties to conduct discovery more efficiently and providing an effective vehicle for motion practice with respect to common issues of law and fact. At the same time, however, a court presiding over an MDL must take steps to ensure that efficiency does not trump fundamental fairness and that the desire for certainty does not deprive any individual party of substantive rights. Having recently entered an Order clarifying the effect of consolidated complaints (the “Consolidated Complaints”) filed in this MDL on individual complaints (Order No. 50 (14–MD–2543 Docket No. 875), attached as Exhibit 1), the Court provides this Opinion to describe the background leading up to, and rationale behind, that Order—in the hopes that doing so will provide the parties and other courts presiding over complex MDLs with helpful guidance.¹

¹ This Opinion is intended to explain and supplement Order No. 50; it is not intended to modify or alter Order No. 50 in any way.

BACKGROUND

On June 12, 2014, the Judicial Panel on Multidistrict Litigation (the “JPML”) issued an order transferring fifteen actions to this Court for “coordinated or consolidated pretrial proceedings” pursuant to [Title 28, United States Code, Section 1407](#). (14–MD–2543 Docket No. 1). All actions pending before the JPML at the time of its initial Order asserted economic loss claims against General Motors, LLC (“New GM”) based on an ignition switch defect in certain General Motors vehicles, one that “causes the vehicle’s ignition switch to move unintentionally from the ‘run’ position to the ‘accessory’ or ‘off’ position, resulting in a loss of power, vehicle speed control, and braking, as well as a failure of the vehicle’s airbags to deploy.” (*Id.* at 1–2). Since then, the JPML has expanded the scope of actions transferred to this MDL to encompass personal injury and wrongful death claims (*see* Transfer Order (14–MD–2543 Docket No. 505) 1 n. 1), as well as economic loss claims based on both ignition switch defects and other alleged defects, on the theory that “there will be discovery that is common to the MDL and to” such actions (Transfer Order (14–MD–2543 Docket No. 519) 1). To date, the JPML has issued forty-seven transfer orders; the total number of cases in the MDL, including cases directly filed in this Court, is now up to 210, brought by several thousand Plaintiffs. New cases continue to be transferred to and filed in the MDL nearly every week.

*2 Complicating matters, when the JPML created this MDL, there was parallel litigation occurring before the United States Bankruptcy Court for the Southern District of New York arising out of the 2009 bankruptcy of the General Motors Corporation (now called Motors Liquidation Corporation) (“Old GM”). Specifically, New GM had filed several motions to enforce before Bankruptcy Judge Robert E. Gerber, seeking to enforce the terms of a Sale Order and Injunction entered on July 5, 2009 (the “Sale Order”), pursuant to which New GM purchased the majority of the assets of Old GM “free and clear” of many of Old GM’s liabilities. New GM argued that the Sale Order barred many of the claims being pursued in this MDL, including any claims against New GM based on successor liability. (*See* 09–BR–50026 (Bankr.S.D.N.Y.) Docket Nos. 2968, 12620). (On April 15, 2015, Judge Gerber ruled on New GM’s motions, holding that the Sale Order

2015 WL 3619584

does enjoin certain Plaintiffs' claims in their entirety and other Plaintiffs' claims to the extent that they rely on acts or conduct by Old GM. *See In re Motors Liquidation Co.*, 529 B.R. 510, 598 (Bankr.S.D.N.Y.2015). On June 1, 2015, Judge Gerber entered judgment and an order, pursuant to 28 U.S.C. § 158(d), and Fed. R. Bankr.P. 8006(e), certifying the judgment for direct appeal to the United States Court of Appeals for the Second Circuit. (09–BR–50026 (Bankr.S.D.N.Y.) Docket Nos. 13177, 13178). To date, at least three notices of appeal have been filed in connection with the judgment. (09–BR–50026 (Bankr.S.D.N.Y.) Docket Nos. 13179, 13180, 13185). Others are likely to follow.)

In that context, the Court entered Order No. 7 on August 7, 2014 (14–MD–2543 Docket No. 215), indicating that Lead Counsel should “review all existing complaints ... and file a consolidated or master complaint with claims on behalf of the class or classes [of economic loss Plaintiffs], as appropriate.” (*Id.* at 2–3).² The Court explained that “having a consolidated or master complaint sooner rather than later would streamline and clarify the claims and help eliminate those that are duplicative, obsolete, or unreflective of developing facts or current law.” (*Id.* at 3). In addition, the Court reasoned that having a consolidated or master complaint would not only facilitate litigation in this Court, but would also help in the management and adjudication of New GM's motions to enforce in the Bankruptcy Court. (*Id.*). In a subsequent Order (Order No. 8), entered eight days later, the Court set a schedule for the filing of a consolidated complaint, ordering that Lead Counsel for Plaintiffs make available to all MDL Plaintiffs a draft version of the complaint within forty-five days and that Lead Counsel file a final version within sixty days. (Order No. 8 (14–MD–2543 Docket No. 249) 5). The Court provided that any Plaintiff could file objections to the consolidated complaint, and ordered that any such objections must be filed within seven days of the filing of the complaint. (*Id.*).

² In Order No. 7, the Court expressed its view that consolidated or master complaints would be helpful only with respect to economic loss claims and complaints, and would not be “necessary or prudent with respect to personal injury and wrongful death claims” given, among other things, the likelihood of case-specific factual and legal issues. (Order No. 7, at 2). Accordingly, this Opinion and Order—like the Consolidated Complaints themselves—pertains only to economic loss claims and complaints.

*3 On October 14, 2014, Lead Counsel filed two Consolidated Complaints. (14–MD–2543 Docket Nos. 345, 347 (*errata* at 14–MD–2543 Docket No. 379)). The first—which (excluding counsels' signatures) is 649 pages long—is based on purchases or leases of General Motors vehicles before July 11, 2009, the effective date of the Sale Order (the “Pre-Sale Complaint”). (Consol. Class Action Compl. Against New GM Recalled Vehicles Manufactured By Old GM & Purchased Before July 11, 2009 (Docket No. 347)). The second, which is 686 pages long, is based on purchases or leases of General Motors vehicles after July 11, 2009 (the “Post-Sale Complaint”). (Consol. Compl. Concerning GM-Branded Vehicles Acquired July 11, 2009 Or Later (Docket No. 345)). Naturally, but significantly, the Consolidated Complaints did not name as Plaintiffs every single Plaintiff who had filed an economic loss claim in the MDL. Instead, each Complaint named only a subset of the economic loss Plaintiffs in this MDL as proposed class representatives (*see* Pre-Sale Compl. 9–45; Post-Sale Compl. 8–52), and indicated that it was brought on behalf of proposed nationwide classes of all persons who either bought or leased certain General Motors vehicles within specified time periods. (Pre-Sale Compl. 1; Post-Sale Compl. 7–8). Both Complaints also included a version of the following provision:

This pleading neither waives nor dismisses any claims for relief against any defendant not included in this pleading that are asserted by any other plaintiffs in actions that have been or will be made part of this MDL proceeding, except by operation of the class notice and (with respect to any Rule 23(b)(3) class) any opt-out provisions on claims or common questions asserted in this Complaint and certified by this Court.

(Post-Sale Compl. 1; *see* Pre-Sale Compl. 2 (similar)). No Plaintiffs objected to the Consolidated Complaints after their filing.

In advance of the status conference held on November 6, 2014, the parties indicated in a joint agenda letter that New GM took issue with the above-quoted language in the Consolidated Complaints, on the theory that “any purported

2015 WL 3619584

reservation of claims” was “inconsistent with and improper under this Court's Orders.” (Joint Agenda Ltr. (Docket No. 376) at 4). At the conference, the Court noted that it had “come to [its] attention after the two consolidated complaints were filed [that] there is some ambiguity in the MDL world or MDL context with respect to what role the ‘consolidated complaint’ plays ... that is to say, whether these essentially supersede the individual complaints, at least until the time that remand comes into play, as would be the case in ordinary litigation with an amended complaint, or if [in] essence [they serve] some sort of administrative role more specific to the MDL context.” (Nov. 6, 2014 Hr'g Tr. (Docket No. 414) 106). Lead Counsel agreed that the Consolidated Complaints were intended to have superseding rather than administrative effect—a distinction discussed below—and that they had reached a tentative agreement with New GM that “the complaints that are not in the consolidated complaint would be deemed dismissed without prejudice, and that [Plaintiffs] would be giv[en] a ... deadline for filing any amendments [Plaintiffs] want to make.” (*Id.* at 107). The Court directed the parties to continue meeting and conferring about the issue—and to consider whether the Court should give all Plaintiffs an opportunity to be heard with respect to the Consolidated Complaints' effect on their underlying complaints. (*Id.* at 108–09).

*4 The Court revisited the issue at the next status conference, held on December 15, 2014. (Dec. 15, 2014 Hr'g Tr. (14–MD–2543 Docket No. 480) 16–39). Three days later, Lead Counsel and New GM submitted a joint proposed order regarding the Consolidated Complaints' effect on the underlying complaints; the Court entered the Order, designated Order No. 29, later that day. (Order No. 29 (14–MD–2543 Docket No. 477); Defs.' Resp. Opp'n Elliott, Sesay, & Bledsoe Pls.' Mot. Reconsideration MDL Order No. 29 (14–MD–2543 Docket No. 554) (“Defs.' Resp.”), Ex. A). Order No. 29 provides, in relevant part, as follows:

[A]ny economic loss allegations, claims, and defendant(s) not included in the Consolidated Complaints are hereby dismissed without prejudice (1) upon the effective date of this Order for complaints already transferred to or filed in MDL 2543, and (2) 60 days following the date of transfer or filing for complaints that are transferred to or filed in MDL 2543 after the date of this Order but prior to June 4, 2015.... If any plaintiff whose claims are dismissed pursuant to this paragraph objects to dismissal of his or her allegations, claims, or any defendant(s) not named in the Consolidated Complaints, then such plaintiff may seek leave with the

Court to reinstate his or her allegations or claims or the addition of such dismissed defendant(s) upon a showing of good cause within 14 days of the dismissal without prejudice.

(Order No. 29 at 2–3). Attached to the Order as Exhibit A was a list of all the individual cases in the MDL asserting only economic loss claims (to be dismissed without prejudice in their entirety) or asserting mixed economic loss and personal injury claims (with respect to which the economic loss claims would be dismissed without prejudice).

The Order gave Lead Counsel until June 4, 2015 (since extended to June 12, 2015 (Apr. 24, 2015 Hr'g Tr. (Docket No. 944) 27)), to seek leave of Court to amend the Consolidated Complaints. (Order No. 29 at 3). Significantly, the paragraph immediately after the one quoted above also provided that “[a]ny claims and defendant(s) that are dismissed *without* prejudice and reinstated pursuant to the preceding paragraph, but which are not included in any amendment of the Consolidated Complaints filed by June [12], 2015, shall be deemed dismissed *with* prejudice as of the later of (a) June [12], 2015 or (b) 90 days following the date the complaint is transferred to or filed in MDL 2543.” (*Id.* (emphasis added)). Finally, “[f]or any complaint transferred to or filed in MDL 2543 after June [12], 2015 (a ‘Post-June [12], 2015 Complaint’),” Lead Counsel were granted sixty days following the transfer or filing to seek leave to amend the Consolidated Complaints to add factual matter, claims, or defendants included in the underlying complaint. (*Id.* at 3–4). If Lead Counsel did not seek such leave to amend, or if the requested amendment was denied by the Court, “then any allegations, claims, and/or defendant(s) in the Post-June [12], 2015 Complaint not included in the Consolidated Complaints shall be dismissed *with* prejudice at the expiration of the 60-day period or the Court's order denying the amendment, whichever occurs first.” (*Id.* at 4 (emphasis added)).

*5 On January 2, 2015, Gary Peller—counsel for Plaintiffs in *Elliott, et al. v. General Motors LLC, et al.*, 14–CV–8382; *Sesay, et al. v. General Motors LLC, et al.*, 14–CV–6018; and *Bledsoe, et al. v. General Motors LLC, et al.*, 14–CV–7631—filed a motion for reconsideration of Order No. 29 and, in the alternative, an objection to dismissal of his clients' claims pursuant to the procedures set forth in that Order. (14–MD–2543 Docket Nos. 491, 494). Mr. Peller argued, among other things, that (1) dismissal of individual Plaintiffs' claims pursuant to Order No. 29 threatened their due process rights (Mem. Law Supp. Reconsideration Order No. 29 *Elliott, Sesay, & Bledsoe Pls.* (14–MD–2543 Docket

2015 WL 3619584

No. 502) (“Peller Mem”) 4, 19); and (2) that most MDL courts do not treat consolidated complaints as superseding individual complaints and, in any event, do not dismiss claims of those plaintiffs not named in the consolidated complaints (*id.* at 20–24). Mr. Peller also noted that, because the parties’ joint proposed order entered by the Court had been submitted by Lead Counsel, not by Mr. Peller, and—pursuant to the Court’s Individual Rules and Practices in Civil Cases, as well as Section VII of Order No. 8—had not been submitted on ECF, he had not had an opportunity to be heard on its contents. (*Id.* at 17 n. 34). Notably, no other Plaintiffs objected to dismissal of their cases or claims.

The Court heard from the parties and Mr. Peller at the status conference held on March 13, 2015. (*See* March 13 Hr’g Tr. (14–MD–2543 Docket No. 686) 61–83). Following discussion of Mr. Peller’s motion and objection, the Court reinstated the *Elliott*, *Sesay*, and *Bledsoe* Plaintiffs’ claims and indicated that it planned to enter an amended order modifying and clarifying the effects of the Consolidated Complaints on underlying cases, effectively granting Mr. Peller’s motion for reconsideration. (*Id.*.; Order No. 39 (14–MD–2543 Docket No. 671) § VII). The Court directed the parties, in consultation with Mr. Peller, to submit an agreed-upon proposed amended order or competing orders (*id.*), which the parties did three weeks later. (*See* 14–MD–2543 Docket Nos. 809, 810). After reviewing the parties’ submissions, the Court drafted its own proposed order—incorporating aspects of both sides’ proposals—and gave the parties an opportunity to be heard with respect to the proposed order at the status conference held on April 24, 2015. (14–MD–2543 Docket No. 855). After the parties indicated that they had no objection to (or suggestions for) the proposed order (Apr. 24, 2015 Hr’g Tr. 29) the Court entered an amended version of Order No. 29—namely, Order No. 50—later that day. (14–MD–2543 Docket No. 875).

Order No. 50 preserves Order No. 29 in one respect: It provides that any economic loss claims and complaints filed in the MDL as of the date of Order No. 29 that had been dismissed without prejudice pursuant to that Order (that is, all underlying economic loss claims and complaints except for the *Elliott*, *Bledsoe*, and *Sesay* complaints, which had been reinstated on March 13, 2015) remain dismissed. (*Id.* ¶ 6). Additionally, the Order establishes a system whereby individual economic loss complaints are dismissed without prejudice within a certain time after their direct filing in, or transfer to, the MDL, after Plaintiffs are granted an opportunity to object. Finally, and significantly, the Order

clarifies that its provisions “do not extinguish the claims of individual plaintiffs in the event class certification is denied, or the presentation of claims by individual plaintiffs who exclude themselves from any class that is certified, under procedures to be prescribed by the Court (after hearing from the parties) in connection with its class certification determinations.” (*Id.* ¶ 3). The Order further clarifies that all dismissals pursuant to the procedures of the Order are without prejudice, and tolls the statute of limitations for all Plaintiffs until the class certification phase. Like Order No. 29, therefore, Order No. 50 is intended to facilitate management of the MDL by clarifying that the Consolidated Complaints do supersede individual complaints for purposes of pretrial proceedings (including motion practice) and ensuring that the parties do not have to file or litigate motions in hundreds of individual cases. At the same time, Order No. 50 is intended to ensure that the administrative convenience provided by the Consolidated Complaints does not come at the expense of the substantive rights of any Plaintiffs not named in the Complaints.

*6 When the Court granted Mr. Peller’s motion for reconsideration of Order No. 29 at the March 13, 2015 status conference, it indicated it might issue a written opinion supplementing its oral reasons for granting the motion, on the theory that explaining the process and rationale behind entry of what became Order No. 50 might prove useful to the parties in this MDL and to courts and parties involved in other complex civil litigation. (*See* Order No. 39 § VII). This is that opinion.

DISCUSSION

Title 28, United States Code, Section 1407(a), enacted in 1968, provides that “when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(a). Such transfer is warranted when the JPML finds that it would “be for the convenience of parties and witnesses and ... promote the just and efficient conduct of such actions.” *Id.* Promoting “the just and efficient conduct of such actions,” however, is not necessarily an easy task, especially when, as here, MDLs involve hundreds of independent actions brought by thousands of plaintiffs. “For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to

2015 WL 3619584

accomplish.” *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1231 (9th Cir.2006) (hereinafter, “*In re PPA*”). A district court must be afforded “broad discretion to administer the [MDL] proceeding as a whole,” because “multidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts.” *Id.* at 1232.

Even as it engages in “macro” judicial management, an MDL court must not lose sight of the fact that an MDL is comprised of individual actions brought on behalf of individual litigants, each with his or her (or its) own—sometimes unique—rights and interests. Moreover, for at least some actions and litigants, the MDL will serve as a way station rather than a final destination. That is, although many MDLs ultimately result in some form of a global settlement, not all do; and those that do settle often include cases with unique issues or claims that are not resolved by the global settlement or plaintiffs that are not within the scope of, or opt out of, the certified class or classes. Significantly, pursuant to the terms of Section 1407, if any case or claim remains unresolved at the conclusion of pre-trial proceedings, it must be remanded back to the federal court from which it was transferred (absent a waiver). Indeed, in the seminal case *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 31, 40, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), the Supreme Court re-affirmed the JPML's obligation, under Section 1407, to remand any cases not terminated before the conclusion of pre-trial proceedings—and, in doing so, invalidated a JPML rule permitting transferee courts to assign a member case to itself for trial. It follows that there is a fundamental tension embedded in MDLs—between, on the one hand, facilitating effective motion practice, discovery, and resolution of *all* claims present in the MDL while, on the other hand, acknowledging (for purposes of eventual remand and otherwise) the individual character of all of the actions before an MDL Court. Nowhere is that tension more apparent than in MDL courts' different treatment of consolidated or master complaints.

*7 Consolidated or master complaints are not specifically mentioned in the Federal Rules of Civil Procedure. Nevertheless, courts have interpreted Rule 42(a), which authorizes district courts to consolidate actions and to make such orders “as may tend to avoid unnecessary costs or delay,” to authorize the filing of such complaints. See *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141 (E.D.La.2002) (citing *Katz v. Realty Equities Corp. of N. Y.*, 521 F.2d 1354 (2d Cir.1975), and other cases). MDL courts differ, however, in the treatment they afford to consolidated complaints. Some

judges have elected to treat consolidated complaints merely as an “administrative summary” of the claims to be presented, without an independent legal existence or effect. See *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590 (6th Cir.2013) (noting that in many MDLs, “the master complaint is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs”). “When plaintiffs file a master complaint of this variety, each individual complaint retains its separate legal existence.” *Id.*; see also *In re Nuvaring Prods. Liab. Litig.*, No. 08–MD–1964 (RWS), 2009 WL 2425391, at *2 (E.D.Mo. Aug.6, 2009) (concluding that “the filing of the master consolidated complaint in this action was simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation,” and was not intended to be the subject of Rule 12(b) motion practice). Courts have adopted such an approach based on the concern that “a master complaint, if given the status of a traditional complaint, could be used to circumvent the remand requirement of 28 U.S.C. § 1407 by substituting itself for all individual actions filed in the MDL and thereby frustrate the intended effect of that statute as recognized in *[Lexecon]*.” *In re Propulsid*, 208 F.R.D. at 141.

Alternatively, as the Supreme Court recently noted, parties in an MDL “may elect to file a ‘master complaint’ and a corresponding ‘consolidated answer,’ which supersede prior individual pleadings.” *Gelboim v. Bank of Am. Corp.*, — U.S. —, — n. 3, 135 S.Ct. 897, 904 n. 3, 190 L.Ed.2d 789 (2015). “In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings.” *Id.* Under such an approach, the court treats the consolidated pleadings as “legally operative” and—should there be motion practice—may treat them as dispositive with respect to the common legal and factual issues that motivated the underlying cases' transfer to the MDL in the first instance. See *In re LIBOR–Based Fin. Instruments Antitrust Litig.*, 27 F.Supp.3d 447, 484 (S.D.N.Y.2014). Particularly in large—and ever-expanding—MDLs like the one before this Court, the benefits of treating consolidated complaints as “superseding” are clear: It assists in “streamlining the litigation,” *In re Global Crossing, Ltd. Sec. Litig.*, No. 02–CV–910 (GEL), 2004 WL 2584874, at *3 (S.D.N.Y. Nov.12, 2004); “controls the course and scope of the proceedings,” *In re Katrina Canal Breaches Litig.*, 309 F. App'x 836, 838 (5th Cir.2009) (per curiam) (internal quotation marks omitted); and facilitates efficient motion practice, see generally *In re WorldCom, Inc. Sec. Litig.*, No. 03–CV4498 (DLC), 2005 WL 2403856, at *3 (S.D.N.Y. Sept.30, 2005).

*8 Like snowflakes, no two MDLs are exactly alike and, no doubt, whether to require the filing of a consolidated complaint and, if so, whether to treat such a complaint as “administrative” or “superseding” will depend on the particulars of a given MDL. Thus, it is critical that the parties and the court make clear what species of pleadings are being used. *Cf. Refrigerant Compressors Antitrust Litig.*, 731 F.3d at 591 (“The use of one term to describe two different types of pleadings leads to confusion.... Plaintiffs often file something labeled a ‘master complaint’ without saying whether they mean to file an operative pleading or an administrative summary, prompting satellite litigation about the status of the documents submitted to the court”). Where a consolidated complaint is intended to be legally operative, it is also critical for the court to make clear precisely what effect the filing of the consolidated complaint has on the underlying complaints so that the parties can take whatever steps are necessary to protect and preserve their substantive rights. To streamline the litigation and eliminate duplicative claims and complaints, dismissal of the underlying complaints may be the preferred approach. *See, e.g., Global Crossing*, 2004 WL 2584874, at *3 (“[G]iven the desirability of streamlining the litigation and eliminating duplicative cases that serve no purpose in light of the class actions being vigorously pursued by Lead Plaintiffs ... the Court has put plaintiffs and their attorneys on clear notice that they must advise the Court, within a specified time limit, whether they object to consolidation and/or whether, after consolidation is ordered, they continue to see a rationale for pursuing a separate complaint, on pain of dismissal. The vast majority of plaintiffs have elected to withdraw their complaints in accordance with the consolidation order, and have consented to dismissal; a handful have timely stated reasons why their complaints, though consolidated with the principal action for pretrial purposes, should not be dismissed.”); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, 664 F.Supp.2d 752, 770 (E.D.Mich.2009) (“*Ford SCDS*”) (dismissing “claims and defendants not enumerated” in the consolidated complaint). But a court must make clear whether (and when) dismissal is *without* prejudice or *with* prejudice.

The former option—dismissal without prejudice—helps ensure that the rights and interests of individual parties will not be inadvertently compromised. After all, an individual plaintiff can always seek to reinstate his or her lawsuit depending on what happens in the MDL (in particular, depending on what happens in the class certification phase of the MDL). At the same time, dismissing without prejudice

poses some risk to the principles of efficiency, certainty, and finality, as the parties in an underlying case could, in theory, sit idly by while discovery and motion practice take place with respect to the consolidated complaint only to reemerge and demand to start at (or near) square one. *See Ford SCDS*, 664 F.Supp.2d at 769 (concluding that dismissal of underlying complaints with prejudice was appropriate because “[a]llowing plaintiffs to silently pursue claims and parties not included in the [master complaint] poses substantial uncertainty in these proceedings, ... contrary to the purpose of the MDL process”). By contrast, dismissal with prejudice provides more certainty and closure. But it is plainly in some tension with the proposition that consolidation pursuant to Section 1407 is for “pre-trial” purposes only. *Cf. Refrigerant Compressors Antitrust Litig.*, 731 F.3d at 592 (holding that the filing of a consolidated complaint had the effect of merging the consolidated actions, but only for “the duration of the pretrial proceedings,” and emphasizing that “when the pretrial phase ends and cases not yet terminated return to their originating courts for trial [under Section 1407], the plaintiffs’ actions [would] resume their separate identities”).

*9 Further, if premature, dismissal with prejudice can also jeopardize an individual party’s rights and interests. For example, if an underlying complaint is dismissed before the class certification stage, the plaintiff in that action cannot know whether he or she would want to opt out of a class (assuming a class is even ultimately certified and that the plaintiff would fall within the scope of the class) and go it alone, leaving him or her in the difficult position of not knowing whether to take steps to protect his or her rights. Additionally, a dismissed party’s claims are arguably extinguished, potentially precluding any recovery even in the event of a settlement. *See, e.g., Samuels v. N. Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir.1991) (“A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action.”) (internal quotation marks omitted); *Petition of Shavit*, 197 B.R. 763, 768 (Bankr.S.D.N.Y.1996) (noting that “a dismissal with prejudice is a complete adjudication on the merits, with *res judicata* effect,” and accordingly “operates to bar another action on the claim that was so dismissed” (internal quotation marks omitted)). Given that dismissal with prejudice is “a harsh remedy and is appropriate only in extreme situations,” *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir.1996), it should not be undertaken lightly or prematurely.

2015 WL 3619584

Upon reflection, those were the problems created by this Court's original order regarding the effect of the Consolidated Complaints—Order No. 29. As discussed above, that Order provided that, upon the filing of amended Consolidated Complaints by Lead Counsel (now due on June 12, 2015), any “claims and defendant(s)” reinstated pursuant to the procedures set forth in the Order but not included in the amended Consolidated Complaints would be dismissed *with* prejudice. (Order No. 29 at 3).³ The Order, however, provided no formal means by which a Plaintiff whose claims were left out of the amended Consolidated Complaints could object to Lead Counsel's omission, let alone object to dismissal of his or claims. Equally important, because such dismissal was *with* prejudice, the Order had the unintended effect of potentially compromising the substantive rights of Plaintiffs whose claims were not included in the amended Consolidated Complaints. That is, by virtue of being left out of the amended Consolidated Complaints, a Plaintiff might have been barred from pursuing his or her claims if a class was not ultimately certified; precluded from participating in—or recovering as part of—any class if ultimately certified; and prevented from opting out of a class and pursuing his or her claims separately if a class were ultimately certified. In essence, therefore, Order No. 29 inadvertently left the fate of certain economic loss Plaintiffs in the hands of Lead Counsel: If Lead Counsel named a Plaintiff or included that Plaintiff's claims in the amended Consolidated Complaint, then that Plaintiff's rights would be protected and pursued; if Lead Counsel did not, then that Plaintiff's rights might be extinguished.⁴

³ Strictly speaking, Order No. 29 was silent with respect to the ultimate fate of complaints and claims that had been dismissed without prejudice but *not* reinstated. It stands to reason that those complaints and claims would not have been treated more favorably than complaints and claims that had been reinstated upon a showing of good cause, so presumably they too would have been dismissed with prejudice. The Court need not resolve the issue, however, as Order No. 29 has been superseded by Order No. 50.

⁴ The same was true of Order No. 29 with respect to Plaintiffs whose complaints are transferred to this MDL after the June amendment deadline: If Lead Counsel sought leave to amend the Consolidated Complaints again to include the claims of those Plaintiffs, then their rights would be preserved;

if not, or if the proposed amendment was denied by the Court, then any claims brought in their individual complaints would be dismissed with prejudice. (Order No. 29 at 3–4).

*10 One solution to those problems, of course, would have been to require Lead Counsel to name every individual Plaintiff in the amended Consolidated Complaints or to include every underlying claim or theory in the amended Consolidated Complaints. *See, e.g., In re Mortg. Elec. Registration Sys. (MERS) Litig.*, No. 09–MD–2119 (JAT), 2011 WL 251453, at *11 (D.Ariz. Jan.25, 2011) (directing the plaintiffs, “if they choose to seek leave to amend, to jointly file a proposed consolidated amended complaint together with the various plaintiffs whose actions are currently joined to this MDL”); *see In re Mortg. Elec. Registration Sys. (MERS) Litig.*, 09–MD–2119 (D .Ariz.) Docket No. 1424, Ex. 3 (naming, in the consolidated amended complaint (“C AC”), what appear to be most if not all of the plaintiffs currently in the MDL); *see also In re Mortg. Elec. Registration Sys. (MERS) Litig.*, No. 09–MD–2119 (JAT), 2011 WL 4550189, at *1 (D.Ariz. Oct.3, 2011) (noting that defendants' motions sought “to dismiss all seventy-two member cases which were directed to join the CAC”). In the Court's view, however, that “solution” would have caused even bigger problems. For one thing, it would run counter to the well-established principle that plaintiffs (here, represented by Lead Counsel) are “the masters of their complaints.” *Standard Fire Ins. Co. v. Knowles*, —U.S. —, —, 133 S.Ct. 1345, 1350, 185 L.Ed.2d 439 (2013). Additionally, given the number of parties and the complexity of the issues in this MDL, such a requirement would have resulted in amended Consolidated Complaints that were significantly more unwieldy and complex than the existing Consolidated Complaints (which—at 649 and 686 pages—are already pushing the envelope on the “short and plain statement” requirements of [Rule 8 of the Federal Rules of Civil Procedure](#)). Finally, and perhaps most significantly, although requiring Lead Counsel to file “kitchen sink” amended Consolidated Complaints might protect the rights of all individual Plaintiffs, doing so would significantly compromise the efficiency that the MDL process was intended to provide. Among other things, it would inevitably require litigation of claims or theories that might not ultimately be pursued—and by lawyers not necessarily committed to those claims or theories to boot.

Instead of taking that suboptimal approach, the Court tried to strike a more appropriate balance in the Order that superseded Order No. 29—namely, Order No. 50. Like Order No. 29, Order No. 50 makes clear that the Consolidated Complaints

2015 WL 3619584

(and the anticipated amended Consolidated Complaints) are legally operative—that is, that they are intended to be superseding rather than administrative. (Order No. 50 ¶ 5). Additionally, in the interests of efficiency and certainty, Order No. 50 reaffirms that any complaint or claim that was previously dismissed and not reinstated pursuant to the procedure set forth in Order No. 29 remains dismissed. (*Id.* ¶ 6). Unlike Order No. 29, however, Order No. 50 provides that “all dismissals are, unless and until the Court orders otherwise, without prejudice.” (*Id.* at 1). It also gives Plaintiffs whose claims are not included in the amended Consolidated Complaints an opportunity to be heard by Lead Counsel and to object to dismissal of their claims. (*See id.* at 1; *see also id.* ¶ 8). And finally, in order “to protect the due process rights of economic loss plaintiffs,” it expressly provides that “dismissal of their individual complaints in order to streamline these proceedings does not preclude such plaintiffs from (a) recovering as a member of any class that might be certified or (b) pursuing claims, should a plaintiff choose to do so, if no class is certified or if the plaintiff opts out of a class that is certified.” (*Id.* at 1; *see also id.* ¶ 3 (“The provisions of this Order do not extinguish the claims of individual plaintiffs in the event class certification is denied, or the presentation of claims by individual plaintiffs who exclude themselves from any class that is certified, under procedures to be prescribed by the Court (after hearing from the parties) in connection with its class certification determinations.”)).

*11 Admittedly, in light of those provisions, Order No. 50 does not provide the same degree of finality or certainty that Order No. 29 provided. More specifically, in New GM's words, it does increase the risk of an individual Plaintiff “sit[ting] on the sidelines for a period of months or years, and then seek[ing] to force defendants to relitigate issues that already have been decided and to repeat activities that already have occurred.” (Apr. 3, 2015 Ltr. (14–MD–2543 Docket No. 810) 5). In the Court's view, however, that is the price that must be paid to ensure that the due process rights of individual Plaintiffs are not trampled in the name of efficiency. Moreover, Order No. 50 contains several provisions intended to mitigate and address such risks and help ensure that the MDL process will “promote the just and efficient” resolution of all member actions. *See* 28 U.S.C. § 1407. First, the Order provides that any ruling made with respect to the Consolidated Complaints “shall apply” to non-consolidated actions (that is, underlying complaints) unless a party shows cause, upon the motion of any party, why the ruling should not apply. (Order No. 50 ¶ 12). Second, the Order directs the parties to propose an additional order

“to be entered after Plaintiffs file the amended Consolidated Complaints to ensure that motion practice and discovery with respect to common issues of fact and law are conducted as part of these MDL proceedings.” (*Id.* ¶ 9). Through that order, the Court can and will take steps to ensure that a party cannot “sit on the sidelines” and expect to get discovery that could have and should have been obtained through the MDL and that motion practice with respect to common issues of law and fact is conducted by this Court as part of the MDL.

Finally, Order No. 50 contemplates further orders (including the possibility of dismissal of non-consolidated claims and complaints with prejudice) at or around class certification stage. At that point, it will presumably be clear whether a class will be certified; and if so, whether a particular Plaintiff falls within the scope of the certified class. Thus, individual Plaintiffs will be able to take whatever steps are necessary to preserve and protect their claims with a better understanding of the consequences if they fail to do so. As New GM notes, that does mean that certain important issues remain unresolved. (Apr. 3, 2015 Ltr. (14–MD–2543 Docket No. 810) at 5). But absent a better sense of what will occur at the class certification phase—including whether any class certification decisions by this Court will be appealed (*see* Apr. 3, 2015 Ltr. (14–MD–2543 Docket No. 809) 4)—setting procedures at this stage of the litigation would be premature at best and prejudicial to the parties at worst. Accordingly, to protect the rights of plaintiffs and to avoid setting deadlines that would almost inevitably be subject to change, Order No. 50 provides that the Court will set such procedures “in connection with its class certification determinations,” not now. (Order No. 50 ¶ 3).

CONCLUSION

*12 In complex, multidistrict litigation of this sort, courts must grapple with—indeed, juggle—a host of challenges and considerations. Among the most important of those challenges and considerations is striking the right balance between, on the one hand, protecting and preserving the rights and interests of individual litigants while, on the other hand, ensuring that such solicitude does not undermine the central purpose of MDL consolidation—namely, promoting “just and efficient” resolution of the parties' disputes. 28 U.S.C. § 1407(a). In its effort to streamline the litigation, the Court's initial order addressing the effect of the Consolidated Complaints in this MDL—Order No. 29—failed to grant appropriate weight to the former concern. For the reasons

2015 WL 3619584

stated above, however, the Court concludes that Order No. 50—a copy of which is attached for ease of reference—does strike the right balance.

As noted, Order No. 50 contemplates entry of additional orders touching on these issues. Through those orders and others, the Court will undoubtedly refine the balance between the individual and collective even further. For now, however, the Court finds that Order No. 50 appropriately protects the interests of all individual parties while ensuring that the Court is able to “expeditiously and thoroughly resolve” the common legal and factual issues that motivated the JPML to transfer these cases here. *In re Asbestos Cases of Hatch, James & Dodge, G. Patterson Keahey*, No. 06–CV–741 (TS), 2007 WL 582983, at *2 (D.Utah Feb.20, 2007).

SO ORDERED.

EXHIBIT 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION

This Document Relates To All Actions

JESSE M. FURMAN, United States District Judge:

14–MD–2543 (JMF)

14–MC–2543 (JMF)

ORDER NO. 50

[Reconsidering and Amending Order No. 29 Regarding the Effect of the Consolidated Complaints]

This matter is before the Court on the motion of the *Elliott, Sesay* and *Bledsoe* plaintiffs to reconsider Order No. 29 (14–MD–2543 Docket No. 477), regarding the effect on the claims of economic loss plaintiffs of consolidated complaints filed by Lead Counsel pursuant to Order No. 7 on October 14, 2014 (14–MD–2543, Docket Nos. 345, 347), and any amendments to those Consolidated Complaints pursuant to the procedures set forth below. As noted in Order No. 39 (14–

MD–2543 Docket No. 671), the motion for reconsideration is GRANTED.

Specifically, upon due consideration of the parties' submissions and proposed orders (14–MD–2543 Docket Nos. 809, 810; *see also* 14–MD–2543 Docket Nos. 502, 553, 554, 571), and having given the parties an opportunity to comment on the Court's own proposed order (*see* Order No. 49, 14–MD–2543 Docket No. 855), the Court determines that Order No. 29 should be: (1) clarified to specify that all dismissals are, unless and until the Court orders otherwise, without prejudice; (2) modified to provide a procedure to allow certain economic loss plaintiffs not named in the amended Consolidated Complaints to challenge the dismissal of their claims; and (3) revised to protect the due process rights of economic loss plaintiffs, such that dismissal of their individual complaints in order to streamline these proceedings does not preclude such plaintiffs from (a) recovering as a member of any class that might be certified or (b) pursuing claims, should a plaintiff choose to do so, if no class is certified or if the plaintiff opts out of a class that is certified.

*13 Accordingly, this Order supersedes Order No. 29 in its entirety, except that Order No. 29 remains intact insofar as it dismissed, without prejudice, the allegations, claims, and defendant(s) included in complaints that already had been transferred to or were filed in MDL 2543 as of the date of entry of that Order and not included in the Consolidated Complaints, which complaints were listed in Order No. 29, Exhibit A. (*See* 14–MD–2543 Docket No. 477; *see* ¶ 6, *infra*).

Background

In Order No. 7, the Court directed Lead Counsel to review all the existing complaints and “file a consolidated or master complaint with claims on behalf of the class or classes, as appropriate. After doing so, any counsel who believed that their claims should have been included, but were not, would have an opportunity to object.” The Court's intent was that the Consolidated Complaints “would streamline and clarify the [economic loss] claims and help eliminate those that are duplicative, obsolete, or unreflective of developing facts or current law.” (Order No. 7 (14–MD–2543 Docket No. 215) at 3). In Order No. 8, the Court set a schedule for filing the Consolidated Complaints, which provided opportunities for other plaintiffs' counsel to submit comments on the draft Consolidated Complaints and to object to the

2015 WL 3619584

final Consolidated Complaints. (Order No. 8 (14–MD–2543 Docket No. 249) at 5).

On October 14, 2014, Lead Counsel filed two Consolidated Complaints (14–MD–2543 Docket Nos. 345, 347). The first Consolidated Complaint asserts economic loss claims concerning GM-branded vehicles (manufactured by either General Motors Corporation (“Old GM”) or General Motors LLC (“New GM”)) that were acquired July 11, 2009 or later. The second Consolidated Complaint asserts economic loss claims for owners of vehicles manufactured by Old GM and purchased before July 11, 2009. In each, New GM was the sole defendant. Each of the Consolidated Complaints includes the following caveat:

This pleading neither waives nor dismisses any claims for relief against any defendant not included in this pleading that are asserted by any other plaintiffs in actions that have been or will be made part of this MDL proceeding, except by operation of the class notice and (with respect to any 23(b)(3) class) any opt-out provisions on claims or common questions asserted in this Complaint and certified by this Court.

(14–MD–2543 Docket No. 345 at 1; 14–MD–2543 Docket No. 347 at 2). The Consolidated Complaint as to vehicles manufactured by Old GM and purchased before July 11, 2009, further alleges that “[c]ertain claims for certain parties may, consistent with 28 U.S.C. § 1407 and the caselaw thereunder, be matters for determination on remand by transferor courts.” (14–MD–2543 Docket No. 347 at 2).

The Court and certain of the parties are concerned that the above language in the Consolidated Complaints may create ambiguity as to the status of economic loss claims not asserted in the Consolidated Complaints. To clarify the effect of the Consolidated Complaints (and any amended Consolidated Complaints) on claims asserted in these MDL proceedings, the Court makes the following findings and adopts the following procedures.

General Provisions

*14 1. In its June 9, 2014 Transfer Order transferring the MDL 2543 proceedings to this Court, the Judicial Panel on Multidistrict Litigation found that “[c]entralization under Section 1407 will eliminate duplicate discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, and the judiciary.” *In re: General Motors LLC Ignition Switch Litigation*, 26 F.Supp.3d 1390, 1391 (J.P.M.L.2014).

2. Order Nos. 7, 29, and this Order were and are intended to streamline and simplify the operation and management of MDL 2543 by reducing the need of the parties to file or respond to (and the Court to decide) pretrial motions in multiple underlying complaints. The Consolidated Complaints and their amendments are intended to bring together common allegations and claims asserted by economic loss plaintiffs in these MDL proceedings. The Consolidated Complaints have been, and will continue to be, critical tools to organize and conduct motion practice, both here and in the Bankruptcy Court, to address class certification, and to manage the discovery process. They are the operative pleadings for these purposes.

3. The provisions of this Order do not extinguish the claims of individual plaintiffs in the event class certification is denied, or the presentation of claims by individual plaintiffs who exclude themselves from any class that is certified, under procedures to be prescribed by the Court (after hearing from the parties) in connection with its class certification determinations.

Procedures for Dismissal Without Prejudice

4. As stated on the record at the status conference earlier today, Lead Counsel has until June 12, 2015 (*i.e.*, almost six weeks after May 5, 2015, the expected date for substantial completion of Phase One discovery pursuant to Order No. 20) to amend the Consolidated Complaints based upon discovery or other developments in the case, including the April 15, 2015 ruling—and any subsequent rulings—by the Bankruptcy Court. Thereafter, it shall be presumed that no further amendment will be permitted, except upon good cause shown as to factual matters and claims that are thereafter revealed by discovery or alleged for the first time in cases

2015 WL 3619584

that are transferred to or filed in the MDL after the above-described deadline.

5. The Court has designated the Consolidated Complaints as the operative class action complaints in these MDL 2543 proceedings. The Court entrusts Lead Counsel with the identification and appropriate pleading of common claims asserted in the lawsuits consolidated in this MDL, after consultation with other plaintiffs' counsel, subject to the procedures for objections to be described in the paragraphs and sub-paragraphs below. Accordingly:

(a) By joining the Consolidated Complaints, those plaintiffs named in the Consolidated Complaints have amended their prior pleadings, and—to the extent they were not already dismissed pursuant to the terms of Order No. 29—their underlying complaints are dismissed without prejudice. The underlying complaints of any plaintiffs added to any amended Consolidated Complaints (*see* ¶ 4, *supra*) will be deemed dismissed on the date of the submission of those Complaints (*see* ¶ 7, *infra*).

***15** (b) Lead Counsel shall provide a copy of any draft amended Consolidated Complaints by secure electronic means to counsel for each economic loss plaintiff fourteen (14) days prior to the amendment deadline. Plaintiffs' counsel will provide Lead Counsel with any comments or proposed changes seven (7) days prior to the amendment deadline.

(c) Plaintiffs will have fourteen (14) days from the filing of the amended Consolidated Complaints to object and Lead Counsel shall have fourteen (14) days to respond. Any such objections and responses shall not exceed five (5) single-spaced pages and shall be filed in both 14–MD–2543 and [14–MC–2543](#). No replies shall be allowed without leave of Court.

6. With respect to complaints filed in or transferred to this MDL before December 18, 2014, allegations, claims, and defendant(s) not included in the Consolidated Complaints, as well as the complaints of plaintiffs not named in the Consolidated Complaints, were dismissed without prejudice effective December 18, 2014. (*See* Order No. 29, Ex. A). The time to object to that dismissal without prejudice of the cases identified on Order No. 29, Exhibit A having passed, all of those complaints—with the sole exceptions of the *Elliott*, *Bledsoe*, and *Sesay* complaints, which were reinstated by the

Court on March 13, 2015 (*see* Order No. 39 (14–MD–2543, Docket No. 671) § VII)—remain dismissed.

7. With respect to complaints filed in or transferred to this MDL since December 18, 2014, up until the time of the filing of the amended Consolidated Complaints, any allegations, claims and defendant(s) that are not included in the amended Consolidated Complaints shall be deemed dismissed without prejudice with respect to the plaintiffs named in such amended Consolidated Complaints; and any allegations, claims and defendant(s) shall be deemed dismissed without prejudice with respect to plaintiffs who are not named in such amended Consolidated Complaints, unless such plaintiff not named in the Consolidated Complaints seeks leave of Court to reinstate his/her claims, for good cause shown, within fourteen (14) days of the filing of amended Consolidated Complaints. Lead Counsel shall file, concurrently with the amended Consolidated Complaints, a list of the allegations, claims, and/or defendant(s) to be dismissed without prejudice pursuant to this paragraph.

8. With respect to claims transferred to or filed in MDL 2543 after the filing of amended Consolidated Complaints, Lead Counsel shall have 60 days following transfer or filing to seek leave to amend the Consolidated Complaints, for good cause shown, to address any factual matter, claims and/or defendant(s) raised for the first time in such pleadings. If Lead Counsel do not seek leave to amend the Consolidated Complaints within the 60–day period, or if the requested amendment is denied by the Court, then any allegations, claims, and defendant(s) not included in the amended Consolidated Complaints shall be dismissed without prejudice at the expiration of the 60–day period or the Court's order denying the amendment, whichever occurs first, unless such plaintiff not named in the Consolidated Complaints sustains an objection to dismissal pursuant to the following procedure:

***16** a. On August 15, 2015, and every month thereafter (*i.e.*, on the fifteenth day of every month) until the Court orders otherwise, Lead Counsel and Counsel for New GM shall jointly submit a list of allegations, claims, and defendant(s) in later-filed complaints to be dismissed without prejudice pursuant to this paragraph.

b. Any such plaintiff not named in the Consolidated Complaints may seek leave of Court to reinstate his/her claims, for good cause shown, within fourteen (14) days of the filing of the list naming his/her complaint to object to dismissal. Lead Counsel and New GM shall

2015 WL 3619584

have fourteen (14) days to respond. Any such objections and responses shall not exceed five (5) single-spaced pages and shall be filed in both 14–MD–2543 and 14–MC–2543. No replies shall be allowed without leave of Court.

9. The parties should meet and confer with an eye toward proposing an order to be entered after Plaintiffs file the amended Consolidated Complaints to ensure that motion practice and discovery with respect to common issues of fact and law are conducted as part of these MDL proceedings. Among other things, the proposed order should create a process requiring any Plaintiffs' counsel with allegations, claims, or defendants not included in the amended Consolidated Complaints to coordinate with Lead Counsel to ensure that discovery as to common issues of law and fact is completed as part of the MDL proceedings. Additionally, the parties should discuss whether, when, and how the Court should create a process to litigate the viability of allegations, claims, or defendants not included in the amended Consolidated Complaints.

10. For any allegations, claims, and defendants that have been or will be dismissed pursuant to Order No. 29 or this Order, the statute of limitations shall be tolled from the date of dismissal to 30 days after the Court decides Lead Counsel's motion for class certification.

***Obligations of the Parties with Respect to
Allegations, Claims, or Defendant(s) that are
Reinstated Pursuant to the Preceding Paragraphs***

11. If any allegations, claims or dismissed defendant(s) are reinstated after dismissal without prejudice pursuant to Order No. 29 or this Order, such individual economic loss plaintiff shall serve, in accordance with Order No. 30 (14–MD–2543 Docket No. 758), a plaintiff fact sheet ("PFS") within 30 days of this Order or of such reinstatement, whichever is later. Other than the obligation to serve a PFS, any individual economic loss action that is not dismissed pursuant to Order

No. 29 or this Order shall be stayed and no motion or responsive pleading to any allegations or claims or on behalf of a defendant reinstated by the Court shall be due unless and until ordered by the Court.

***Procedure for Objecting to Application of Rulings on
the Consolidated Complaints to Underlying Actions***

12. In order to achieve the efficiencies of consolidation while respecting the principle that consolidation may not diminish the rights of plaintiffs, the Court adopts the following procedure to apply rulings made on the basis of consolidated pleadings to non-consolidated actions (*i.e.*, actions involving plaintiffs not named in the Consolidated Complaints). Rulings made with respect to the Consolidated Complaints shall apply to non-consolidated actions unless challenged as follows: Upon the application of any party to these MDL proceedings—to be made no later than fourteen (14) days following a Court ruling on the Consolidated Complaints—a party in a non-consolidated action shall be required to show cause within fourteen (14) days why a ruling made on the basis of the Consolidated Complaints should not apply to the non-consolidated action. The initial moving party shall then have seven (7) days to respond. Absent leave of Court, any such show cause papers and responses shall not exceed five (5) single-spaced pages and shall be filed in both 14–MD–2543 and 14–MC–2543. No replies shall be allowed without leave of Court.

*17 SO ORDERED.

Date: April 24, 2015

New York, New York

JESSE M. FURMAN United States District Judge

All Citations

Not Reported in F.Supp.3d, 2015 WL 3619584

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 29

309 Fed.Appx. 836

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.

In re: KATRINA CANAL BREACHES LITIGATION.

Maureen O'Dwyer et al., Plaintiffs–Appellants
v.

Board of Commissioners of the Port
of New Orleans, Defendant–Appellee.

No. 08–30234.

|
Feb. 6, 2009.

Synopsis

Background: Property owner brought action against city port's board of commissioners, seeking to recover damages for levee breaches and flooding caused by hurricane. The United States District Court for the Eastern District of Louisiana, [Stanwood R. Duval Jr., J., 2007 WL 3003001](#), granted board's motion for judgment on the pleadings. Property owner appealed.

Holdings: The Court of Appeals held that:

[1] claims that appeared in property owner's individual complaint were superseded, and

[2] board was not responsible for design, construction, maintenance, or failure of levees and floodgates.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Judgment on the Pleadings.

West Headnotes (3)

[1] **Federal Civil Procedure** ➡ Effect

Claims that appeared in property owner's individual complaint against city port's board of commissioners, seeking to recover damages for levee breaches and flooding caused by hurricane, but not in master consolidated class action complaint in litigation arising out of breaches and flooding, were superseded, where District Court entered a pre-trial order stating that the master complaint superseded and replaced all previously filed class action complaints. [Fed.Rules Civ.Proc.Rule 16\(e\)](#), 28 U.S.C.A.

5 Cases that cite this headnote

[2] **Water Law** ➡ Rights and liabilities in general

Water Law ➡ Breaches, flooding, and overflow

City port's board of commissioners was not responsible for design, construction, maintenance, or failure of levees and floodgates, and, thus, was not liable to property owner for damages resulting from levee breaches and flooding caused by hurricane, where Louisiana statute provided that levee district, not the board, had “full and exclusive right, jurisdiction, power, and authority to locate, relocate, construct, maintain, extend, and improve levees, embankments, seawalls, jetties, breakwaters, water-basins, and other works in relation to such projects.” [LSA–R.S. 38:307](#).

[3] **Federal Courts** ➡ Failure to mention or inadequacy of treatment of error in notice of appeal

Property owner failed to preserve for review on appeal claim that District Court and attorneys primarily responsible for producing master consolidated class action complaint in litigation arising out of levee breaches and flooding were improperly motivated by conflicts of interest and personal bias, where she did not include the claim

in her notice of appeal from District Court's order granting judgment on the pleadings in favor of city port's board of commissioners, in property owner's action seeking to recover damages for levee breaches and flooding caused by hurricane.

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

***837** [Ashton R. O'Dwyer, Jr.](#), New Orleans, LA, for Plaintiffs–Appellants.

[John Fredrick Kessenich](#), [Jonathan H. Sandoz](#), [Kirk N. Aurandt](#), Daigle Fisse & Kessenich, Madisonville, LA, for Defendant–Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before [GARWOOD](#), [DENNIS](#), and [PRADO](#), Circuit Judges.

Opinion

PER CURIAM: *

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

****1** Plaintiffs–Appellants Maureen O'Dwyer et al. (“O'Dwyer”) appeal the district court's grant of Rule 12(c) judgment on the pleadings in favor of Defendant–Appellee Board of Commissioners of the Port of New Orleans (“the Port”). O'Dwyer's appeal is without merit because it attempts to argue (1) an issue that was not raised or ruled upon below; and (2) an issue that relates to an alternative ground not essential to the district court's decision. Accordingly, we affirm the district court's judgment.

On August 17, 2006, O'Dwyer filed a class action lawsuit in the Eastern District of Louisiana seeking to recover damages for the levee breaches and flooding caused by Hurricane Katrina; the Port was among the many defendants named in this suit. O'Dwyer's suit was consolidated within the [In re: Katrina Canal Breaches Litigation](#) umbrella, and the claims at issue here were assigned to the “Levee” category.

On March 1, 2007, the district court issued Case Management Order No. 4 pursuant to [Federal Rule of Civil Procedure 16](#). This pre-trial order directed all class-action plaintiffs in the Levee category (“Levee Plaintiffs”) to file a single Master Consolidated Class Action Complaint (“Master Complaint”). The order specifically stated that the Master Complaint “shall supersede and replace all previously filed class action complaints.” The Levee ***838** Plaintiffs complied with the order and filed a Master Complaint, which alleged that the Port held full responsibility and duty for the design, construction, and maintenance of certain levees in New Orleans and that the Port was therefore liable for any flood damage attributable to the failure of those levees.

O'Dwyer filed a “Notice of Objection” to the Master Complaint, asserting that the district court did not have the authority to supersede O'Dwyer's pleadings and objecting to the Master Complaint's use of the word “superseding.” O'Dwyer offered no reasoning or authority in support of this objection.

The Port filed an answer to the Master Complaint on March 30, 2007, and subsequently moved for judgment on the pleadings, seeking to dismiss all the Master Complaint's claims against the Port for failure to state a claim upon which relief could be granted. No party opposed the Port's motion.

On October 12, 2007, [2007 WL 3003001](#), the district court issued an order and reasons granting the Port's motion for judgment on the pleadings. The district court noted that the motion was unopposed and granted the motion on the ground that the Port had no duties or responsibilities under Louisiana law with respect to levee maintenance or flood control; rather, the court held that [La.Rev.Stat. § 38:307](#) vested such duties and responsibilities exclusively in another state agency, the Orleans Levee District. No party filed a motion for reconsideration or a new trial in response to the district court's grant of the Port's motion for judgment on the pleadings, and on November 7, 2007, the Port filed a motion for entry of final judgment under Rule 54(b). Again, no party opposed the motion. Thus, on January 15, 2008, for the reasons stated in its order and reasons dated October 12, 2007, the district court entered judgment dismissing with prejudice the claims by O'Dwyer and others against the Port. O'Dwyer timely appealed, and we now affirm.

****2 [1]** O'Dwyer argues that the district court erred in granting judgment on the pleadings because it failed to

consider the arguments presented in O'Dwyer's individual complaint but not presented in the Master Complaint. However, this argument lacks merit because the Master Complaint, filed pursuant to the district court's Rule 16 pre-trial order, superseded O'Dwyer's individual complaint. It is well settled that "[o]nce the pretrial order is entered, it controls the course and scope of the proceedings under Federal Rule of Civil Procedure 16(e), and if a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint." *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir.1998) (citing *Valley Ranch Dev. Co. v. FDIC*, 960 F.2d 550, 554 (5th Cir.1992); *Flannery v. Carroll*, 676 F.2d 126, 129–30 (5th Cir.1982)); see also *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) ("Here, we have not only an amended complaint, but a final pretrial order that superseded all prior pleadings and 'controll[ed] the subsequent course of the action' ") (citing Fed.R.Civ.P. 16(e); *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir.2002) ("[C]laims, issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the complaint....")). Here, the district court entered a Rule 16 pre-trial order stating that the Master Complaint "shall supersede and replace all previously filed class action complaints." Thus, O'Dwyer's individual complaint was superseded, and, contrary to O'Dwyer's assertions, any arguments or claims that appear in O'Dwyer's individual complaint but not in the Master Complaint were waived and cannot be considered on *839 appeal.¹ See, e.g., *Am. Rice, Inc. v. Producers Rice Mill, Inc.*, 518 F.3d 321, 335 (5th Cir.2008) ("If a claim or issue is omitted from the [pretrial] order, it is waived" (alteration in original)); *Arsement v. Spinnaker Exploration Co., LLC*, 400 F.3d 238, 245 (5th Cir.2005) ("It goes without saying that a pre-trial order controls the scope and course of trial; a claim or issue not included in the order is waived...."); *Elvis Presley Enters.*, 141 F.3d at 206.²

¹ Even if we were to consider the allegations in O'Dwyer's individual complaint, we would still find that the district court properly granted judgment on the pleadings because the allegations in O'Dwyer's individual complaint do not differ materially from those in the Master Complaint, which, as discussed *infra*, were properly dismissed in light of La.Rev.Stat. § 38:307.

² Alternatively, O'Dwyer contends that the district court should have allowed amendment of O'Dwyer's individual complaint before granting

the Port's motion for judgment on the pleadings. However, this argument again fails to understand that the Master Complaint, rather than O'Dwyer's individual complaint, was the relevant document for the district court to consider in evaluating whether judgment on the pleadings was proper. To the extent that O'Dwyer argues that the district court erred in not permitting amendment to the Master Complaint, such an argument is waived because neither O'Dwyer nor any other plaintiff filed before the district court a motion to amend the Master Complaint or a motion for reconsideration of the district court's judgment on the pleadings. See *Nichols v. Enterasys Networks, Inc.*, 495 F.3d 185, 189 (5th Cir.2007) ("As the issue has not been clearly raised in front of the district court, it cannot be considered on appeal."); *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir.1994) ("[I]f a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.").

[2] We decline to address O'Dwyer's argument that the district court erred in alternatively basing its decision upon La.Rev.Stat. § 9:2800(H). As an independent ground for granting the Port's motion, the district court relied on La.Rev.Stat. § 38:307, which gives the Orleans Levee District, not the Port, "full and exclusive right, jurisdiction, power, and authority to locate, relocate, construct, maintain, extend, and improve levees, embankments, seawalls, jetties, breakwaters, water-basins, and other works in relation to such projects." La.Rev.Stat. § 38:307 (emphasis added). Based on § 38:307, the district court concluded that the Levee Plaintiffs could prove no set of facts showing, as the Master Complaint alleged, that the Port was responsible and liable for the design, construction, maintenance, or failure of the levees and floodgates. We agree, and we hold that because the district court properly granted the Port's motion under § 38:307, any error in its alternative reliance on § 9:2800(H) would be harmless.

**3 [3] Finally, O'Dwyer argues that the district court and the attorneys primarily responsible for producing the Master Complaint were improperly motivated by conflicts of interest and personal bias. However, these issues are not properly presented in this appeal because O'Dwyer did not include them in her notice of appeal. Cf. *In re Katrina Canal*

Breaches Litig., —Fed.Appx. —, 2008 WL 5069808 at *1 (5th Cir.2008) (unpublished per curiam) (“O'Dwyer has filed, and the district court denied, two motions to recuse the district judge. Neither of the motions to recuse is part of this appeal.... We will not address issues that are not relevant to this appeal.”).

For these reasons, the judgment of the district court is AFFIRMED.

All Citations

309 Fed.Appx. 836, 2009 WL 290474

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 30



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Le v. Kohls Department Stores, Inc.](#), E.D.Wis.,
February 8, 2016

2011 WL 5008090

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

In re MAGNESIUM OXIDE
ANTITRUST LITIGATION.

Civ. No. 10-5943 (DRD).

|

Oct. 20, 2011.

Attorneys and Law Firms

Trujillo, Rodriguez & Richards, LLC, by: [Lisa J. Rodriguez, Esq.](#), Haddonfield, NJ, Gold Bennett Cera & Sidener LLP, by: [Solomon B. Cera, Esq.](#), [C. Andrew Dirksen, Esq.](#), San Francisco, CA, Goldman Scarlato & Karon, P.C., by: [Daniel R. Karon, Esq.](#), Cleveland, OH, for Direct Purchaser Plaintiffs.

Lite Depalma Greenberg, LLC, by: [Allyn Z. Lite, Esq.](#), [Joseph J. DePalma, Esq.](#), Newark, NJ, Hagens Berman Sobol Shapiro LLP, by: [Steve W. Berman, Esq.](#), [Anthony D. Shapiro, Esq.](#), [Elizabeth A. Fegan, Esq.](#), [Jason A. Zweig, Esq.](#), New York, NY, Hudson Mallaney & Shindler, by: [J. Barton Goplerud, Esq.](#), West Des Moines, IA, Girardi Keese, by: [Stephen G. Larson, Esq.](#), Los Angeles, CA, for Indirect Purchaser Plaintiffs.

Loweinstein Sanler PC, by: Douglas S. Eakley, Esq., [Michael J. Hahn, Esq.](#), Roseland, NJ, Paul, Weiss, Rifkind, Wharton & Garrison LLP, by: [Aidan Synnott, Esq.](#), [Daniel A. Crane, Esq.](#), New York, NY, Cozen O'Connor, P.C., by: [John P. Johnson, Esq.](#), [Francis P. Newell, Esq.](#), [Peter M. Ryan, Esq.](#), Philadelphia, PA, Finklestein Thompson LLP, by: [Rosalee B. Connell, Esq.](#), [Douglas G. Thompson, Esq.](#), [Michael G. McLellan, Esq.](#), Washington, DC, for Defendants.

OPINION

DEBEVOISE, Senior District Judge.

*1 This matter arises out of the consolidation of five separate actions in this Court¹ alleging a conspiracy to fix prices in and allocate shares of the domestic Magnesium Oxide

market from January 2002 to the present (“the Class Period”). On November 15, 2010, Direct Purchaser Plaintiffs (“DP Plaintiffs”) Orangeburg Milling Company, Inc., Bar Ale, Inc., and Air Krete, Inc. filed a Class Action Complaint (“CAC”) against Defendants Premier Chemicals, LLC (“Premier”), Sumitomo Corporation of America (“Sumitomo”), and YAS, Inc. (“YAS”) pursuant to Sections 4 and 16 of the Clayton Act, [15 U.S.C. §§ 15, 26](#), alleging violations of Section 1 of the Sherman Act, [15 U.S.C. § 1](#), and seeking class certification under [Federal Rule of Civil Procedure 23\(b\)\(2\) and \(3\)](#), declaratory judgment, treble damages, costs and attorneys’ fees, and an injunction. On December 30, 2010, DP Plaintiffs filed an Amended CAC to add additional factual allegations in support of their claims.

¹

See Docket Nos. 10-cv-5174, 10-cv-5352, 10-cv-6095, and 10-cv-6093, and 10-cv-5943, all of which were consolidated under Docket No. 10-cv-5943.

On October 7, 2010, Indirect Purchaser Plaintiffs (“IP Plaintiffs”) Ronald Hayek, Daniel, Walker, Sue Walker, and John Bidart filed a CAC against Defendants under Section 16 of the Clayton Act, alleging violations of [Section 1](#) of the Sherman Act, and under various state antitrust and consumer protection laws. IP Plaintiffs seek similar relief as DP Plaintiffs.² On December 31, 2010, IP Plaintiffs filed an Amended CAC to add similar factual allegations as those added by DP Plaintiffs in their Amended CAC.

²

To be sure, IP Plaintiffs seek only injunctive relief for Defendants’ alleged violations of federal antitrust laws, as only direct purchasers may bring federal antitrust actions for damages. *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

On March 1, 2011, Defendants filed a Motion to Dismiss³ all of Plaintiffs’ claims pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). For the reasons set forth below, Defendants’ motion is granted. No Defendant is entitled to dismissal of Plaintiffs’ federal and state antitrust claims on the merits because Plaintiffs sufficiently allege a meeting of the minds among all Defendants to fix prices in and allocate shares of the domestic Magnesium Oxide market. However, Defendants are entitled to dismissal of IP Plaintiffs’ federal and state antitrust claims and the majority of their consumer protection claims for lack of standing. In addition, those consumer protection claims under which IP Plaintiffs

have standing are dismissed to the extent they are based on allegations of fraud because those allegations do not comply with the requirements of [Federal Rule of Civil Procedure 9\(b\)](#). Finally, Plaintiffs' federal and state antitrust claims are dismissed because they are time-barred by their respective statutes of limitations.

³ In fact, Sumitomo, Premier, and YAS each filed separate motions to dismiss. However, each joined in the others' arguments. Therefore, for the sake of simplicity and brevity, the Court will treat them as a single motion.

I. BACKGROUND

Magnesium Oxide ("MgO") is a solid, white, naturally occurring mineral that is used in producing a wide variety of products, including refractory products, animal feeds, fertilizers, electrical insulation, and pharmaceuticals. It is formed by an ionic bond between one magnesium atom and one oxygen atom. MgO can be mined from magnesite or processed from seawater or subterranean brines containing magnesium chloride. This case concerns the two most common forms of MgO: Caustic-calcined magnesia ("CCM") and dead-burned magnesia ("DBM"). DBM and CCM are produced differently and have different commercial applications.⁴

⁴ CCM "is manufactured at lower temperatures than [DBM] and is used in products like animal feeds and fertilizers." (Direct CAC ¶ 25; Indirect CAC ¶ 31.) DBM, on the other hand, "is most often used in refractory applications." (*Id.*)

*2 In 2000, according to the CACs, domestic consumption of DBM and CCM came from two sources: the United States and China. Roughly 50% of CCM "and a lesser amount of" DBM consumed in the United States were produced domestically, while the rest was imported from China. (Direct Purchasers' Consolidated Amended Class Action Complaint ("Direct CAC") ¶ 27; (Indirect Purchasers' Consolidated Amended Class Action Complaint ("Indirect CAC") ¶ 33.) At that time, Premier allegedly maintained control over the majority of DBM and CCM consumed in the United States by (1) purchasing imported CCM and DBM for resale to its customers in the United States, and (2) sourcing magnesite from China for production into DBM to be sold domestically.

"Sumitomo similarly purchased Chinese MgO but only [DBM] for resale to its U.S. customers" and "sourced magnesite from China for manufacture into [DBM] for sale in the U.S." (Direct CAC ¶ 27; Indirect CAC ¶ 34.) To do so, it enlisted the help of YAS to (1) "facilitate[] [its] purchases of Chinese magnesite" (Direct CAC ¶ 27; Indirect CAC ¶ 35), and (2) purchase Chinese DBM for resale in the United States.

This arrangement proved successful because Hideo Sumikawa, the current president of YAS, previously worked for Sumitomo and has since maintained relationships with certain Chinese magnesite mines. "In particular, Sumitomo, through Coy Akiyama—head of Sumitomo's inorganic chemicals unit—purchases [DBM] from Chinese mines that Sumikawa (YAS) has facilitated, thereby allowing Sumitomo and YAS to participate together in the U.S. MgO market." (Direct CAC ¶ 33; Indirect CAC ¶ 41.)

According to Plaintiffs, sometime before the Class Period, Premier "saw its share of MgO markets shrink due to increased Chinese competition." (Direct CAC ¶ 28; Indirect CAC ¶ 36.) Specifically, "cheaper imports, mainly from China ha [d] replaced some of the U.S. domestic production, notably affecting Premier." (Direct CAC ¶ 29; Indirect CAC ¶ 37.) Thus, during the Class Period, Premier and Sumitomo allegedly bought nearly all of the Chinese DBM available for purchase and resold it to their customers in the United States.

In addition, Plaintiffs allege that, "[d]uring the Class Period, with some limited exceptions, the MgO markets were considered to be fairly saturated, with limited potential for growth." (Direct CAC ¶ 30; Indirect CAC ¶ 38.) However, "[i]nstead of competing, representatives from Premier, Sumitomo, and YAS began meeting regularly to discuss fixing U.S. MgO prices and allocating MgO markets." (Direct CAC ¶ 31; Indirect CAC ¶ 39.) Specifically, Plaintiffs allege a conspiracy among Premier, Sumitomo, and YAS to (1) fix prices in and allocate shares of the domestic DBM market and (2) allocate the domestic CCM market to Premier so that it could fix prices in that market, which resulted in Plaintiffs' purchasing DBM and CCM at artificially high prices.

i. The DBM and CCM Agreements

*3 Plaintiffs allege that, during the Class Period, Cary W. Ahl, Sr. Premier's then-president, "regularly called" Mr. Sumikawa of YAS "to discuss fixing Premier's and Sumitomo's [DBM] prices and allocating their respective MgO accounts in the U.S." (Direct CAC ¶ 34; Indirect CAC

¶ 42.) These market allocation and price-fixing schemes were allegedly implemented by Mr. Ahl and his successors at Premier and Terry Wakisama at Sumitomo.

In the summer of 2004, Coy Akiyama of Sumitomo, Mr. Sumikawa of YAS, Gary Vannorsdel, an animal nutrition broker, and Mr. Vannorsdel's son, met at a Holiday Inn, in Tulsa, Oklahoma, to discuss plans for Sumitomo to enter the CCM market without upsetting Premier. Sumitomo had been shipping DBM to the United States on “partially empty barges and wanted to maximize efficiencies by filling these barges with [CCM] for sale to the western U.S.” (Direct CAC ¶ 39; Indirect CAC ¶ 48.) Indeed, DBM shipments filled only half of Sumitomo's New Orleans barge capacity. Apparently, “Tulsa was the only port that could accommodate this barge, and Sumitomo had access to a very large storage facility in Tulsa.” (Direct CAC ¶ 36; Indirect CAC ¶ 44.)

At the Tulsa meeting, “[i]n the course of discussing a strategy for Sumitomo to enter the U.S. [CCM] market, Akiyama (Sumitomo) recounted to Sumikawa (YAS) multiple discussions between him and Ahl where Ahl had called Akiyama to set [DBM] prices; to allocate [DBM] markets; and to ensure that Sumitomo was maintaining its agreement with Premier to fix [DBM] prices and allocate [DBM] markets.” (Direct CAC ¶ 40; Indirect CAC ¶ 49.) At one point, Mr. Vannorsdel “expressed concern about compromising his relationship with Premier by helping facilitate Sumitomo and YAS's involvement” in the CCM market, to which Mr. Akiyama responded, “ ‘Don't be concerned because we [Sumitomo] talk with Premier on a daily basis to set prices and to discuss what accounts they can have.’ ” (Direct CAC ¶ 41; Indirect CAC ¶ 50.)

Shortly after the Tulsa meeting, Mr. Ahl discovered Sumitomo's plan to enter the CCM market and retaliated by dropping DBM prices.⁵ As a result, Sumitomo did not follow through with its plans to enter the CCM market. “Following the [CCM]-related message that Premier sent to Sumitomo and YAS via Premier's pre-market-entry retaliation, Sumitomo and YAS illegally agreed with Premier to remain out of the [CCM] market—a market Sumitomo, as a rational profit-seeking entity, was motivated to enter—thus allowing Premier to maintain its control over [CCM] pricing.” (Direct CAC ¶ 43; Indirect CAC ¶ 52.)

⁵ These prices were later restored.

ii. Fraudulent Concealment

Plaintiffs allege that the MgO conspiracy was “inherently self-concealing” and that Defendants took affirmative measures to conceal it. (Direct CAC ¶ 48–49; Indirect CAC ¶ 55–56.) Specifically, Plaintiffs allege that “[D]efendants met secretly and among themselves for the express purpose of fixing prices and allocating markets of domestically sold MgO.” (Direct CAC ¶ 50; Indirect CAC ¶ 57.) In addition, Defendants allegedly explained increases in the price of MgO “by references to tight supply, thinning margins, and increased energy and freight costs.” (Direct CAC ¶ 51; Indirect CAC ¶ 58.) As a result, Plaintiffs allege that “neither [P]laintiffs nor the class members had knowledge of any of the foregoing violations, and neither [P]laintiffs nor the class members, until recently, could have discovered through reasonable diligence that [D]efendants and their co-conspirators had engaged in the foregoing violations.” (Direct CAC ¶ 49; Indirect CAC ¶ 56.)

iii. The Complaints

*4 On November 15, 2010, DP Plaintiffs—i.e. those who purchased either DBM or CCM directly from one or more Defendants, their predecessors, subsidiaries, or co-conspirators during the Class Period—filed a CAC against Defendants under Sections 4 and 16 of the Clayton Act alleging violations of [Section 1](#) of the Sherman Act, and seeking class certification under [Federal Rule of Civil Procedure 23\(b\)\(2\) and \(3\)](#), declaratory judgment, treble damages, costs and attorneys' fees, and an injunction. On December 30, 2010, DP Plaintiffs filed an Amended CAC to add additional factual allegations in support of their claims.

On October 7, 2010, IP Plaintiffs—i.e. those who purchased products containing DBM or CCM that was manufactured, distributed or sold by one or more Defendants, their predecessors, subsidiaries, or co-conspirators during the Class Period—filed a CAC against Defendants under Section 16 of the Clayton Act, alleging violations of [Section 1](#) of the Sherman Act, and under various state antitrust and consumer protection laws, and seeking similar relief as the DP Plaintiffs. On December 31, 2010, IP Plaintiffs filed an Amended CAC to add similar factual allegations as those added by DP Plaintiffs in their Amended CAC.

II. DISCUSSION

Defendants now move to dismiss both Amended CACs pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). In

doing so, Defendants argue that Plaintiffs (1) lack standing to assert their federal and state antitrust claims; (2) fail to allege a plausible antitrust conspiracy to fix DBM prices, allocate portions of the domestic DBM market, and allocate the domestic CCM market to Premier; and (3) fail to plead fraudulent concealment with particularity to equitably toll the applicable federal and state antitrust statutes of limitations. Defendants further argue that IP Plaintiffs' lack standing to assert their consumer protection and unfair competition claims, and that those claims are improperly pled.

A. Standard of Review

In assessing the parties' arguments, the Court must apply the standard of review applicable to requests for dismissal pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). That rule permits a court to dismiss a complaint for failure to state a claim upon which relief can be granted. When considering a [Rule 12\(b\)\(6\)](#) motion, the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.1997). The Court's inquiry, however, "is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims." *In re Rockefeller Ctr. Prop., Inc.*, 311 F.3d 198, 215 (3d Cir.2002).

The Supreme Court recently clarified the [Rule 12\(b\)\(6\)](#) standard in two cases: *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The decisions in those cases abrogated the rule established in *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." In contrast, *Bell Atlantic*, 550 U.S. at 545, held that "[f]actual allegations must be enough to raise a right to relief above the speculative level." Thus, the assertions in the complaint must be enough to "state a claim to relief that is plausible on its face," *id.* at 570, meaning that the facts alleged "allow [] the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Iqbal*, 129 S.Ct. at 1949; *see also*, *Phillips v. County of Allegheny*, 515 F.3d 224, 234–35 (3d Cir.2008) (In order to survive a motion to dismiss, the factual allegations in a complaint must "raise a reasonable expectation that discovery will reveal evidence of the necessary element," thereby justifying the

advancement of "the case beyond the pleadings to the next stage of litigation.").

*5 When assessing the sufficiency of a complaint, the Court must distinguish factual contentions—which allege behavior on the part of the defendant that, if true, would satisfy one or more elements of the claim asserted—from "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S.Ct. at 1949. Although for the purposes of a motion to dismiss the Court must assume the veracity of the facts asserted in the complaint, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1950. Thus, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.*

When a claim is dismissed pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), leave to amend and reassert that claim is ordinarily granted. *In re Burlington Coat Factory Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997). A claim may be dismissed with prejudice, however, if amending the complaint would be futile. *Id.* "Futile," as used in this context, means that the complaint could not be amended to state a legally-cognizable claim. *Id.* (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir.1996)).

B. Plaintiffs' Standing to Bring Antitrust Claims

Standing is a jurisdictional prerequisite under Article III of the United States Constitution. "Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian Sch. Tuition Org. v. Winn*, — U.S. —, —, 131 S.Ct. 1436, 1441, 179 L.Ed.2d 523 (2011). "To state a case or controversy under Article III, a plaintiff must establish standing." *Id.* at 1442 (citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). The Supreme Court explained the elements of standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992):

"First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able]' to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not

before the court.’ Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’ “

Defendants argue that Plaintiffs lack antitrust standing because they do not identify whether they purchased DBM or CCM. Specifically, Defendants contend that the alleged agreements regarding DBM and CCM, respectively, amount to “two conspiracies [that] are allegedly directed at different purchasers and encompass different time frames[,] and [n]othing indicates that anticompetitive activity in one market would have an effect on prices in the other market.” (YAS Br., 9.) “Under these circumstances,” according to Defendants, “a purchaser of [DBM] would suffer no redressable injury from anticompetitive conduct in the [CCM] market, and would accordingly lack standing to maintain claims based on such conduct (and vice versa).” (*Id.*).

*6 This argument is unavailing because, as discussed fully below, Plaintiffs allege a single conspiracy in the domestic MgO market comprised of two agreements: one to fix prices in and allocate shares of the domestic DBM market, and one to allocate the domestic CCM market to Premier. These agreements are interdependent in that Defendants entered into the CCM agreement in order to maintain the DBM agreement. As a result, price-fixing in the DBM market has an effect on prices in the CCM market, and vice versa, because the absence of one agreement would eliminate the consideration for the other.

As a general matter, DP Plaintiffs’ allegation that they were “injured by having paid more for MgO⁶ than they otherwise would have paid absent [D]efendants’ unlawful conduct” (Direct CAC ¶ 56) is sufficient to establish antitrust standing. Standing to sue under Section 4 of the Clayton Act is determined by a five-factor test:⁷ “(1) the causal connection between the antitrust violation and the harm to the plaintiff; (2) whether the plaintiff’s alleged injury is of the type that the antitrust laws were intended to redress; i.e., did the plaintiff suffer antitrust injuries; (3) the directness of the injury; (4) the existence of more direct victims of the violation; and (5) the potential for duplicative recovery or complex apportionment of damages.” *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399 (3d Cir.2000) (citing *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 495 U.S. 519, 538 (1983)). Here, there is little doubt that those who purchased DBM and/or CCM directly from Defendants at supracompetitive prices have standing to sue for damages under Section 4 and for injunctive

relief under Section 16. *See id.* at 401 (“It is difficult to imagine a more formidable demonstration of antitrust injury” than supra-competitive pricing.); *In re Mercedes Benz Anti-Trust Litig.*, 157 F.Supp.2d 355, 364 (D.N.J.2001) (“Where, as here, it is alleged that consumers paid a price higher than the price that would have been offered had the dealers been competing, the purpose of the antitrust laws is obviously thwarted.”). Thus, DP Plaintiffs have standing to pursue their antitrust claims.

6 MgO collectively refers to DBM and/or CCM. (Direct CAC ¶ 1.)

7 As discussed further below, standing to assert claims for injunctive relief under Section 16 of the Clayton Act are analyzed under a more relaxed standard. *See In re Warfarin*, 214 F.3d at 399.

IP Plaintiffs, however, do not. While they seek solely injunctive relief under Section 16 of the Clayton Act—and therefore are not subject to the aforementioned five-factor test, *see* Note 7—they must still allege “(1) [a] threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust injury.” *In re Warfarin*, 214 F.3d at 400. In analyzing whether an antitrust injury proximately caused an alleged loss to an indirect purchaser, this Circuit has been guided by the Supreme Court’s decision in *Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).⁸ *McCready* explained that “an antitrust violation may be expected to cause ripples of harm to flow through the Nation’s economy; but ... [i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action.” 457 U.S. at 476. Thus, in determining whether an injury was proximately caused by an antitrust violation for Article III standing purposes, courts should “look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant’s conduct unlawful and in providing a private remedy.” *Id.* at 478. In doing so, they should consider whether the plaintiff’s injury is “inextricably intertwined with the injury that the conspirators sought to inflict,” *In re Warfarin*, 214 F.3d at 400–01 (purchasers of prescription drug whose active ingredient was the subject of a price-fixing conspiracy maintained standing to sue as indirect purchasers because “the excess amount paid” for the drug was “inextricably intertwined with the injury [Defendant] aimed to inflict”), or, put another way, “whether the injury

alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations ... would be likely to cause.” *McCready*, 457 U.S. at 479 (quotations and citations omitted) (alleged conspiracy among psychiatrists and Blue Shield to take patients away from psychologists by refusing to reimburse Blue Shield subscribers for psychotherapeutic services resulted in “clearly foreseeable” harm to Blue Shield subscribers and “was a necessary step in effecting the ends of the alleged illegal conspiracy.”).

8 Although that decision analyzed proximate causation in the context of a Section 4 claim for damages, the Court of Appeals has applied its analysis to Section 16 claims because proximate cause is an element of standing under both. See *In re Warfin Sodium Antitrust Litig.*, 214 F.3d 395, 400–01 (3d Cir.2000).

*7 Here, IP Plaintiffs allege that “as a direct and proximate result of Defendants’ and their co-conspirators’ unlawful contract, combination and conspiracy, Plaintiffs and the Class members were injured and financially damaged in their business and property by having paid more for MgO Products than they would have absent Defendants’ and their coconspirators’ unlawful conduct.” (Indirect CAC ¶ 54.) However, they fail to specify which MgO products—i.e. products containing DBM or CCM—they purchased. The mere fact that a product contains DBM or CCM does not necessarily mean that an increase in the price of that product is “inextricably intertwined” with, or an “a necessary step in achieving the ends” of, the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets. Indeed, the price of DBM and CCM would have a minimal foreseeable effect on the price of products containing trace amounts of them, but a significant foreseeable effect on the price of products in which they are major ingredients. Thus, without knowing which specific products IP Plaintiffs purchased, it is impossible to determine whether an increase in their price is the type of injury that furthers the object of the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets. Accordingly, IP Plaintiffs’ federal antitrust claims are dismissed for lack of standing.⁹ However, IP Plaintiffs are granted leave to amend in order to allege (1) the specific purchased products containing DBM or CCM and (2) the nexus between an increase in the price of those products and the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets.

9 IP Plaintiffs also lack standing to assert their state antitrust claims because those claims are construed in accordance with federal antitrust principles. See *In re Digital Music Antitrust Litig.*, 592 F.Supp.2d 435, 448 n. 21 (S.D.N.Y.2008) (Arizona, California, District of Columbia, Iowa, Kansas, Maine, Michigan, Minnesota, North Carolina, South Dakota, Vermont, West Virginia, Wisconsin), *rev’d on other grounds by, Starr v. Sony BMG Music Entm’t.*, 592 F.3d 314 (2d Cir.2010); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 635–36 (9th Cir.1987) (Hawaii); *Gutnayer v. Cendant Corp.*, 116 Fed. App’x 758, 761 (7th Cir.2004) (Illinois); *Monsanto Co. v. Swann*, No. 4:00–CV–1481, 2001 WL 34079480, at *3 (E.D.Mo. Sept.19, 2001) (Mississippi); Neb.Rev.Stat. § 59–829 (2010) (Nebraska); Nev.Rev.Stat. § 598A.050 (2011) (Nevada); *Minuteman, LLC v. Microsoft Corp.*, 147 N.H. 634, 637, 795 A.2d 833 (N.H.2002) (New Hampshire); *Clough v. Rush*, 959 F.2d 182, 187 (10th Cir.1982) (New Mexico); *Fido’s Fences v. Canine Fence Co.*, 672 F.Supp.2d 303, 313 (E.D.N.Y.2009) (New York); *Westgo Indus., Inc. v. W.J. King Co.*, Civil No. A3–75–82, 1981 WL 2064, at *6 (D.N.D. Mar.1, 1981) (North Dakota); *Oregon Laborers–Employees Health & Welfare Trust Fund v. Phil Morris, Inc.*, 185 F.3d 957, 963 n. 4 (9th Cir.1999) (Oregon); *In re Refalen Antitrust Litig.*, 221 F.R.D. 260, 278–79 (D.Mass.2004) (Tennessee); *Am. Airlines v. Christensen*, 967 F.2d 410, 414 (10th Cir.1992) (Utah).

Defendants further argue that IP Plaintiffs lack standing to assert their state law antitrust claims, with the exception of Iowa and California, because they only allege purchasing MgO products in Iowa and California. Specifically, Defendants contend that IP Plaintiffs “have no standing to bring claims based on violations of states in which they neither reside nor purchased any MgO products.” (Sumitomo Br. (IP Pl.), 4.) IP Plaintiffs counter that “Defendants improperly confuse ‘standing’ with class certification issues,” which, at this point, are premature. (IP Pl.’s Br., 30.) Specifically, IP Plaintiffs maintain that they “are not bringing claims in their own name in other states; rather they are seeking to *represent* similarly situated persons in other states,” and that “[t]his issue, improperly raised by Defendants on a motion to dismiss will be addressed at class certification under Rule 23.” (*Id.* at 31) (emphasis in original).

It is well-settled that a named plaintiff in a class action lawsuit is required to establish Article III standing. *See Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (“That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.” (quotations and citations omitted)); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (“[T]he plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.”); *O’Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.” (citations omitted)); *Winer Family Trust v. Queen*, 503 F.3d, 319, 326 (3d Cir.2007) (“The initial inquiry in either case is whether the lead plaintiff individually has standing.”).

*8 Less well-settled is whether, pre-class certification, named plaintiffs are required to establish standing for each and every claim set forth in a class action complaint, or whether it is sufficient to establish standing for a single claim because a court will determine if the named plaintiffs have standing to represent the unnamed class members seeking redress under the balance of asserted claims during the class certification process pursuant to *Federal Rule of Civil Procedure 23*. This issue typically arises in cases, such as this one, where named plaintiffs assert analogous causes of action under the laws of many states but cannot specifically tie their injuries to each state. Indeed, here, IP Plaintiffs, who allege that they purchased MgO products in Iowa and California, assert violations of twenty-five states’ antitrust laws.¹⁰

¹⁰ At this time, IP Plaintiffs lack Article III standing to assert violations of the following state antitrust laws because they fail to allege a causal connection between their injuries and the conduct prohibited by the laws of those states, which require a showing that such conduct occurred, or whose effect was felt, in-state. *See A.R.S. § 44-1402* (Arizona) (“A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful”); *DC ST § 28-4502* (District of

Columbia) (same); *HRS § 480-4* (Hawaii) (same); *10 M.R.S.A. § 1101* (Maine) (same); *SDCL § 37-1-3.1* (South Dakota) (same); *K.S.A. § 50-101* (Kansas) (“A trust is a combination of capital, skill, or acts, by two or more persons,” among other things, “[t]o fix any standard or figure, whereby such person’s price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use or consumption in this state”); *M.C.L.A. §§ 445.771, 445.772* (Michigan) (“A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.... Relevant market means the geographical area of actual or potential competition in a line of trade or commerce, all or any part of which is within this state”); *M.S.A. § 325D.54* (Minnesota) (act applies to “(a) any contract, combination, or conspiracy when any part thereof was created, formed, or entered into in this state; and (b) any contract, combination, or conspiracy, wherever created, formed, or entered into; any establishment, maintenance, or use of monopoly power; and any attempt to establish, maintain, or use monopoly power; whenever any of the foregoing affects the trade or commerce of this state.”); *Neb. Rev. St. § 59-801* (Nebraska) (“Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal.”); *N.R.S. § 598A.060* (Nevada) (same); *N.M.S.A. § 1978, 57-1-1* (New Mexico) (same); *W.Va.Code § 47-18-3* (West Virginia) (same); *NY GBL § 340* (New York) (Every contract, agreement, arrangement or combination whereby ... [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained ... is hereby declared to be against public policy, illegal and void.”); *N.C.G.S.A. § 75-1* (North Carolina) (“Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal.”); *NDCC, 51-08.1-01, 02* (North Dakota) (“A contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.... Relevant market

means the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state.”); O.R.S. 646.705 (Oregon) (“As used in ORS 136.617 and 646.705 to 646.805, ‘trade or commerce’ means trade or commerce within the state; or between the state and any state, territory, or foreign nation.”); (Tennessee) T.C.A. § 47–25–101 (“All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.”). IP Plaintiffs’ allegations that “[P]rices for MgO and MgO Products were raised, fixed, maintained, and stabilized at artificially high levels throughout the states,” and “Defendants’ illegal conduct had a substantial effect on commerce in the above states” (Indirect CAC ¶¶ 72, 73) are conclusory and fail to specifically tie their injuries to the alleged MgO conspiracy occurring or its effects in those states.

IP Plaintiffs lack statutory standing to sue under Utah’s antitrust laws because they have a citizenship/residency requirement. See U.C.A. §§ 1953 76–10–919 (“A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant.”), and under Illinois’s antitrust laws because they do not allow a private right of action. See 740 ILCS 10/7 (“This State, counties, municipalities, townships and any political subdivision organized under the authority of this State, and the United States, are considered a person having standing to bring an action under this subsection.”).

However, IP Plaintiffs apparently have standing to sue under Mississippi, New Hampshire, Vermont,

and Wisconsin antitrust laws, as they provide a private right of action and have no discernible requirement of in-state conduct or effect, or residency. See Miss.Code Ann. §§ 75–21–1, 9 (Mississippi); N.H. Rev. Stat. § 356:1 (New Hampshire); 9 V.S.A. §§ 2453, 2465 (Vermont); W.S.A. §§ 133.03, 133.18 (Wisconsin).

Courts, including this one, have held that “the fact that the named Plaintiffs may not have individual standing to allege violations of ... laws in states other than those in which they purchased Defendants’ [product] is immaterial [because] [t]he issue ... is one of predominance—whether questions of law or fact common to all class members predominate over any questions affecting only individual members.” *Ramirez v. STI Prepaid LLC*, 644 F.Supp.2d 496, 505 (D.N.J.2009) (quotations and citations omitted); see also *In re Grand Theft Auto Video Game Consumer Litig. (No. II)*, No. 06–MD–1739, 2006 WL 3039993, at *3 (S.D.N.Y. Oct. 25, 2006) (“The relevant question ... is not whether the Named Plaintiffs have standing to sue Defendants—they most certainly do—but whether their injuries are sufficiently similar to those of the purported Class to justify the prosecution of a nationwide class action. This question is, at least in the first instance, appropriately answered through the class certification process.”); *In re Buspirone Patent Litig.*, 185 F.Supp.2d 363, 377 (S.D.N.Y.2002) (“[T]hese alleged problems with standing will not arise unless class certification is granted. If certification is granted, the proposed class would contain plaintiffs who have personal standing to raise claims under the laws governing purchases in all of the [] states, and the only relevant question about the named plaintiffs’ standing to represent them will be whether the named plaintiffs meet the ordinary criteria for class standing ...”).

Other courts find that they must initially “review[] the standing of actual, not proposed plaintiffs” to assert the claims in a class action complaint because “[t]he alternative ... would allow named plaintiffs in a proposed class action, with no injuries in relation to the laws of certain states referenced in their complaint, to embark on lengthy class discovery with respect to injuries in potentially every state in the Union.” *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 154–56 (E.D.Pa.2009); see also *In re Potash Antitrust Litig.*, 667 F.Supp.2d 907, 924 (N.D.Ill.2009) (named plaintiffs are required to establish standing for each claim under which they purport to represent class members because “[t]o have standing as a class representative, the plaintiff must be part of the class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he

represents.” (quotations and citations omitted)), *rev'd on other grounds by, Minn-Chem Inco. v. Agrium Inco.*, — F.3d —, No. 10–1712, 2011 WL 4424789 (7th Cir. Sept.23, 2011); *In re Packaged Ice Antitrust Litig.*, 08–md–01952, 2011 WL 891160, at *11 (E.D.Mich. Mar. 11, 2011) (“[N]amed plaintiffs lack standing to assert claims under the laws of the states in which they do not reside or in which they suffered no injury.”).

*9 Two Supreme Court decisions, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), are at the heart of this issue. In *Amchem*, the Supreme Court reviewed a challenge to certification of a global settlement class involving persons who were exposed to asbestos. See 521 U.S. at 591–92. In doing so, it analyzed the role of settlement in determining class certification under Rule 23, as well as arguments set forth by objectors that certain members of the settlement class lacked standing to sue because they had not sustained a cognizable injury or because their injury was not redressable. *Id.* at 612. The Court declined to reach the standing arguments because it found the class certification issues under Rule 23 to be dispositive. *Id.* Consequently, the Court held that because resolution of the class certification issues “here is logically antecedent to the existence of Article III issues, it is appropriate to reach them first.” *Id.* (citation omitted).

The Court further explained that it was “follow[ing] the path taken by the [Third Circuit] Court of Appeals” in “declin[ing] to reach these issues because they ‘would not exist but for the [class-action] certification.’” *Id.* (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 623 (3d Cir.1996)). To be sure, in *Georgine*, the Court of Appeals, when faced with class certification and Article III issues simultaneously, decided the class certification issues first because they were dispositive. 83 F.3d at 623. In doing so, the Court found “it prudent not to decide issues unnecessary to the disposition of the case, especially when many of these issues implicate constitutional questions.” *Id.* (citing *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) (expressing the rule that courts will avoid constitutional questions when possible)). Thus, these rulings echo the “fundamental and longstanding principle of judicial restraint [] requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).

The *Ortiz* court also dealt with certification issues regarding a global settlement class for asbestos related injuries and arguments regarding the Article III standing of certain class members who petitioners alleged did not suffer an injury-in-fact. 527 U.S. at 821, 831. As in *Amchem*, the Court decided to address the class certification issues before the Article III questions. *Id.* at 831. In doing so, it explained:

Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88–89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). But the class certification issues are, as they were in *Amchem*, “logically antecedent” to Article III concerns, 521 U.S., at 612, 117 S.Ct. 2231, 138 L.Ed.2d 689, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see *Steel Co.*, *supra*, at 92, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210. Thus the issue about Rule 23 certification should be treated first, “mindful that [the Rule’s] requirements must be interpreted in keeping with Article III constraints....” *Amchem*, *supra*, at 612–613, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689.

*10 *Id.*

Thus, *Amchem* and *Ortiz* stand for the proposition that, in cases where a court is presented with class certification and Article III standing issues simultaneously, and the class certification issues are dispositive in that they pertain to statutory standing—i.e. whether a statute authorizes a given party to sue in the first place, the certification issues are “logically antecedent” to the standing issues and the court may therefore elect to address the certification issues first in the interest of judicial restraint. Under these circumstances, if a court finds that “certification of [a] proposed class [is] improper, the issue of certain class members’ standing would [be] moot.” *In re Welbutrin XL*, 260 F.R.D. at 153.

Here, however, the Court is presented solely with the issue of whether the named IP Plaintiffs have standing to assert the causes of action in the Indirect CAC, a threshold issue that the Court must address. See *Lewis* 518 U.S. at 357. Contrary to *Ramirez* and *In re Grand Theft Auto*, the “[Supreme] Court’s standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); see also *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (“[T]he

standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.”); *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (“It is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.”). Otherwise, a plaintiff would be able to bring a class action complaint under the laws of nearly every state in the Union without having to allege concrete, particularized injuries relating to those states, thereby dragging defendants into expensive nationwide class discovery, potentially without a good-faith basis. In other words, the plaintiff would have to do “no more than name the preserve on which he intends to hunt.” *Johnson v. Ga. Highway Express, Inc.*, 417 F.2d 1122, (5th Cir.1969), overruled on other grounds by *Griffin v. Dugger*, 823 F.2d 1476 (11th Cir.1987). Accordingly, because the named IP Plaintiff lack standing to assert antitrust violations under the laws of Arizona, the District of Columbia, Hawaii, Illinois, Maine, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and West Virginia, *see* Note 10, IP Plaintiffs' claims under those laws are dismissed.

C. The Alleged MgO Conspiracy

i. One Conspiracy or Two

*11 As an initial matter, Defendants maintain that Plaintiffs' allegations are confusing to the point where it is impossible to determine whether the alleged conspiracy relates to DBM, CCM, or MgO in general. As a result, Defendants contend that Plaintiffs fail to allege a plausible antitrust conspiracy. This contention is unfounded. While Plaintiffs at times refer to anticompetitive conduct regarding MgO generally, it is clear from the surrounding allegations whether such conduct concerns DBM or CCM.¹¹ Indeed, as evidenced by their next contention, Defendants have no problem categorizing Plaintiffs' individual allegations as relevant to DBM or CCM.

¹¹ Moreover, the CACs specifically note at the outset that the term MgO can refer to DBM or CCM. *See* (Direct CAC ¶ 1; Indirect CAC ¶ 1 n. 1).

On that note, Defendants contend that, to the extent that the Court finds that Plaintiffs allege distinct conspiracies regarding DBM and CCM, respectively, the Court should analyze the allegations relating to each conspiracy separately and require that those allegations independently meet the pleading requirements of *Twombly* and *Iqbal*. Plaintiffs counter that they allege a single MgO conspiracy comprised of intertwined and interdependent anticompetitive agreements.

As Plaintiffs point out, it is well-settled that “[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *see also In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 822 (3d Cir.1982) (“a seriatim examination of [] claims against each [] conspiracy defendant[] as if they were separate lawsuits ... overlook[s] the conspiracy itself.”). Defendants contend that the Supreme Court's ruling in *Continental Ore* is inapposite because that case concerned a monopolistic exclusion conspiracy, as opposed to a price-fixing conspiracy. This contention is remarkably unpersuasive. The very case that *Continental Ore* cites for the proposition that a court must look to an alleged conspiracy as a whole, *United States v. Patten*, 226 U.S. 525, 33 S.Ct. 141, 57 L.Ed. 333 (1913), concerned a conspiracy to artificially inflate the price of cotton. Furthermore, there is no indication that *Continental Ore* limited its ruling to conspiracies based on monopolistic exclusion. *See* 370 U.S. at 699 (“we do not believe that ... liability under the antitrust laws can be measured by any rigid or mechanical formula ...”). Finally, Defendants fail to present, nor does the Court see, a single reason why it would be any less logical or equitable to assess an alleged price-fixing or market allocation conspiracy as a whole than a monopolistic exclusion conspiracy.

Defendants' contention that the Court should analyze Plaintiffs' allegations separately with respect to DBM and CCM because Plaintiffs allege “two different courses of conduct as to the two different products at two different times” (Sumitomo Reply Br., 3) is also unavailing. While it is true that Defendants initially “agreed to fix prices and allocate markets for DBM,” (“the DBM Agreement”) and subsequently agreed to allocate the domestic CCM market to Premier (“the CCM Agreement”), (*id.*), those agreements are not mutually exclusive. To the contrary, the CCM Agreement is dependent on the DBM Agreement,

and vice versa. See *In re Vitamins Antitrust Litig.*, 320 F.Supp.2d 1, 16 (D.D.C.2004) (recognizing the potential “interdependency between various branches of a common conspiracy.”). Specifically, Defendants entered into the CCM Agreement in order to restore and maintain the DBM Agreement after Premier broke that agreement due to Sumitomo and YAS’s attempt to enter the domestic CCM market. Consequently, the absence of one eliminates the consideration for the other. Moreover, “[h]orizontal antitrust conspiracies commonly include sellers in more than one relevant market.” *In re Vitamins Antitrust Litig.*, No. MISC 99–197, 2000 WL 1475705, at *10 (D.D.C. May 9, 2000). Accordingly, the Court will treat Plaintiffs CACs as alleging a single conspiracy not to compete in the sale of two forms of MgO.

ii. The Necessity of Allegations Regarding the MgO Market

*12 Defendants argue that Plaintiffs fail to allege an unlawful price-fixing and market allocation conspiracy because they do not set forth relevant market conditions and Sumitomo’s, YAS’s, and Premier’s relative market power indicating that they plausibly could have fixed the price of DBM and allocated the domestic DBM and CCM markets. Plaintiffs argue that they are alleging per se violations of Section 1 of the Sherman Act and therefore “Defendants’ arguments concerning market power and relevant markets are legally irrelevant.” (DP Pl.’s. Br., 12.)

“Section 1 of the Sherman Act provides: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 314 (3d Cir.2010) (quoting 15 U.S.C. § 1). “[T]his statutory language imposes two essential requirements on an antitrust plaintiff.” *Id.* “First, the plaintiff must show that the defendant was a party to a contract, combination ... or conspiracy.” *Id.* at 315 (quotation and citation omitted). This requires the plaintiff to demonstrate “some form of concerted action” indicating a “unity of purpose or a common design and understanding or a meeting of the minds or a conscious commitment to a common scheme.” *Id.* (quotations and citations omitted).

Second, “the plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade.” *Id.* (quotation and citation omitted). “[T]he usual standard applied to determine whether a challenged practice unreasonably restrains trade is the so-called rule of reason.”

Id. (quotation and citation omitted). “[U]nder a rule-of-reason analysis, the plaintiff bears the initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic market.” *Id.* (quotation and citation omitted). “[S]uccessful attempts to meet this burden typically include a demonstration of defendants’ market power, as a judgment about market power is [a] means by which the effects of the [challenged] conduct on the market place can be assessed.” *Id.* at 315–16 (quotation and citations omitted).

“If the plaintiff carries this burden, the court will need to decide whether the anticompetitive effects of the practice are justified by any countervailing pro-competitive benefits.” *Id.* However, “Judicial experience has shown that some classes of restraints” almost never have “redeeming competitive benefits,” and therefore a court need not apply the rule of reason analysis. *Id.* Instead, they are “subject to a ‘per se’ standard.” *Id.* “Paradigmatic examples are horizontal agreements among competitors to fix prices or to divide markets.” *Id.* (quotation and citation omitted). If a plaintiff’s allegations “fall into one of the recognized classes,” an unreasonable restraint on trade is “conclusively presumed” and therefore “plaintiffs are relieved of the obligation to define a market and prove market power.” *Id.* (citations omitted).

*13 As discussed below, Plaintiffs sufficiently allege that Defendants entered into (1) a horizontal agreement to fix prices in and allocate shares of the domestic DBM market and (2) a horizontal agreement to allocate the domestic CCM market to Premier. Accordingly, Plaintiffs assert per se antitrust violations that do not require allegations regarding the nature of the domestic DBM and CCM markets or Defendants’ power within those markets.¹²

¹² This also disposes of Sumitomo’s contention that the Court should consider “certain relevant facts” noted in *Animal Science Prods., Inc. v. China Nat’l Metals & Minerals*, 596 F.Supp.2d 842 (D.N.J.2008) regarding the domestic DBM and CCM markets. (Sumitomo (DP Pl.’s) Br., 4.)

iii. The DBM Agreement

Defendants argue that Plaintiffs’ allegations of an agreement to fix prices in and allocate shares of the domestic DBM market are facially insufficient because (1) they fail to provide the substance of the agreement, (2) they fail to rule out potentially alternative, lawful explanations for such

an agreement, and (3) their “factual narrative is inherently implausible.” (Sumitomo (DP Pl.’s.) Br., 15.) Plaintiffs argue that their allegations of a price-fixing and market allocation agreement are sufficient because (1) they “explicitly state who was conferring with whom about MgO pricing, markets and customers” (DP Pl.’s. Br., 15.), and (2) Defendants’ arguments regarding the inherent plausibility of the alleged conspiracy implicate factual questions that are not properly resolved on a motion to dismiss.

Defendants’ contention that Plaintiffs’ allegations are inadequate because they “fail to disclose the actual substance of the alleged conversations or agreements” (Sumitomo (DP Pl.’s.) Br., 14) is unavailing. *Twombly* does not require detailed allegations regarding the specific nature of a price-fixing or market allocation agreement; rather, “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” 550 U.S. at 556. Put another way, a complaint “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.” *Id.* Requiring Plaintiffs to set forth the full details of an antitrust conspiracy at this stage of the litigation would present an onerous burden because “in antitrust cases, [] the proof is largely in the hands of the alleged conspirators.” *In re Neurontin Antitrust Litig.*, No. 02–1390, 2009 WL 2751029, at *7 (D.N.J. Aug.28, 2009) (quoting *Hosp. Building Co. Trustees of Rex Hosp.*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976)).

Here, Plaintiffs allege that (1) a significant portion of DBM consumed in the United States comes from China; (2) during the Class Period, Premier and Sumitomo bought nearly all Chinese DBM available for purchase and resold it to their customers in the United States; (3) Mr. Ahl of Premier “regularly called” Mr. Sumikawa of YAS “to discuss fixing Premier’s and Sumitomo’s [DBM] prices and allocating their respective MgO accounts in the U.S” (Direct CAC ¶ 34; Indirect CAC ¶ 42); (4) these market allocation and price-fixing schemes were implemented by Mr. Ahl and his successors at Premier and Mr. Wakisama of Sumitomo; (5) at the 2004 Tulsa meeting, Mr. Akiyama recounted to Mr. Sumikawa “multiple discussions” between him and Mr. Ahl to set DBM prices and allocate DBM markets “and ensure that Sumitomo was maintaining its agreement with Premier to fix [DBM] prices and allocate [DBM] markets,” (Direct CAC ¶ 40; Indirect CAC ¶ 49); and (5) when Mr. Vannorsdel allegedly “expressed concern about compromising his relationship with Premier by helping facilitate Sumitomo and YAS’s involvement” in the CCM

market, Mr. Akiyama responded, “ ‘Don’t be concerned because we [Sumitomo] talk with Premier on a daily basis to set prices and to discuss what accounts they can have.’ ” (Direct CAC ¶ 41; Indirect CAC ¶ 50.)

*14 These allegations plausibly suggest that Defendants entered into an agreement to fix prices in and allocate shares of the domestic DBM market, the specifics of which can be reasonably expected to be revealed in discovery. Plaintiffs state (1) the subject of the alleged agreement, (2) the parties to the agreement and the specific individuals that discussed and implemented the agreement, and (3) the context in which the agreement arose. This is sufficient to withstand a motion to dismiss.

Defendants’ contention that Plaintiffs fail to assert a plausible antitrust conspiracy because their allegations could, in fact, refer to a lawful vertical agreement between Sumitomo and Premier to fix prices for DBM whereby Sumitomo purchases DBM from Premier as a reseller, is irrelevant. At the pleading stage, Plaintiffs need only set forth allegations that create an inference of an unlawful agreement, *Twombly*, 550 U.S. at 556, which, as previously discussed, they have done; they need not set forth allegations tending to rule out potential alternative explanations.¹³

13 This is to be distinguished from the requirement to plead plus factors to rule out independent action “when a plaintiffs’ claims of conspiracy rest on parallel conduct,” *In re Ins. Brokerage*, 618 F.3d at 323, which is discussed below regarding the alleged CCM Agreement. Plaintiffs need not assert plus factors to establish the plausibility of the DBM Agreement because they set forth direct allegations of that agreement. *See In re Ins. Brokerage*, 618 F.3d at 323 (“Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate.”).

Finally, Defendants’ contention that the alleged DBM Agreement is “inherently implausible” in that, on the one hand, Sumitomo was allegedly worried about retaliatory action by Premier for attempting to enter the CCM market and, on the other hand, “could give credible assurances to the Vannorsdels that it could shield them from Premier[’s] retaliation because of [Sumitomo’s] ‘daily’ contact with Premier,” (Sumitomo (DP Pl.’s.) Br., 15) is similarly irrelevant because it asks the Court to improperly assess the merits of Plaintiffs’ allegations.¹⁴ *See Aktieselskabet AF 21. November*

2001 v. Fame Jeans Inc., 525 F.3d 8, 17 (D.C.Cir.2008) (“*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim. A court deciding a motion to dismiss must not make any judgment about the probability of the plaintiff’s success ... the court must assume that all the allegations in the complaint as true (even if doubtful in fact)” (quotations and citations omitted)). Thus, Plaintiffs have sufficiently alleged an unlawful agreement among Defendants to fix prices in and allocate shares of the domestic DBM market.

14 Moreover, there is nothing “inherently implausible” about Sumitomo’s attempt to assuage the Vannorsdels’ concern about Premier’s potential retaliation by stating that it speaks with Premier on a daily basis to set DBM prices and allocate shares of the DBM market. It is certainly plausible that Sumitomo was aware of the risk of retaliation by Premier but believed it could “enter the [CCM] market discreetly” (Direct CAC ¶ 39; Indirect CAC ¶ 48) because Premier’s attention was focused on maintaining their agreement in the DBM market.

iv. The CCM Agreement

Defendants contend that Plaintiffs fail to allege the existence of an unlawful agreement to allocate the domestic CCM market to Premier because (1) they merely allege parallel conduct that does not indicate concerted action, (2) there are obvious alternative explanations for Sumitomo’s and YAS’s decision not to enter the CCM market, and (3) they fail to establish that Defendants were competitors in the CCM market. Plaintiffs counter that they are not relying on parallel conduct but rather direct admissions of an agreement among Defendants to allocate the domestic CCM market to Premier, and therefore Defendants’ proffered alternative explanations are irrelevant.

As previously discussed, Section 1 of the Sherman Act “does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy.” *Twombly*, 550 U.S. at 553 (quotation and citation omitted). This is because seemingly anticompetitive conduct may be just as “consistent with conspiracy ... [as] with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Id.* at 554 (citation omitted). Accordingly, “[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express.” *Id.* at 553 (quotation and citation omitted). “Hence,

when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* at 557.

*15 This is usually accomplished by pleading one or more “plus factors” that “indicate the existence of an actionable agreement.” *In re Ins. Brokerage*, 618 F.3d at 321. While “[t]here is no finite set of such criteria,” the Court of Appeals has identified “at least three such plus factors: (1) evidence that the defendant had a motive to enter into a[] conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.” *Id.* at 321–22 (quotations and citation omitted).

Here, Plaintiffs’ allegations suggest an agreement among Defendants to allocate the CCM market to Premier. Plaintiffs allege that (1) representatives from Sumitomo and YAS met with others at a Tulsa hotel, in the summer of 2004, to discuss entering the domestic CCM market in order to fill Sumitomo’s barge capacity; (2) Premier discovered their plan to enter the domestic CCM market and retaliated by lowering DBM prices; and (3) as a result, Sumitomo and YAS agreed with Premier to remain out of the CCM market.

To be sure, contrary to Plaintiffs’ contentions, these allegations do not amount to a direct admission of an unlawful agreement to allocate the CCM market to Premier; taken in isolation, they merely amount to parallel conduct plus a conclusory allegation of an agreement. Placing these allegations in the context of the CACs as a whole, however, Plaintiffs successfully demonstrate the first plus factor—that Sumitomo and YAS had a motive to enter into an unlawful agreement with Premier to stay out of the domestic CCM market—and provide a plausible context for that agreement. As previously discussed, Sumitomo and YAS maintained an agreement with Premier to fix prices in and allocate shares of the domestic DBM market. As a result, as the CACs indicate, Sumitomo and YAS wanted to enter the CCM market undetected so that they could continue to maintain their agreement with Premier in the DBM market. When Premier discovered their plans and, in response, cut prices in the DBM market, Sumitomo and YAS agreed with Premier to stay out of the CCM market with the motive of restoring and maintaining their agreement in the DBM market.

In this context, Defendants’ alternative explanations that a profit-maximizing entity could independently decide not to

enter a market in which (1) it remained unfamiliar with the product and its customers and (2) the dominant player recently cut prices are by no means “obvious” or “more plausible” (Sumitomo (DP Pl’s.) Br., 18) than an illegal agreement to stay out of the CCM market and therefore do not provide a basis for dismissal. At the pleading stage, “a claim of conspiracy predicated on parallel conduct should be dismissed if common economic experience, or the facts alleged in the complaint itself, show that independent self-interest is an obvious alternative explanation for defendants’ common behavior.” *In re Ins. Brokerage*, 618 F.3d at 326. Plaintiffs’ allegations need not rule out all potential alternative explanations. See *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 352 (2d Cir.2010) (“Although the *Twombly* court acknowledged that for purposes of summary judgment a plaintiff must present evidence that tends to exclude the possibility of independent action, it specifically held that, to survive a motion to dismiss, plaintiffs need only enough factual matter (taken as true) to suggest that an agreement was made” (quotations and citations omitted)).

*16 Finally, Sumitomo’s argument that Plaintiffs fail to allege a plausible agreement to allocate the CCM market to Premier because there is no indication that Defendants were actual or potential competitors in the CCM market is unavailing. Sumitomo specifically contends that Plaintiffs must establish that it had the intent and capability of entering the CCM market as a competitor in order to allege a plausible agreement among Defendants to allocate the CCM market to Premier. However, the authority cited by Sumitomo provides little support for this contention. See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49–50, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990) (parties need not have competed in the same territorial market to unlawfully allocate that market); *Andrx Pharm, Inc. v. Bioval Corp., Int’l*, 256 F.3d 799, 806–07 (D.C.Cir.2001) (potential competitor must show background and experience in new market, financial capability to enter market, and affirmative steps toward entry in order to establish injury-in-fact for standing to sue under Section 4 of the Clayton Act); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir.1979) (to sustain jury finding of unlawful horizontal market allocation agreement among potential competitors, there must have been sufficient support in the record to establish that potential competitors had the “necessary desire, intent, and capability to enter the market”).

To be sure, the Court of Appeals has generally recognized that the existence of an unlawful horizontal agreement to allocate

a given market must occur among competitors or potential competitors in that market:

An agreement among persons who are not actual or potential competitors in a relevant market is for Sherman Act purposes *brutum fulmen* ... To some extent, of course, a horizontal agreement tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus its very existence supports an inference that it would have an effect in a relevant market. Where, ... however, the disputed issue is the existence or scope of the alleged horizontal agreement that is to be inferred from circumstantial evidence, the first inquiry must be whether or not each firm alleged to have been a party to it was an actual or potential competitor in that market.

United States v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir.1986) (reversing dismissal of indictment on double jeopardy grounds). However, Sumitomo fails to present, nor is the Court aware of, any authority requiring a purchaser plaintiff to specifically establish, at the pleading stage, that the parties to a horizontal agreement to allocate a given market were competitors or potential competitors in that market. To require Plaintiffs, pre-discovery, to establish Sumitomo’s background and experience in the CCM market, its financial capability to enter that market, and the specific steps taken by Sumitomo to enter it, would be overly onerous, as much of this information is likely to be exclusively in the hands of Sumitomo.¹⁵ Thus, Plaintiffs have sufficiently alleged an unlawful agreement among Defendants to allocate the domestic CCM market to Premier.

15 In any event, Plaintiffs allege Sumitomo’s motive for entering the CCM market (filling excess barge capacity), and certain steps taken to enter that market (meeting with the Vannorsdels in Tulsa).

v. YAS' Involvement in the Alleged Conspiracy

*17 YAS separately argues that Plaintiffs fail to establish its participation in the alleged conspiracy because they fail to show that it came to a meeting of the minds with Sumitomo and Premier to (1) fix prices in and allocate shares of the domestic DBM market and (2) allocate the domestic CCM market to Premier.¹⁶ Plaintiffs counter that (1) they have set forth direct allegations indicating YAS's knowledge and participation in the alleged conspiracy, and (2) YAS need not have played the same role in the conspiracy, maintain the same motives as Sumitomo or Premier for participating in it, or sell MgO to be held liable.

¹⁶ Citing to *Toledo Mack Sales & Serv. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir.2008), YAS further argues that Plaintiffs' failure to establish that YAS occupies the same level as Sumitomo and Premier on the MgO supply chain "precludes *per se* treatment of YAS' alleged antitrust violations." (YAS Br., 4 n. 5.) This argument misses the mark. While *Toledo Mack* noted that, "[i]n contrast to horizontal price-fixing agreements between entities at the same level of a product's distribution chain, the legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed by the rule of reason," and that "[t]he rule of reason analysis applies even when ... the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers," 530 F.3d at 225 (citation omitted), Plaintiffs do not allege YAS' arrangement with Sumitomo to source Chinese magnesite and MgO constitutes an unlawful vertical agreement to support a horizontal conspiracy between Sumitomo and Premier. Rather, Plaintiffs allege that YAS participated directly with Sumitomo and Premier in the alleged horizontal conspiracy to fix prices in and allocate shares of the DBM market and allocate the CCM market to Premier. Moreover, "[t]he law is settled that where an upstream supplier participates in a conspiracy involving horizontal competitors, it is proper to analyze the entire restraint as one of horizontal price-fixing." *In re Mercedes-Benz*, 157 F.Supp.2d at 362.

As previously discussed, to hold YAS or any other Defendant liable, Plaintiffs must set forth allegations suggesting that

YAS maintained "unity of purpose or a common design and understanding or a meeting of minds or a conscious commitment to a common scheme" with Sumitomo and Premier to (1) fix prices in and allocate shares of the domestic DBM market, and (2) allocate the CCM market to Premier. *In re Ins. Brokerage*, 618 F.3d at 315 (quotations and citation omitted). This does not require a showing that YAS knew of or participated in every transaction in furtherance of or related to the alleged conspiracy. See *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1259 (8th Cir.1972) ("Although knowledge is implicit in the requirement of unity of purpose, no case of which we are aware requires that each party to a conspiracy knows of each transaction encompassed by the conspiracy in order to be held accountable therefore."); *In re Vitamins Antitrust Litig.*, 320 F.Supp.2d 1, 15 (D.D.C.2004) ("Although Plaintiffs must show that each Defendant had knowledge of an agreement as to the overall conspiracy, they need not show (1) evidence of a formal agreement, or (2) knowledge, on behalf of the Defendant, of every detail of the alleged conspiracy."); *In re Mercedes-Benz*, 157 F.Supp.2d at 375 ("That a particular defendant may or may not have joined in a specific overt act in furtherance of the conspiracy ... does not affect its status as a conspirator."). On the other hand, "knowledge alone [of the conspiracy] is not sufficient" to hold it liable. *In re Vitamins*, 320 F.Supp.2d at 16. Plaintiffs must therefore set forth allegations suggesting that YAS (1) had knowledge of the conspiracy to fix prices in and allocate shares of the domestic DBM market, and allocate the CCM market to Premier, and (2) intended to join that conspiracy. *Id.* "[A] party progresses from mere knowledge of an endeavor to intent to join it when there is 'informed and interested cooperation, stimulation, instigation. And there is also a stake in the venture which, even if it may not be essential, is not irrelevant to the question of conspiracy.'" *Id.* (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 713, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943)).

1. The DBM Agreement

Plaintiffs allege that Mr. Sumikawa of YAS (1) facilitates Sumitomo's purchases of Chinese DBM for resale in the domestic DBM market, (2) received regular phone calls from Mr. Ahl of Premier "to discuss fixing Premier's and Sumitomo's [DBM] prices and allocating their respective [DBM] accounts in the U.S.," (Direct CAC ¶ 34; Indirect CAC ¶ 42), and (3) attended the 2004 Tulsa meeting where (i) Mr. Akiyama of Sumitomo recounted to him "multiple discussions" between him and Mr. Ahl to set DBM prices and allocate DBM markets "and ensure that Sumitomo was

maintaining its agreement with Premier to fix [DBM] prices and allocate [DBM] markets,” (Direct CAC ¶ 40; Indirect CAC ¶) and (ii) it was revealed that Sumitomo communicates with Premier on a daily basis fix prices and allocate accounts. These allegations create a plausible inference that YAS had knowledge of an agreement to fix prices in and allocate shares of the domestic DBM market and the intent to join it. Accepting Plaintiff's allegations as true and making all reasonable inferences in their favor, YAS' facilitation of Sumitomo's DBM purchasing indicates a plausible stake in the DBM Agreement, while its receipt of phone calls to discuss the Agreement and attendance at a meeting at which it was revealed indicates that YAS had knowledge of the DBM Agreement and that it engaged in informed and interested cooperation.

*18 Citing to *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir.2007) and *Hinds County, Mississippi v. Wachovia Bank N.A.*, 620 F.Supp.2d 499, 518 (S.D.N.Y.2009), YAS argues that these allegations should be “discounted” because they amount to mere “averments of agreements made at some unidentified place and time.” (YAS Br., 4.) *In re Elevator Antitrust Litig.* concerned a list of “basically every type of conspiratorial activity that one could imagine ... in entirely general terms without any specification of any particular activities by any particular defendant.” 502 F.3d at 50. Similarly, *Hinds County* dealt with conclusory allegations of “ ‘per se illegal horizontal communications’ in support of [an] alleged conspiracy.” 620 F.Supp.2d at 518. Here, in contrast, Plaintiffs allege (1) the way in which YAS participates with Sumitomo—a member of the conspiracy—in the domestic DBM market, (2) phone calls from Premier—another party to the conspiracy—to YAS to discuss fixing prices in and allocating shares of the domestic DBM market, and (3) YAS's attendance at a meeting where Sumitomo—its partner in the domestic DBM market—recounted to YAS discussions in which it set prices in and allocated shares of the domestic DBM market with Premier. These allegations, do not amount to a mere “list of theoretical possibilities,” *In re Elevator Antitrust Litig.*, 502 F.3d at 50, or “require the Court to assume the existence of the conspiracy.” *Hinds County*, 620 F.Supp.2d at 518. Rather, they make the alleged conspiracy more plausible.

YAS further argues that “it is wholly implausible that [it] (a minor player that was not itself a manufacturer, importer or seller¹⁷) would have discussed fixing Premier's and Sumitomo's [DBM] prices,” particularly since Plaintiffs fail to “allege that YAS had any ability to influence (let alone)

dictate Sumitomo's [DBM] prices, nor which customers Sumitomo dealt with.” (YAS Br., 5.) As previously discussed, this line of argument is not only improper at the pleading stage—where the Court must accept Plaintiffs' allegations as true—it is also unpersuasive. There is nothing “wholly implausible” about YAS participating in discussions to fix prices in and allocate shares of the domestic DBM market. Sumitomo was only able to participate in the domestic DBM market in the first place due to YAS's relationship with Chinese mines from which Sumitomo could purchase DBM and magnesite. Consequently, it is certainly plausible that YAS could participate in discussions with co-conspirators to fix prices and allocate shares of the DBM market.

17 Citing to *Howard Hess Dental Laboratories Inc. v. Dentsply Intern., Inc.*, 424 F.3d 363 (3d Cir.2005), YAS also argues that Plaintiffs' failure to allege that it sold DBM or CCM requires its dismissal from this case as a matter of law. While that case notes the well-settled proposition that only direct purchasers may recover damages in federal antitrust suits, it by no means indicates that only a seller of the product in question may be found liable in a Section 1 conspiracy. As previously discussed, YAS need not have participated in a particular act in furtherance of the conspiracy to be held liable.

2. The CCM Agreement

Plaintiffs' allegations suggesting an agreement among Sumitomo and Premier to allocate the CCM market to Premier apply with equal force to YAS. As previously discussed, Plaintiffs allege that (1) Sumitomo and YAS met with others at a Tulsa hotel, in the summer of 2004, to discuss entering the domestic CCM market in order to fill Sumitomo's barge capacity; (2) Premier discovered their plan to enter the domestic CCM market and retaliated by lowering DBM prices to keep Sumitomo and YAS out of the CCM market; and (3) as a result, Sumitomo and YAS agreed with Premier to remain out of the CCM market.

*19 YAS argues that these allegations are conclusory because they “provide [] no details whatsoever about YAS's participation in this alleged agreement, including what role it is alleged to have played.” (YAS Br., 7.) At the pleading stage, however, Plaintiffs need not allege the specific nature of YAS's or any other Defendant's participation in the agreement to allocate the CCM market to Premier. See *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp.2d 896, 904 (N.D.Cal.2008) (“Although

Plaintiffs will need to provide evidence of each Defendants' participation [at summary judgment] ... they now only need to make allegations that plausibly suggest that each Defendant participated in the alleged conspiracy.”). As previously discussed, Plaintiffs must set forth allegations suggesting that YAS had knowledge of the agreement and the intent to join it. Plaintiffs' allegations that YAS, as Sumitomo's partner in the domestic MgO market, (1) attended a meeting to arrange for Sumitomo to enter the domestic CCM market and (2) subsequently agreed with Sumitomo and Premier to allocate that market to Premier in order to maintain their agreement to fix prices and allocate shares of the domestic DBM market, do just that.

Finally, like Sumitomo, YAS argues that it cannot be held liable for the alleged agreement to allocate the domestic CCM market to Premier because Plaintiffs fail to establish that YAS was an actual or potential competitor in that market. For the reasons discussed in Point IICiv, at the pleading stage, Plaintiffs, as purchasers, need not establish that YAS was an actual or potential competitor in the CCM market in order to allege its participation in a horizontal conspiracy. Furthermore, YAS's (1) role in facilitating Sumitomo's purchase of Chinese DBM and (2) attendance at the 2004 Tulsa meeting where it, Sumitomo, and the Vannorsdels discussed entering into the CCM market, suggests that YAS intended to participate with Sumitomo in the CCM market in the same way as they had been participating in the DBM market. Thus, Plaintiffs have set forth allegations plausibly suggesting that YAS participated in an agreement to allocate the CCM market to Premier.

D. Statute of Limitations and Fraudulent Concealment

Actions brought under the Clayton Act are subject to a four-year statute of limitations. 15 U.S.C. §15b. In an antitrust conspiracy that continues over a period of years, each overt act in furtherance thereof that injures the plaintiff—for example, the selling of a price-fixed product—starts the statute of limitations period running for that particular act. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (“Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business” (citations omitted)). However, “the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.” *Klehr*, 521 U.S. at 190 (citations omitted).

*20 Defendants argue that Plaintiffs' federal antitrust claims are barred by the applicable four-year statute of limitations. Specifically, Defendants contend that Plaintiffs (1) fail to allege overt acts in furtherance of the alleged conspiracy that occurred after 2004 and (2) fail to plead fraudulent concealment with particularity to otherwise toll the statute of limitations. Plaintiffs do not dispute that they fail to allege overt acts after 2004, but maintain that they plead fraudulent concealment with the requisite particularity to toll the statute of limitations.

The equitable doctrine of fraudulent concealment applies to every federal statute of limitations. *Holmberg v. Armbrrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946). To toll a statute of limitations through fraudulent concealment, a plaintiff must show “(1) an affirmative act of concealment; (2) which misleads or relaxes the plaintiff's inquiry, who (3) exercised due diligence in investigating his cause of action .” *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1178–79 (3d Cir.1993) (citation omitted). In addition, allegations of fraudulent concealment must be pled with particularity in accordance with Federal Rule of Civil Procedure 9(b). *In re Mercedes-Benz*, 157 F.Supp.2d at 368.

However, “Rule 9[(b)] does not require plaintiffs to plead facts that, by the nature of the alleged fraud, are within the defendants' control.” *Id.* (citing *In re Craftmatic Secs. Litig.*, 890 F.2d 628, 645 (3d Cir.1989)). Indeed, “[c]ourts must be sensitive to the fact that [a rigid] application of Rule 9(b) prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud.” *In re Craftmatic*, 890 F.2d at 645 (quotation and citation omitted). “Thus, courts have relaxed the rule when factual information is peculiarly within the defendant's knowledge or control.” *Id.* Accordingly, under the more flexible application of Rule 9(b), Plaintiffs need not allege the specific information that is exclusively within Defendants' knowledge or control. See *id.* at 646. However, Plaintiffs must allege facts suggesting fraudulent concealment and “why additional information lies exclusively within the defendants' control.” *Id.*

As discussed fully below, Plaintiffs fail to satisfy each element of fraudulent concealment, thus requiring dismissal of their federal antitrust claims as time-barred. However, the Court will grant Plaintiffs leave to amend their allegations of fraudulent concealment to equitably toll the statute of limitations.¹⁸

18

IP Plaintiffs' state antitrust law claims similarly require dismissal for failure to establish fraudulent concealment, as their applicable statutes of limitations range from three to six years. *See* [Ariz.Rev.Stat. Ann. § 44-1410\(A\)](#) (Arizona) (2011) (four years); [Cal. Bus. & Prof.Code § 16750.1](#) (2011) (California) (four years); [D.C.Code § 28-4511\(b\)](#) (2011) (four years); [Haw.Rev.Stat. § 480-24\(a\)](#) (2010) (Hawaii) (four years); [Ill. Comp. Stat. ch. 740, § 10/7\(2\)](#) (2010) (four years); [Iowa Code § 553.16](#) (2011) (Iowa) (four years); [Four B Corp. v. Daicel Chem. Indus., Ltd.](#), 253 F.Supp.2d 1147, 1156 (D.Kan.2003) (Kansas) (three years) (citing [Kan. Stat. Ann. § 60-512\(2\)](#) (2010)); [McKinnon v. Honeywell Int'l, Inc.](#), 977 A.2d 420, 424 (Me.2009) (Maine) (six years) (citing [Me.Rev.Stat. Ann. tit. 14 § 752](#) (2008)); [Mich. Comp. Laws § 445.781](#) (2010) (Michigan) (four years); [Am. Computer Trust Leasing v. Jack Farrell Implement Co.](#), 763 F.Supp. 1473, 1491 n. 21 (D.Minn.1991) (Minnesota) (four years) (citing [Minn.Stat. § 325D.64](#) (subdiv .1) (2010)); [Miss.Code Ann. § 15-1-49\(1\)](#) (2010) (three years); [Neb.Rev.Stat. § 25-206](#) (2010) (Nebraska) (four years); [Nev.Rev.Stat. § 598A.220\(2\)\(a\)](#) (2010) (four years); [N.H.Rev.Stat. § 356:12\(II\)](#) (1973) (New Hampshire) (four years); [N.M. Stat. § 57-1-12\(B\)](#) (1978) (New Mexico) (four years); [N.Y. Gen. Bus. Law § 340\(5\)](#) (2004) (New York) (four years); [N.C. Gen.Stat. § 75-16.2](#) (2010) (North Carolina) (four years); [N.D. Century Code § 51-08.1-10\(2\)](#) (1987) (four years); [Or.Rev.Stat. § 646.800\(2\)](#) (1975) (Oregon) (four years); [S.D. Codified Laws § 37-1-14.4](#) (1975) (South Dakota) (four years); [State ex rel. Leech v. Levi Strauss & Co.](#), No. 79-722-III, 1980 WL 4696, at *3 (Tenn.Ch. Sept.25, 1980) (Tennessee) (three years) (citing [Tenn. Stat. § 28-3-105\(3\)](#) (2011)); [Utah Code § 76-10-925\(2\)](#) (1979) (Utah) (four years); [Vt. Stat. Ann. tit. 12, § 511](#) (2010) (Vermont) (six years); [W. Va.Code § 47-18-11](#) (1978) (West Virginia) (four years); [Wis. Stat. § 133.18\(2\)](#) (2011) (Wisconsin) (six years). However, to the extent that IP Plaintiffs sufficiently amend their allegations to establish fraudulent concealment of their federal antitrust claims, they will also have established fraudulent concealment of their state law antitrust claims. *See* Note 9.

i. Affirmative Acts of Concealment

Defendants argue that (1) Plaintiffs fail to sufficiently allege affirmative acts of concealment and (2) their allegations that the MgO conspiracy is self-concealing cannot satisfy the first element of fraudulent concealment.¹⁹ Plaintiffs contend that they have alleged (1) a self-concealing conspiracy that satisfies the first element of fraudulent concealment, or, (2) in the alternative, affirmative acts of concealment committed by Defendants.

19

Defendants further argue that Sumitomo's alleged admission to the Vannorsdels of the DBM Agreement cuts against their fraudulent concealment allegations. This is unpersuasive because the admission in no way put Plaintiffs on notice of their claims during the limitations period. *See Emerson Elec. Co. v. Le Carbon Lorraine, SA*, 500 F.Supp.2d 437, 448 (D.N.J.2007) ("Where fraudulent concealment of a federal antitrust claim has been shown, the four-year federal statute of limitations begins anew from the time the plaintiff knew or should have known of the existence of the federal claim." (quotations and citations omitted)).

*21 The Court of Appeals has yet to define what constitutes an affirmative act of concealment in antitrust cases. However, courts have generally taken two distinct views. *In re Mercedes-Benz*, 157 F.Supp.2d at 368. The first requires a plaintiff to show one or more affirmative acts to conceal an antitrust conspiracy that are wholly extrinsic to the conspiracy itself. *See, e.g., Colorado v. Western Paving Constr. Co.*, 630 F.Supp. 206, 2010 (D.Colo.1986), *aff'd en banc by an equally divided court*, 841 F.2d 1025 (10th Cir.1988), *cert. denied*, 488 U.S. 870, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988). The second also requires a plaintiff to show one or more affirmative acts of concealment, but those acts may be part and parcel to, or in furtherance of, the conspiracy. *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir.1995) (citing *Texas v. Allen Constr. Co.*, 851 F.2d 1526, 1532 (5th Cir.1988)). The Court finds the first view to be overly restrictive in this case. In a conspiracy involving price-fixing, "it is virtually impossible to distinguish between acts in furtherance of the conspiracy and acts designed to maintain the conspiracy's secrecy because the conspiracy's success is often contingent upon its ability to avoid detection by regulators and purchasers." *In re Aspartame Antitrust Litig.*, No. 06-1732, 2007 WL 5215231, at *5 (E.D.Pa. Jan.18, 2007); *See also In re Mercedes-Benz*,

157 F.Supp.2d at 372 (“secrecy is [the] natural lair” of a price-fixing conspiracy).

Several courts, including those in this Circuit, have found that a plaintiff may avoid the affirmative act requirement altogether in cases where an antitrust conspiracy is “inherently self-concealing.” See, e.g., *In re Aspartame*, 2007 WL 5215231, at *5; *In re Nine West Shoes Antitrust Litig.*, 80 F.Supp.2d 181, 192 (S.D.N.Y.2000); *In re Mercedes-Benz*, 157 F.Supp.2d at 371; *Pennsylvania Milk Indus. Mgmt. Corp.*, 812 F.Supp. 500 (E.D.Pa.1992); *Bethlehem Steel Corp. v. Fischbach & Moore, Inc.*, 641 F.Supp. 271, 273–74 (E.D.Pa.1986). However, the definition of a self-concealing antitrust conspiracy, particularly one that involves price-fixing, remains nebulous. The *In re Mercedes-Benz* court held that a self-concealing antitrust conspiracy is one where “concealment is so intertwined with the conspiracy as a whole that the equitable foundations of the fraudulent concealment doctrine require the limitations period to be tolled.” 157 F.Supp.2d at 371. Other courts maintain that all properly alleged price-fixing conspiracies are inherently self-concealing. See, e.g., *In re Issuer Plaintiff Initial Public Offering Antitrust Litig.*, No. 00–7804, 2004 WL 487222, at *4 (S.D.N.Y. Mar.12, 2004); *Nine West*, 80 F.Supp.2d at 192.

The Court agrees that, under certain circumstances, an antitrust conspiracy may depend on its own concealment to the point that any act in furtherance thereof can also be said to conceal it. As the Supreme Court explained long ago, the purpose of the fraudulent-concealment doctrine is to prevent a defendant from “concealing a fraud, or ... committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it.” *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349, 22 L.Ed. 636 (1874). However, the Court cannot find that conspiracies involving price-fixing are *per se* self-concealing, as such a finding would render them wholly exempt from the applicable statute of limitations.

*22 Although not binding, *In re Publication Paper Antitrust Litig.*, No. 04–1631, 2005 WL 2175139 (D.Conn. Sept.7, 2005) provides a helpful framework under which to determine whether a conspiracy involving price-fixing is self-concealing for the purposes of establishing fraudulent concealment. That case found that a price-fixing conspiracy may be self-concealing, depending on the nature of the industry in which the item is price-fixed:

In a competitive, well-regulated industry it will often be the case that a price-fixing conspiracy, if not concealed, would immediately fail because of governmental or private legal action. In such circumstances, any announcement of a price increase will carry with it an implicit statement that the price increase is legitimate, i.e., the result of competitive forces, not collusion. Nevertheless, not every price-fixing conspiracy is self-concealing. For example, there may be industries in which the participants are aware of collusion but it is not stopped because of indifference, fear, or because the perpetrators are exempt from, or beyond the reach of, antitrust laws. In such circumstances, the defendants' announcement of a price increase will not carry with it any implied certification of legitimacy, and so, absent additional circumstances, will not be self-concealing.

In re Publication Paper, 2005 WL 2175139, at *4. Accordingly, “whether a particular price-fixing conspiracy or, more precisely, whether a particular announcement of a price increase necessarily conceals its true nature depends on the nature of the industry and the circumstances surrounding the announcement.” *Id.* In other words, a plaintiff must show circumstances indicating that a price increase “carries with it a pretense of legitimacy” or “that it would necessarily be assumed that [it was] the result of legitimate market forces.” *Id.* To do so, a plaintiff may, for example, set forth allegations showing “that price increases are not abnormal, that such increases are typically ascribed to market forces, that an openly collusive price increase would not be tolerated, and that there was nothing suspicious about the circumstances under which each of the pre-limitations period price announcements were made.” *Id.*

Here, Plaintiffs fail to allege particular circumstances surrounding the MgO market indicating that the alleged conspiracy was self-concealing. Plaintiffs come close to pleading an affirmative act of concealment in alleging that

“price increases for MgO were justified by references to tight supply, thinning margins, and increased energy and freight costs” (Direct CAC ¶ 51; Indirect CAC ¶ 58), however they fail to explain the particular circumstances surrounding Defendants' price increases and pretextual justifications for those increases—information which is in Plaintiffs' control—in accordance with Rule 9(b).²⁰ Thus, Plaintiffs have failed to meet the first element of fraudulent concealment to toll the statute of limitations. However, the Court will grant Plaintiffs leave to amend to adequately plead either (1) circumstances surrounding the MgO market during the Class Period indicating that the alleged conspiracy is self-concealing, or (2) particular circumstances surrounding Defendants' price increases and the allegedly pretextual justifications for those price increases. See *In re Burlington Coat Factory Litig.*, 114 F.3d at 1434.

20

Nor can Plaintiffs' conclusory allegation that “defendants met secretly and among themselves for the express purpose of fixing prices and allocating markets of domestically sold MgO” (Direct CAC ¶ 50; Indirect CAC ¶ 57) satisfy the affirmative act requirement.

ii. Reliance

*23 Defendants argue that Plaintiffs fail to meet the second element of fraudulent concealment because they have not alleged that they relied on Defendants' alleged affirmative acts of concealment. Plaintiffs argue that there is no reliance requirement to establish fraudulent concealment.

While the aforementioned elements of fraudulent concealment do not specifically note a reliance requirement, the language of the second element strongly suggests one. As previously noted, the second element of fraudulent concealment requires a showing that the defendant's concealment misled or relaxed the plaintiff's potential inquiry into what otherwise would have been evidence of its cause of action. *In re Lower Lake Erie*, 998 F.2d at 1179; see also *Forbes v. Eagleson*, 228 F.3d 471, 487 (3d Cir.2000) (“[T]he plaintiff must show that he actually was mis[led] ... into thinking that he d [id] not have a cause of action” (quotation and citation omitted)). Implicit in the notion that a plaintiff's inquiry was misled or relaxed by an act of concealment is that the plaintiff relied on that act of concealment. That is, the plaintiff's inquiry would not have been misled or relaxed if it did not rely on the defendant's act of concealment. Here, Plaintiffs make no allegations that they were misled by Defendants' concealment of the alleged conspiracy and

therefore have failed to meet the second element of fraudulent concealment. However, the Court will grant Plaintiffs leave to amend to adequately plead that they relied on the self-concealing nature of Defendants' conspiracy and/or pretextual justifications for Defendants' price increases. See *In re Burlington Coat Factory Litig.*, 114 F.3d at 1434.

iii. Due Diligence

Defendants argue that Plaintiffs fail to satisfy the due diligence element of fraudulent concealment because they do not allege any due diligence performed during the Class Period, particularly that which led to the discovery of the alleged conspiracy. Plaintiffs counter that, under the fraudulent concealment doctrine, they need only plead that they would not have discovered their claim, even in the exercise of reasonable due diligence. Plaintiffs further argue that determinations of due diligence are fact-intensive and therefore not properly addressed on a motion to dismiss.

The parties cite somewhat differently worded standards to support their respective positions on what the due diligence prong requires. Defendants cite *In re Lower Lake Erie*, in which the Court of Appeals held that a plaintiff must show that he “exercised due diligence in investigating his cause of action.” 998 F.2d at 1178–79. Plaintiffs, on the other hand cite *Matthews v. Kidder, Peabody & Co., Inc.*, where the Court of Appeals held that a plaintiff must show that his ignorance is not attributable to a lack of “reasonable due diligence in attempting to uncover the relevant facts.” 260 F.3d 239, 256 (3d Cir.2001).

While the wording of the due diligence prong has differed slightly among Third Circuit case law, its substance has remained consistent. The due diligence prong is rooted in the notion of inquiry notice: that an injury accrues when a reasonable plaintiff under the circumstances would have discovered it. See *Matthews*, 260 F.3d at 251. As previously discussed, a federal antitrust injury accrues when an overt act is committed that injures the plaintiff, thereby triggering the four-year statute of limitations; however, one or more affirmative acts of concealment “may toll the statute of limitations [] if [they] mislead[] a plaintiff into thinking that he does not have a cause of action.” *Davis v. Grusemeyer*, 996 F.2d 617, 624 (3d Cir.1993), overruled on other grounds by *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644 (3d Cir.1998). Thus, to establish the due diligence prong of fraudulent concealment, a plaintiff must affirmatively show that he was not on inquiry notice of the alleged antitrust conspiracy. See *id.* (“A key aspect of a plaintiff's case alleging

fraudulent concealment is [] proof that the plaintiff was not previously on notice of the claim he now brings.” (citations omitted)).

*24 In this Circuit, “inquiry notice [is] analyzed in two steps.”²¹ *Matthews*, 260 F.3d at 252. “First, the burden is on the defendant [s] to show the existence of ‘storm warnings.’” *Id.* In this case, a storm warning would be information or data that would alert a reasonable MgO purchaser of ordinary intelligence to potentially culpable conduct. “Second, if the defendants establish the existence of storm warnings, the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries.” *Id.* This requires Plaintiffs to show that (1) they investigated the storm warnings and (2) in their investigation, they exercised the due diligence expected of a reasonable DBM or CCM purchaser of ordinary intelligence. *See id.*

21 While the following inquiry notice analysis is laid out in the context of a RICO case, it has also been applied in antitrust cases involving price-fixing. *See In re Aspartame Antitrust Litig.*, 416 Fed. App’x. 208, 211–12 (3d Cir.2011); *In re Electrical Carbon Prods. Antitrust Litig.*, 333 F.Supp.2d 303, 317 (D.N.J.2004).

As Plaintiffs point out, this inquiry is necessarily bound up with the facts of the case because it “implicates factual questions as to when [a] plaintiff discovered or should have discovered the elements of the cause of action,” *id.* at 250 (quotations and citation omitted); *see also Mercedes-Benz*, 157 F.Supp.2d at 373 (“At a minimum, this issue will involve assessing the factual circumstances surrounding the accused purchasing transactions and whether those circumstances would have put a reasonably diligent plaintiff on notice of a price-fixing conspiracy”), and, as a result, at the pleading stage, this court has been hesitant to dismiss an otherwise fraudulently concealed antitrust claim for failure to sufficiently allege due diligence. *See In re Electrical Carbon Prods.*, 333 F.Supp.2d at 317–18; *Mercedes-Benz*, 157 F.Supp.2d at 374.

Citing to *In re Publication Paper* and *Hinds County*, Defendants maintain that, at the pleading stage, the due diligence prong nonetheless requires that “Plaintiffs [] allege with particularity when the Named Plaintiffs or Class members became aware of the antitrust violations and what inquiries [they] made into the activities alleged in the complaint.” (Sumitomo Reply Br., 18) (internal quotations

omitted). In *In re Publication Paper*, the plaintiffs alleged that they were aware of certain suspicious activities two years before the end of the limitations period. *See* 2005 WL 2175139, at *5. Accordingly, the court found that the plaintiffs were therefore required allege they steps they took to investigate those activities. *See id.* Here, however, Plaintiffs do not allege any suspicious activities or storm warnings within the limitations period.

Defendants' citation to *Hinds County* is more persuasive. In that case, the plaintiffs attempted to satisfy the due diligence prong by alleging that they “did not discover, nor could have discovered through reasonable diligence, that [d]efendants and their co-conspirators were violating the antitrust laws until shortly before this litigation was commenced, because [d]efendants and their co-conspirators were using deceptive and secret methods to avoid detection and affirmatively conceal their violations.” *Hinds County*, 620 F.Supp.2d at 521–22. The court found that allegation too vague to satisfy Rule 9(b) and further explained that to deem such an allegation sufficient would “allow[] the allegations required to satisfy the first prong of fraudulent concealment to also satisfy the third prong.” *Id.* at 521–22.

*25 The Court finds this logic persuasive. Here, Plaintiffs allege that, due to the secretive nature of the alleged MgO conspiracy, “neither plaintiffs nor the class members had knowledge of any of the foregoing violations, and neither plaintiffs nor the class members, until recently, could have discovered through reasonable diligence that [D]efendants and their co-conspirators had engaged in the foregoing violations.” (Direct CAC ¶ 49; Indirect CAC ¶ 56 .) This allegation cannot satisfy the requirements of Rule 9(b), particularly when it fails to encompass when and how Plaintiffs ultimately discovered the alleged MgO conspiracy—information that is certainly with Plaintiffs' control. *See In re Craftmatic*, 890 F.2d at 645. Without some level of specificity regarding Plaintiffs' discovery of the alleged conspiracy, it is impossible to discern whether Plaintiffs could or should have discovered it within the limitations period. Thus, Plaintiffs have failed to meet the due diligence prong of fraudulent concealment. However, Plaintiffs will be granted leave to amend to adequately plead, in accordance with Rule 9(b), (1) when and how they discovered the alleged MgO conspiracy, and (2) that the self-concealing nature of the conspiracy and/or pretextual justifications for Defendants' price increases made it so that they were not alerted to any storm warnings that would otherwise trigger an obligation

to perform due diligence. See *In re Burlington Coat Factory Litig.*, 114 F.3d at 1434.

E. IP Plaintiffs' Claims for Violations of Various States' Consumer Protection Laws

IP Plaintiffs assert claims under California, Florida, Hawaii, Massachusetts, Montana, Nebraska, New Hampshire, New York, South Carolina, and Vermont consumer protection and unfair competition laws. As with IP Plaintiffs' antitrust claims under state law, Defendants argue that IP Plaintiffs lack standing to assert their consumer protection claims, except that under California law, because they “do not allege purchases in any of the 10 states other than California.” (Sumitomo (IP Pl.'s) Br., 5). Defendants further argue that these claims should be dismissed because IP Plaintiffs do not plead them with particularity in accordance with [Federal Rule of Civil Procedure 9\(b\)](#).

i. Standing

IP Plaintiffs' standing to sue under a state's consumer protection law is analogous to their standing under a state's antitrust law. As discussed in Point B, IP Plaintiffs' failure to tie their injuries or Defendants' unlawful conduct to a number of states was fatal to their standing to sue because the antitrust laws of those states require a showing that part of Defendants' conduct occurred or had an effect in-state. On the other hand, IP Plaintiffs have standing to sue under the antitrust laws that have no such requirement.

Similarly, many of the consumer protection and unfair competition laws asserted by IP Plaintiffs require that Defendants' unlawful conduct affect trade and commerce in the state under whose law they are suing, see MCA 30–14–103, 102 (Montana) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.... [T]rade or commerce [must] directly or indirectly affect[] the people of this state.”); MGLA §§ 93A 1, 2 (Massachusetts) (same); [S.C.Code 1976 §§ 39–5–10](#), 20 (South Carolina) (same); [Neb. Rev. St. §§ 59–1602](#), 1601 (Nebraska) (“Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.... Trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska.”); [N.H.Rev.Stat. § 358–A:2](#) (New Hampshire) (“It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this state.”);

[N.Y. Gen. Bus. Law § 349](#) (New York) (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”); *Sherman v. Ben & Jerry's Franchising, Inc.*, 08–CV–207, 2009 WL 2462539, at *10 (D.Vt. Aug.10, 2009) (Out of state plaintiffs alleging out of state conduct do not have standing to sue under Vermont Consumer Fraud Protection Act), while others do not, see [F.S.A. 501.204](#), [501.211](#) (Florida); [HRS 480–2](#), [480–13](#) (Hawaii).²²

22

Thus, contrary to Defendants' contention, the fact that IP Plaintiffs fail to allege that they reside or purchased an MgO product in a given state does not automatically deprive them of standing to sue under the state's consumer protection or unfair competition law. To be sure, the case Defendants cite in support of this contention held that the named plaintiffs in that case lacked standing to assert consumer protection and unfair competition claims under the laws of states in which they neither resided nor suffered an injury. See *In re Potash* 667 F.Supp.2d at 924. However, the Court cannot accept this holding as a bright line rule. Standing issues are intimately bound up with the elements of the particular claim asserted, as a plaintiff must establish that his injury is “fairly traceable to the challenged action of the defendant.” *Lujan*, 504 U.S. at 560; see also *Blum*, 457 U.S. at 999 (“The complaining party must also show that he is within the class of persons who will be concretely affected.”); *Allen*, 468 U.S. at 752 (“[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.”).

*26 IP Plaintiffs' allegations that “Defendants agreed to, and did in fact, act in restraint of trade or commerce in a market that includes the above states, by affecting, fixing, controlling, and/or maintaining, at artificial and noncompetitive levels, the prices at which MgO and MgO Products were sold, distributed, or obtained in those states;” “MgO price competition was restrained, suppressed, and eliminated throughout the states;” and “MgO prices were raised, fixed, maintained, and stabilized at artificially high levels throughout the states” (Indirect CAC ¶¶ 79, 81) are conclusory and do not tie their injuries to the alleged conspiracy's effect on trade and commerce in those specific states. Therefore, IP Plaintiffs' consumer protection claims

under Montana, Massachusetts, Nebraska, New Hampshire, and New York law are dismissed for lack of standing.

ii. Pleading Requirements

The consumer protection laws of Florida and Hawaii—under which IP Plaintiffs currently maintain standing to sue—require that they plead the circumstances of any alleged fraudulent conduct with particularity in accordance with Rule 9(b). See *Jovine v. Abbott Laboratories, Inc.*, 11–CV–80111, 2011 WL 1376029 (S.D.Fla. Apr.12, 2011) (applying Rule 9(b) to allegations of unfair or deceptive acts or practices under the Florida Deceptive and Unfair Trade Practices Act); *Cannon v. U.S. Bank, NA*, Civ. No. 11–00079, 2011 WL 1637415, (D.Hawai'i Apr.29, 2011) (applying Rule 9(b) to allegations of fraudulent business practices under the Hawaii State Unfair and Deceptive Business Practices Act); *Athena Feminine Techs., Inc. v. Wilkes*, No. C 10–4868, 2011 WL 4079927 (N.D.Cal. Sept.13, 2011) (“[A] claim brought under the fraudulent prong of the [Unfair Competition Law] must be pled with particularity under Rule 9(b)”).

IP Plaintiffs' allegations that “Defendants deliberately failed to disclose material facts to Plaintiff and the classes concerning Defendants' unlawful activities and artificially inflated prices for MgO and MgO Products,” and “misrepresented to all consumers during the Class Period that Defendants' MgO prices were competitive and fair” (Indirect CAC ¶ 80); see also (Indirect CAC ¶ 83) (alleging “affirmative misrepresentations and omissions concerning the price of MgO”) are not set forth with any measure of particularity. See *In re Supreme Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 270 (3d Cir.2006) (Under Rule 9(b), a plaintiff must allege fraud with particularity by pleading the following: “(1) a specific false representation [or omission] of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his [or her] damage.” (quotations and citation omitted)). Accordingly, IP Plaintiffs' consumer protection and unfair competition claims under Florida and Hawaii law are dismissed to the extent they are premised on Defendants' fraudulent conduct. However, IP Plaintiffs are granted leave to amend their allegations to comply with the requirements of Rule 9(b). Additionally, at this time, those claims may move forward to the extent they are premised on allegations of Defendants' engaging in unfair competition, as there is no indication that Rule 9(b) applies to such allegations.

III. CONCLUSION

*27 For the foregoing reasons, Defendants' Motion to Dismiss is GRANTED to the following extent only. The Court rules as follows:

- (1) IP Plaintiffs' federal and state antitrust claims are dismissed without prejudice for lack of standing. IP Plaintiffs have thirty (30) days to amend their allegations to set forth (1) the specific products purchased containing DBM or CCM and (2) the nexus between an increase in the price of those products and the alleged conspiracy to fix prices in and allocate shares of the domestic DBM and CCM markets.
- (2) IP Plaintiffs' antitrust claims under Arizona, the District of Columbia, Hawaii, Illinois, Maine, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and West Virginia law are dismissed with prejudice for lack of standing.
- (3) Plaintiffs' federal and state antitrust claims are dismissed without prejudice as time-barred under the applicable statutes of limitations. Plaintiffs have thirty (30) days to amend their allegations of fraudulent concealment to equitably toll those statutes of limitations.
- (4) IP Plaintiffs' consumer protection and unfair competition claims under Montana, Massachusetts, Nebraska, New Hampshire, and New York are dismissed with prejudice for lack of standing.
- (5) IP Plaintiffs' consumer protection and unfair competition claims under Florida and Hawaii law are dismissed without prejudice to the extent they are premised on allegations of Defendants' fraudulent conduct. IP Plaintiffs have thirty (30) days to amend those allegations to comply with Federal Rule of Civil Procedure 9(b).

The Court will enter an order implementing this opinion.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5008090, 2012-1 Trade Cases P 77,878

2011 WL 5008090, 2012-1 Trade Cases P 77,878

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 31

2012 WL 3582708

2012 WL 3582708

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.

In re ZIMMER NEXGEN KNEE IMPLANT
PRODUCTS LIABILITY LITIGATION.

This Document Relates to All Cases.

MDL No. 2272.

Master Docket No. 11 C 5468.

Aug. 16, 2012.

MEMORANDUM OPINION AND ORDER

REBECCA R. PALLMEYER, District Judge.

*1 Plaintiffs, more than 500 individuals who underwent [total knee replacement](#) (“TKR”) surgeries, bring suit against Defendants, Zimmer Inc. and its affiliates (collectively, “Defendants” or “Zimmer”), manufacturers of the Zimmer NexGen Knee system. Plaintiffs allege that certain components of that system are prone to premature loosening, which has led to pain and loss of movement, necessitating revision surgery in some cases. On August 8, 2011, the United States Judicial Panel on Multidistrict Litigation issued a transfer order consolidating Plaintiffs’ cases in this court for pretrial proceedings.

Pursuant to this court’s Order of December 19, 2011, Plaintiffs filed a Master Long Form Complaint and Jury Demand (the “Master Complaint”) on January 12, 2012. Defendants filed a motion to dismiss, in part, the Master Complaint on March 14, 2012. For the reasons explained below, Defendants’ motion is denied.

BACKGROUND ¹

¹ Though the court primarily draws Plaintiffs’ factual allegations from the Master Complaint, the court is not confined to the four corners of the complaint. See *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n. 1 (7th Cir.2012) (“[A] party opposing a Rule

12(b)(6) motion may submit materials outside the pleadings to illustrate the facts the party expects to be able to prove.”). The court also considers factual allegations consistent with the pleadings presented in Plaintiffs’ Technical Memorandum on Knee Anatomy, Total Knee Replacement and the Zimmer NexGen High-Flexion Components and MIS Surgical Technique [210] (hereinafter “Pls.’ Technical Mem.”), Plaintiffs’ scientific presentation to the court on January 12, 2012, and Plaintiffs’ Memorandum in Opposition to Defendants Zimmer Entities’ Motion to Dismiss, In Part, Master Long Form Complaint and Jury Demand [428] (hereinafter “Pls.’ Resp.”).

Plaintiffs’ claims involve a tibial component designed for use with minimally invasive surgery techniques (the “MIS Tibial component”), and four “high-flex” femoral components (the Cruciate Retaining (CR) Flex and Legacy Posterior Stabilized (LPS) Flex components, and the “Gender Solutions” versions thereof (collectively, the “Flex femoral components”)). (Master Long Form Compl. & Jury Demand [211] (hereinafter, “Master Compl.”), ¶ 7.)² According to Plaintiffs, the MIS Tibial component, approved by the FDA in 2005, was a “low profile design” intended to be implanted using a smaller incision, with the benefits of reduced blood loss, less pain, shorter hospital stays, and shorter rehabilitation. (*Id.* ¶¶ 64, 88.) In 2010, after a study found a significantly higher failure rate among MIS Tibial components when implanted without a drop-down stem that extended further into the tibia (*id.* ¶ 149), and after Zimmer had received complaints of loosening of the implanted devices requiring revision surgery (*id.* ¶ 155), Zimmer issued an “Urgent Field Safety Notice”/ “Urgent Device Correction” letter to all customers using the MIS Tibial component (*id.* ¶ 115). The letter cautioned that the “MIS procedures are inherently challenging and can involve reduced visibility, which may lead to difficulty with achieving proper implant alignment and cement fixation” (*id.* ¶ 115), and further warned against implanting the device without the drop-down stem (Pls.’ Technical Mem. at 13). In September of 2010, the FDA classified Zimmer’s response as a Class II recall of more than 68,000 MIS Tibial components, noting that the FDA had received 114 Medical Device Reports of loosening that required revision surgery. (*Id.* ¶¶ 17, 155–56.)

² The difference between CR-Flex and LPS-Flex knee designs is whether the patient’s posterior cruciate ligament is retained. In LPS-Flex knees,

2012 WL 3582708

the cruciate ligament is sacrificed and replaced with a tibial post and femoral notch that perform the function of the posterior cruciate ligament. (*Id.* ¶¶ 55–56.) The Gender Solutions versions of these two products are femoral components designed specifically for women. (*Id.* ¶ 65.)

Though the Flex femoral components have not been similarly subject to a recall, Plaintiffs allege that these components are similarly prone to loosening. The Flex femoral components are “high-flex” devices, designed to accommodate flexion (bending of the knee), up to 155 degrees. (*Id.* ¶¶ 9, 62–63; Pls.’ Technical Mem. at 7–8.) While a typical, healthy knee has the capacity to bend between 155 to 160 degrees, the Zimmer NexGen non-Flex knees that preceded the Flex versions were able to achieve only between 120 to 130 degrees of flexion. (Master Compl. ¶¶ 9, 39, 57.) Plaintiffs allege that Zimmer marketed the Flex knee design for patients with more active lifestyles, particularly for those who garden or kneel for prayer, or for those whose cultural activities and lifestyles require considerable squatting or kneeling activities. (*Id.* ¶¶ 102–10.)

*2 Plaintiffs cite to a number of studies in peer-reviewed journals, however, that observe high rates of loosening for Flex femoral components. (Master Compl. ¶ 128–29; Pls.’ Technical Mem. at 11; Pls.’ Resp. at 31.)³ The studies hypothesize that the loosening is caused by asymmetric distribution of the heightened forces during deep knee flexion. See P. Bollars et al., *Femoral Component Loosening in High-Flexion Total Knee Replacement*, 93-B J. Bone & Joint Surgery 1355, 1361 (2011) (“[H]igh-flexion designs have a greater risk for loosening of the femoral component than conventional TKR designs. The absence of femoral load sharing between the prosthetic component and the condylar bone during flexion is in our opinion an important contributing factor.”); Sung-Do Cho et al., *Three- to Six-Year Follow-Up Results After High-Flexion Total Knee Arthroplasty: Can We Allow Passive Deep Knee Bending?*, 19 Knee Surgery, Sports Traumatology, Arthroscopy 899, 903 (2011) (“[W]ith passive deep knee bending, excessive compressive force could be applied at the posterior femoral condyle, leading to distal shear and anterior tensile forces.... Inadequate bony support of the posterior femoral condyle may result in micromotion and early loosening of the femoral component.”); H.S. Han et al., *High Incidence of Loosening of the Femoral Component in Legacy Posterior Stabilised-Flex Total Knee Replacement*, 89-B J. Bone & Joint Surgery 1457, 1460 (2007) (“If deep knee flexion is achieved, asymmetrical loading between the medial and lateral compartments of

a TKR may contribute to loosening and failure of the implant.”).⁴ Plaintiffs also question whether NexGen Flex femoral components offer any real benefit in flexion, citing studies that show no statistically significant difference in the range of motion achieved by those with Flex devices when compared with that of those implanted with their non-Flex counterparts. (Master Compl. ¶¶ 127, 131.)

3 Plaintiff also cites to a study conducted by Drs. Robert Berger and Craig Della Valle, presented at the American Association of Orthopaedic Surgeons in March 2010, in which the authors observed that out of 108 CR-Flex femoral components examined, 39 showed signs of loosening, 9 were revised for failed femoral loosening, and 1 was subject to an impending revision. (Master Compl. ¶¶ 140–41.) Dr. Berger, who was involved in the design of the NexGen Flex Knee system, was later the subject of a *New York Times* article reporting on his findings. (*Id.* ¶¶ 13, 136–37.)

4 The studies admit that other factors such as physician error and patient lifestyle may also contribute to loosening, and note the limitations of their methodologies. Bollar et al., *supra*, at 1361 (noting that *in vitro* laboratory testing could not replicate conditions *in vivo*, such as a patient’s lifestyle); Cho et al., *supra*, at 903 (noting limitations in a retrospective analysis of the authors’ own patients, including a lack of control group); Han et al., *supra*, at 1460 (noting the weakness in the “retrospective, non-comparative design and the relatively small number of patients”).

DISCUSSION

I. Applicability of Rule 12(b)(6)

As a preliminary matter, the parties disagree about whether Defendants are entitled to bring a motion to dismiss particular causes of action in Plaintiffs’ Master Complaint. Plaintiffs raise two objections to 12(b)(6) motion practice: (1) that Defendants waived their right to bring a motion to dismiss when, prior to the consolidation of these cases in this Multidistrict Litigation (“MDL”), the Defendants filed answers to the complaints in individual actions involving each of the devices at issue;⁵ and (2) that the Plaintiffs’ individual actions should not be subject to a “master motion

2012 WL 3582708

to dismiss” directed at the Master Complaint, which is merely an administrative device that Plaintiffs objected to filing in the first place. The court addresses each of these arguments in turn.

5 Cases in which Defendants filed answers prior to consolidation in this MDL include: *Teague v. Zimmer, Inc.*, No. 11 C 5727 (LPS Flex); *Singsaas v. Zimmer, Inc.*, No. 11 C 5474 (LPS Flex and MIS tibial component); *Davis v. Zimmer, Inc.*, No. 11 C 5472 (LPS Flex); *Barlow v. Zimmer, Inc.*, No. 11 C 5758 (LPS Flex); *Sizemore v. Zimmer, Inc.*, No. 11 C 5477 (CR Flex); *Sloan Perry v. Zimmer, Inc.*, No. 11 C 5725; *Mees v. Zimmer, Inc.*, No. 11 C 5724 (CR Flex); *Hayes v. Zimmer, Inc.*, No. 11 C 5716 (CR Flex); *Genslinger v. Zimmer, Inc.*, No. 11 C 5726 (CR Flex); *Cleveland v. Zimmer, Inc.*, No. 11 C 1210 (CR Flex and MIS tibial component); *Wahlman v. Zimmer, Inc.*, No. 11 C 5486 (Gender Solutions CR Flex); *Anderson v. Zimmer, Inc.*, No. 11 C 5490 (Gender Solutions LPS Flex).

A motion under Rule 12(b)(6) for failure to state a claim upon which relief may be granted “must be made before pleading if a responsive pleading is allowed.” [FED. R. CIV. P. 12\(b\)](#). A motion for judgment on the pleadings under [Rule 12\(c\)](#) may be filed after pleadings are closed, however, and such a motion is governed by the same standard as a 12(b)(6) motion. See [Buchanan–Moore v. Cnty. of Milwaukee](#), 570 F.3d 824, 827 (7th Cir.2009). Thus, Defendants are free to file a [Rule 12\(c\)](#) motion arguing that complaints failed to state a claim upon which relief can be granted. See [FED. R. CIV. P. 12\(b\)\(2\)\(B\)](#). The fact that Defendants have styled their motion to dismiss as a [Rule 12\(b\)\(6\)](#) motion does not alter this analysis. See [Alioto v. Town of Lisbon](#), 651 F.3d 715, 718 (7th Cir.2011) (citing [McMillian v. Collection Prof’ls Inc.](#), 455 F.3d 754, 757 n. 1 (7th Cir.2006)). The court concludes that it makes no difference whether Defendants’ motion is a 12(b)(6) motion in response to the Master Complaint—which, as an amended complaint, supercedes the original complaint, rendering all prior pleadings without legal effect, see [Massey v. Helman](#), 196 F.3d 727, 735 (7th Cir.1999)—or a motion filed after the close of pleadings under [Rule 12\(c\)](#).

*3 Plaintiffs’ second challenge to the propriety of this motion requires more analysis. They contend that a “master motion to dismiss” targeted at the Master Complaint is inappropriate in light of the purposes of a consolidated complaint in an MDL. Plaintiffs cite a number of MDL opinions which recognize that a “master” or “consolidated” complaint is a “procedural

device used to promote judicial efficiency and economy,” not to be “given the same effect as an ordinary complaint” or considered to “ ‘merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.’ ” [In re Propulsid Prods. Liab. Litig.](#), 208 F.R.D. 133, 141–42, 144 (E.D.La.2002) (quoting 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2382 (1971)) (citing Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597 (1991)); see also [In re Vioxx Prods. Liab. Litig.](#), 239 F.R.D. 450, 454 (E.D.La.2006) (“[A] master complaint is only an administrative device used to aid efficiency and economy and, thus, should not be given the status of an ordinary complaint.”); [In re Digitek Prods. Liab. Litig.](#), MDL No. 2:08–md–01968, 2009 WL 2433468, at *8 (S.D.W.Va. Aug.3, 2009) (considering a motion to dismiss in light of “[t]he administrative nature of a master complaint and its focus on facilitating management of the litigation, as opposed to being a primary operative pleading”). This court agrees that “master” or “consolidated” complaints must be interpreted in light of the “primary purpose” of multidistrict litigation: “to promote efficiency through the coordination of discovery.” [In re Orthopedic Bone Screw Prods. Liab. Litig.](#), MDL No. 1014, 1997 WL 109595, at *2 (E.D.Pa. Mar.7, 1997); see also 28 U.S.C. § 1407(a) (“[T]ransfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”).

In light of a master complaint’s administrative purpose, several MDL courts have refused to entertain motions to dismiss master complaints where doing so would require case-specific rulings to determine the sufficiency of each individual plaintiff’s factual allegations. See [In re Nuvaring Prods. Liab. Litig.](#), No. 4:08MD1946 RWS, 2009 WL 4825170, at *2 (E.D.Mo. Dec.11, 2009); [In re Trasylol Prods. Liab. Litig.](#), No. 08–MD–1928, 2009 WL 577726, at *8 (S.D.Fla. Mar.5, 2009). In *Trasylol*, for example, the court, faced with over 400 separate cases, assessed the sufficiency of the master complaint’s fraud claims with “substantial leniency”; the court concluded that any master complaint that contained all of the plaintiff-specific allegations defendant demanded would “completely remov[e] the compromise and attempt at efficiency the Parties and [the court] had in mind in allowing the filing of the Consolidated Master Complaint.” [Trasylol](#), 2009 WL 577726 at *8. Similarly, the *Nuvaring* court concluded that case-specific rulings on the sufficiency of the plaintiffs’ allegations

*4 “are neither the purpose, nor the forte of a court presiding over a multi-district litigation. A MDL seeks to promote judicial economy and litigant efficiency by allowing the transferee court to preside over matters common among all cases.... Given this function, the transferee court typically does not rule on cumbersome, case specific legal issues.”

Nuvaring, 2009 WL 4825170, at *2 (quoting *In re Phenylpropanolamine Prods. Liab. Litig.*, No. MDL 1407, 2004 WL 2034587, at *2 (W.D.Wash. Sept.3, 2004)). The court agrees with this rationale. With more than 549 individual actions already consolidated in this litigation, the Master Complaint cannot be expected to include specific factual matter for claims that require plaintiff-specific proof. The proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court, see *Manual for Complex Litigation (Fourth)* § 22.37 (“When the MDL pretrial proceedings are concluded and individual cases are remanded to the transferor courts, the transferor judge must decide whether additional discovery and other pretrial work require completion, including deciding dispositive motions), or this court when it considers exemplar cases.

Where defendants bring a motion to dismiss that raises issues common to all plaintiffs, however, the administrative nature of a Master Complaint does not necessarily preclude 12(b) (6) motion practice. Defendants cite a number of cases where MDL courts have entertained motions to dismiss “master” or “consolidated” complaints under such circumstances. See *Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352, 1360 (11th Cir.2011) (affirming dismissal of consolidated RICO and consumer protection claims brought by insurers against drug manufacturer involving an illegal off-label marketing campaign); *In re Katrina Canal Breaches Litig.*, 309 F. App'x 836, 839 (5th Cir.2009) (affirming judgment on the pleadings dismissing a consolidated complaint brought by property owners against the port commissioners who, by statute, were not responsible for the design, construction, or maintenance of levees and floodgates); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. MDL 07-1873, 2008 WL 5217594, at *1-2, 20

(E.D.La. Dec.12, 2008) (granting in part and denying in part motions to dismiss a master complaint involving breach-of-warranty claims for heightened formaldehyde levels in FEMA-supplied trailers); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, No. 1:07-MD-1845-TWT, 2008 WL 2132233, at *1 (N.D.Ga. May 21, 2008) (granting in part and denying in part a consolidated complaint arising from peanut butter contaminated with salmonella); *In re Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig.*, No. MDL 05-01699 CRB, 2007 WL 2028408, at *9 (N.D.Cal. July 10, 2007) (sustaining in part and dismissing in part a consolidated complaint brought by consumers against a drug manufacturer alleging a misleading marketing campaign); *In re Bridgestone/Firestone Inc., Tires Prods. Liab. Litig.*, 153 F.Supp.2d 935, 938-48 (S.D.Ind.2001) (granting a motion to dismiss state-law claims seeking recall of automobile tires as preempted by federal law). Plaintiffs do not attempt to distinguish these cases. Consequently, the court will consider Defendants' motion to dismiss to the limited extent that it challenges the sufficiency of the factual allegations common to all Plaintiffs.

II. Choice of Law

*5 In its Order concerning Defendants' contacts with prospective expert witnesses who are also treating physicians of individual Plaintiffs, this court agreed with Defendants that the filing of a consolidated, master complaint does not, absent consent of the parties, alter the choice of which state's substantive law governs the claims that originated in transferor courts outside of Illinois. In an attempt to avoid the need to analyze the sufficiency of the Master Complaint under the laws of multiple jurisdictions, Defendants purport to bring this motion against only those cases transferred from Illinois federal courts.⁶ For such cases, Defendants urge, the law of either Illinois (where the injury presumptively occurred), or Indiana (the location of Zimmer's headquarters and presumably where the devices were designed and manufactured), provide the rule of decision. Zimmer's briefs primarily focus on Illinois law, however, with only passing reference to Indiana law in footnotes.

⁶ For the same reasons that this court will not entertain motions to dismiss the Master Complaint for failure to plead plaintiff-specific facts, the court is skeptical that addressing a motion to dismiss the Master Complaint for such a limited subset of the cases consolidated in this action is an efficient use of the court's time and resources. Were Defendants'

motion to turn on peculiar features of Illinois or Indiana law, the court is hesitant to invite further motion practice on the sufficiency of Plaintiffs' Master Complaint under the laws of every other jurisdiction. Because Defendants' motion primarily challenges the sufficiency of the factual allegations under federal pleadings standards, however, and because the court ultimately concludes that Plaintiffs' factual allegations are sufficient, the court will consider Defendants' motion, limited as it is to cases from transferor courts located in Illinois.

Without making a choice-of-law determination for those cases consolidated from transferor courts located in Illinois, the court will consider the sufficiency of Plaintiff's pleadings under Illinois law.⁷ As for issues of federal law, this court applies the law of the Seventh Circuit. See *In re Sears, Roebuck & Co.*, Nos. MDL-1703, 05 C 4742, 05 C 4743, 2006 WL 1517779, at *2 n. 1 (N.D.Ill. May 24, 2006) (citing *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 911 (8th Cir.2004)) (“As a general rule, when a transferee court such as this court receives a case from the MDL Panel, the transferee court applies the law of the circuit in which it is located to issues of federal law.”).

⁷ Defendants contend that the relevant substantive law does not differ between Illinois and Indiana, and therefore no choice-of-law determination is required. Whether or not Defendants are correct about the relevant differences between Illinois and Indiana law, the court takes Defendants' argument to be an admission, for the purposes of this motion, that sufficiency of the Master Complaint under Rule 8 to plausibly state Illinois causes of action will also satisfy the pleading requirements for Indiana causes of action.

III. Pleading Standard

Under [Federal Rule of Civil Procedure 8\(a\)\(2\)](#), a plaintiff need only provide “ ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); see also *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2009). Accordingly, under [Rule 8](#)'s general notice-pleading regime, a plaintiff need not provide detailed factual

allegations. *Twombly*, 550 U.S. at 555; see also *Erickson*, 551 U.S. 89 at 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (“Specific facts are not necessary”). When evaluating the sufficiency of a complaint, the court reads its allegations in the way most favorable to plaintiff, accepting well-pleaded allegations as true and drawing inferences in favor of the plaintiff. *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir.2011). Nothing in the Supreme Court's recent pleadings jurisprudence casts doubt on these general principles. See *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir.2010) (“Critically, in none of the three recent decisions—*Twombly*, *Erickson*, or *Iqbal*—did the Court cast any doubt on the validity of [Rule 8 of the Federal Rules of Civil Procedure](#).”); *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir.2009) (“Any doubt that *Twombly* had repudiated the general notice-pleading regime of [Rule 8](#) was put to rest two weeks later, when the Court issued *Erickson*”).

*6 The Court has made clear, however, that the “threadbare recitals of a cause of action's elements, supported by mere conclusory statements,” are not entitled to the assumption of truth afforded a plaintiff's well-pleaded factual content. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); see also *Twombly*, 550 U.S. at 555 (“[A] plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do” (first alteration in original) (quoting *Papsan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986))). “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.” *Iqbal*, 556 U.S. at 679. Assuming their veracity, the court must determine whether plaintiff's well-pleaded factual allegations “plausibly give rise to an entitlement to relief.” *Id.*

Although “[s]pecific facts are not necessary,” *Erickson*, 551 U.S. at 93, the “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555 (citations omitted). Put another way, the complaint must present sufficient factual material to allege a claim that is “plausible on its face.” *Id.* at 570. Such facial plausibility exists “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. The reasonable inference must appear to flow from a plaintiff's allegations; if the allegations instead are “ ‘merely consistent with’ a

2012 WL 3582708

defendant's liability," they do not satisfy the plausibility test. *Id.* (quoting *Twombly*, 550 U.S. at 557). This plausibility analysis is a "context-specific task," and it calls on the court to rely on its experience and to exercise common sense. *Id.*

The Supreme Court has been careful, however, to note that the "plausibility" requirement "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiff's legal claims. *Twombly*, 550 U.S. at 556; see also *Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that defendant has acted unlawfully."). As the Seventh Circuit reads these decisions,

"[p]lausibility" in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not.... For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.

*7 *Swanson*, 614 F.3d at 404. Rather, the Seventh Circuit understands the Court to require a plaintiff to "give enough details about the subject-matter of the case to present a story that holds together." *Id.*

The Seventh Circuit has also suggested that the "required level of factual specificity rises with the complexity of the claim." *McCauley v. City of Chicago*, 671 F.3d 611, 616–17 (7th Cir.2011); see also *Swanson*, 614 F.3d at 405 ("A more complex case ... will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected."). This sliding scale of specificity aligns with the principal policy reason driving the Court's concern about pleading standards: in complex cases, the costs of discovery are high and "often asymmetric, ... and one way to rein them in would be to make it more difficult to earn the right to engage in discovery." *Swanson*, 614 F.3d at 405; see also *Twombly*, 550 U.S. at 557–58 ("[S]omething beyond ... mere possibility ... must be alleged, lest a plaintiff with 'a largely

groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.' " (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)) (internal quotation marks omitted)).

II. Sufficiency of Pleadings

A. Design Defect

Defendants concede that Plaintiffs have sufficiently pleaded design defect claims for the MIS tibial components, which was the subject of a Class II recall. Defendants nevertheless contend that the Plaintiffs' factual allegations do not give rise to a reasonable inference that the failure of Plaintiffs' knees was the result of a design defect in the Flex femoral components. Specifically, Defendants argue that while the peer-reviewed journal articles and other sources cited by Plaintiff that report higher revisions rates for recipients of Flex femoral components may be *consistent* with a theory of design defect, they are not enough to support a reasonable inference that the failures were *caused by* defects in the design. Defendants would have this court weigh the probability that the failure of Plaintiffs' knees was the result of a defect in the design of the Flex femoral components against the probability that the failure was due to other factors, such as physician error or Plaintiffs' more active lifestyles. According to Defendants, a reasonable inference of design defect arises only if the Plaintiffs' factual allegations suggest that a design defect was more likely than any of the alternative explanations Defendants raise as affirmative defenses.

The court believes that the Defendants' approach to the "plausibility" analysis is the very type of probability requirement that the Supreme Court cautioned against in *Iqbal* and *Twombly*. The Seventh Circuit has expressly cautioned that *Twombly* does not require a district court to "stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences." *Swanson*, 614 F.3d at 404. It is not the role of this court at the pleading stage to prejudge the case by determining whether the affirmative defenses seem more plausible than Plaintiffs' products liability theory. The proper question is whether a reasonable inference can bridge the gap between Plaintiffs' factual allegations and the legal conclusions they wish to draw, and whether discovery is likely to produce evidence that will further support that inference.

2012 WL 3582708

*8 This case is certainly a complex one, both in terms of the size of this MDL and the technical nature of the products involved. That said, the court does not believe the gap between the well-pleaded facts and the legal conclusion for which Plaintiffs argue is as large as in cases where the Supreme Court has found a plaintiff's pleading deficient. In the complex antitrust claims involved in *Twombly*, the Court concluded that evidence of parallel conduct amongst the “baby Bells,” without more, did not support a reasonable inference that the companies had illegally conspired to avoid competing with one another. *Twombly*, 550 U.S. at 554. Likewise, in the relatively more straightforward discrimination case presented in *Iqbal*, see *Swanson*, 614 F.3d at 408 (Posner, J., dissenting) (describing *Iqbal* as “not especially complex”), the Court perceived a large gulf between the alleged mistreatment at the hands of government agents and the conclusion that officials at the highest levels of government were aware of and condoned that treatment for reasons related to the plaintiff's religion, race, or national origin. *Iqbal*, 556 U.S. at 680–83. In contrast, the gap between well-pleaded factual allegations that the Flex femoral components failed at a higher rate than non-Flex components and the conclusion that the failure is attributable to the difference in design between the two components is not so large that Plaintiffs need plead substantial additional facts to make that inference a reasonable one.

Further, the well-pleaded facts in this case make it distinguishable from cases cited by Defendants that courts have dismissed for failure to state a design defect claim. In *Frey v. Novartis Pharmaceuticals Corp.*, a plaintiff who experienced multi-organ hypersensitivity after ingesting anti-seizure medication brought a suit against the drug's manufacturer when the manufacturer later issued a label change and a warning letter to doctors adding a precaution regarding that condition as a potential side effect of the drug. 642 F.Supp.2d 787, 789–90 (S.D. Ohio 2009). While the case was allowed to proceed on a failure-to-warn theory, the court concluded that with regard to design defect, the plaintiff had “simply provided a formulaic recitation of the elements of a claim under the statute,” and had “not alleged any facts that would permit the Court to conclude that there was a defect in the design or formulation of [the drug] and that the defect was the proximate cause of [the plaintiff's] alleged injuries.” *Id.* at 795; see also *Tillman v. Taro Pharm. Indus. Ltd.*, No. 10–cv–04202, 2011 WL 3704762, at *4 (N.D. Ill. Aug. 17, 2011) (concluding that the plaintiff's complaint included “only formulaic recitations of the elements of her cause of action”).

In contrast, Plaintiffs allege that the revision rate for Flex knees is higher than for their non-Flex counterparts, and that the Flex knees do not provide a statistically significant advantage in patients' postoperative range of motion—the purported benefit of the Flex knees. Plaintiffs reference studies in peer-reviewed journals that support both of these points. That these studies note their own limitations and the possibility that other causes may explain the higher revision rates does not mean that design defect is not one of the plausible explanations.

*9 Defendants also cite a products liability case from the Eastern District of California for the proposition that “[a] sufficient factual allegation would explain how the particular design of the [product] caused [plaintiff] harm.” *Altman v. HO Sports Co.*, No. 1:09–cv–1000 AWI SMS, 2009 WL 4163512, at *8 (E.D. Cal. Nov. 23, 2009); see also *Goodson v. Boston Scientific Corp.*, No. 1:11–CV–3023–TWT, 2011 WL 6840593, at *4 (N.D. Ga. Dec. 29, 2011) (dismissing a design defect claim because “[t]he Complaint does not describe how the ... devices were defective”). In a post-*Twombly/Iqbal* decision, however, the Seventh Circuit rejected a defendant's objection to a products liability claim brought against the manufacturer of a hip replacement system on the grounds that the complaint did not “specify the precise defect.” *Bausch v. Stryker Corp.*, 630 F.3d 546, 560 (7th Cir. 2010). The court recognized that “although the complaint would be stronger with such detail,” failure to plead such detail did not support dismissal for failure to satisfy Rule 8 pleading requirements. *Id.*

At any rate, the court believes that Plaintiffs here have provided sufficient factual allegations concerning the nature of the defect. In the Master Complaint and in the technical report and presentation, Plaintiff cited to studies that posit that the loosening may be the result of the distribution of the load during deep flexion. Plaintiffs further cite studies that question whether the Flex devices offered a clear advantage in a patient's postoperative range of motion. These allegations give Defendants sufficient notice of the nature of the defect Plaintiffs allege. In the light most favorable to Plaintiff, these factual allegations are sufficient to support a reasonable inference that the product failed to perform as an ordinary consumer would expect and that the benefits of the design do not outweigh the inherent risk of loosening. See *Blue v. Envyl. Eng'g, Inc.*, 215 Ill.2d 78, 91–92, 293 Ill. Dec. 630, 828 N.E.2d 1128, 1138–39 (2005) (explaining Illinois's adoption of the consumer expectation test and the risk-utility test).

B. Failure to Warn

Similar to their argument that Plaintiffs have not pleaded facts sufficient to support the inference that Plaintiffs' injuries were caused by defects in the femoral component, Defendants assert that the Master Complaint does not contain sufficient factual allegations to support a strict liability claim based on a failure-to-warn theory. Specifically, Defendants claim that the Master Complaint lacks factual allegations concerning which product labeling or information contained inadequate warnings; what those warnings should have been; whether Zimmer knew or should have known about the unwarned dangers; and how Zimmer's failure to warn proximately caused Plaintiffs' injuries, which, under the "learned intermediary" doctrine adopted by Illinois law, requires a showing that had Defendants adequately warned Plaintiffs' physicians, those physicians would not have chosen to implant the Flex femoral components. See *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 430, 261 Ill.Dec. 744, 764 N.E.2d 35, 42 (2002).

*10 Upon review of Plaintiffs' factual allegations, the court concludes that they do support a reasonable inference in favor of Plaintiffs' failure to warn claim. Plaintiffs offer detailed factual allegations concerning Zimmer's marketing of the Flex components: They allege that Zimmer promoted the Flex knees as safe and effective to accommodate up to 155 degrees of flexion, especially in active individuals who perform high-flexion activities such as gardening and kneeling for prayer that require deep flexion. (Master Compl. ¶¶ 102–110; Pls.' Resp. 27–29.) Plaintiffs allege, further, that Zimmer promoted the knees as safe and effective for all patients, even for those who do not have the need of higher flexion. (*Id.* ¶ 69, 261 Ill.Dec. 744, 764 N.E.2d 35.) Regardless of whether the precise representations Plaintiffs cite were directed to patients or physicians, physicians appear to have received the message: for example, the peer-reviewed studies cited by Plaintiffs, written by physicians who are presumably experts in the field, note that the NexGen components were designed to safely provide high degrees of flexion. See *Cho et al.*, *supra*, at 902 ("The NexGen® LPS-flex total knee system was designed to provide 150° of flexion following TKA."); *Han et al.*, *supra*, at 1457 ("The NexGen legacy posterior stabilised (LPS)-flex fixed TKR ... is designed to allow 155° of knee flexion safely.").

If, as is plausible from Plaintiffs' factual allegations, the deep flexion that the design was meant to accommodate causes loosening in the long run, Zimmer's alleged representations

would be misleading without further warnings. As for allegations that Zimmer knew or should have known of the higher risks of loosening, the court notes that even under the heightened pleading standards for fraud, a person's mental state may be alleged generally. See *Burks v. Raemisch*, 555 F.3d 592, 594 (7th Cir.2009). It is at least plausible that Zimmer was put on notice of the increased risk from the studies and reports of higher loosening rates Plaintiffs cite. Further, with respect to the issue of whether a Plaintiff's physician would have opted against using the Flex femoral components in the face of adequate warning, the type of detail Defendant seeks appears to be plaintiff-specific. For purposes of the Master Complaint, the court concludes Plaintiffs have sufficiently alleged that "proper warning would have been heeded and no health care professional, including Plaintiffs' physicians, would have used" the Flex femoral components. (Master Compl. ¶¶ 262, 273, 284, 295); see also *Erickson v. Baxter Healthcare, Inc.*, 151 F.Supp.2d 952, 970 (N.D.Ill.2001) (observing that even at the summary judgment state, "the plaintiffs are entitled ... to a presumption that a learned intermediary would have heeded the warning given"). Defendants' motion to dismiss the failure to warn claims in Plaintiffs' Master Complaint is denied.

C. Manufacturing Defect

*11 Defendants also contend that Plaintiffs' factual allegations are insufficient to support a plausible claim of manufacturing defect. Similar to their argument concerning design defect, Defendants assert that the Master Complaint merely offers a "formulaic recitation" of the elements of a manufacturing defect, without providing factual allegations concerning the manufacturing specifications and standards and how the product deviated from those specifications and standards. Unlike the challenges to the design defect and failure-to-warn claims, however, Defendants contest Plaintiffs' manufacturing defect claim for both the femoral and tibial components.

As opposed to design defects, where a "specific unit conforms to the intended design but the intended design itself, or its sale without adequate instructions or warnings, renders the product unreasonably dangerous," a manufacturing defect generally "occurs in only a small percentage of units in a product line." *Blue*, 215 Ill.2d at 89, 293 Ill.Dec. 630, 828 N.E.2d at 1137. The sheer number of Plaintiffs in this litigation suggests defects in the design of the components, but individual Plaintiffs may have claims for manufacturer defect as well. Consequently, the type of factual allegations Defendants assert are absent from the Master Complaint

2012 WL 3582708

appear to be plaintiff-specific allegations, the sufficiency of which is best left for a court considering individual plaintiffs' substantive pleadings.

Moreover, as mentioned above, the Seventh Circuit rejected a similar argument that a plaintiff had failed to specify the precise defect that caused her hip replacement to fail. See *Bausch*, 630 F.3d at 560 (“Rule 9(b) does not impose any special requirement that such a claim be pled with particularity, as it does for fraud claims, for example.”). Additionally, the Seventh Circuit noted that it is common for “injured plaintiffs to plead both defective manufacture and defective design and to pursue discovery on both theories.” *Id.* The court reasoned that “the victim of a genuinely defective product ... may not be able to determine without discovery and further investigation whether the problem is a design problem or a manufacturing problem.” *Id.* Consequently, the most appropriate time to address whether these cases involve design defect claims or manufacturing defect claims is at summary judgment. See *id.* (collecting cases).

D. Remaining Claims

The court need address Defendants' remaining objections to the Master Complaint only briefly. Defendants' motion to dismiss the parallel negligence claims and claims for implied warranty of merchantability concerning the Flex femoral components rest on the argument, already rejected by the court, that Plaintiffs have not offered adequate factual allegations for the court to draw a reasonable inference that the Flex femoral components were defective. The remainder of Defendants' motion seeks dismissal of claims against both the Flex femoral and MIS tibial components for failure to plead plaintiff-specific facts.

*12 The perceived inadequacy of the Master Complaint's factual allegations supporting the negligent misrepresentation, express warranty, and implied warranty of fitness claims concern the absence of plaintiff-specific facts. For instance, Defendants assert that “[n]owhere does the Master Complaint identify a single statement from the array of promotional material, package inserts, and surgical technique instructions related to the Devices ... that was communicated to any particular Plaintiff or physician and that constitutes an actionable misrepresentation or warranty.” (Zimmer's Mot. to Dismiss, In Part, Master Long Form Compl. and Jury Demand, at 27) (emphasis added). Likewise, Defendants also seek to dismiss Plaintiffs' consumer fraud claims under the Illinois Consumer Fraud Act (“ICFA”), 815 ILCS 505/1 *et seq.*, for failure to include

plaintiff-specific facts about particular misrepresentations. Unlike Plaintiffs' other claims, however, the ICFA claim is a species of fraud claim subject to the heightened pleading standard of Rule 9. See *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 399 (7th Cir.2011). Consequently, to properly plead an ICFA claim, “a plaintiff must state the identify of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.” *ABN AMRO, Inc. v. Capital Int'l Ltd.*, 595 F.Supp.2d 805, 849 (N.D.Ill.2008).

In the *Trasylol* case mentioned above, the court addressed the pleading of fraud in an MDL master complaint. See *Trasylol*, 2009 WL 577726, at *8–9. The court concluded that particularized pleadings were not feasible in a master complaint, and instead preferred to “assess the sufficiency of plaintiffs' claims with substantial leniency, especially when the information that may or may not support Plaintiffs' claims is largely within the control of the Defendants.” *Id.* at *8. The court cautioned, however, that “leniency must not overreach so as to effect a negation of the policy behind Rule 9.” *Id.* at *9. While the court concluded that the plaintiffs had “minimally stated enough to allow discovery” into what the defendant knew of the safety of the drug in question, the court noted that information concerning misrepresentations lay “largely in the possession of Plaintiffs' physicians, and so, any allegation of fraud based on such statements must be pled with particularity in the individual Plaintiff's complaint, and be subject to discovery during the case-specific discovery state if, and only if, properly alleged.” *Id.*

Like the *Trasylol* court, this court cannot envision a Master Complaint pleaded with the type of plaintiff-specific particularity Defendants believe is necessary. A motion to dismiss the Master Complaint is not the appropriate time to address deficiencies in plaintiff-specific allegations in the Short Form complaints or the Plaintiffs' fact sheets. For purposes of the Master Complaint, the court concludes that the factual allegations concerning the marketing and promotion of the devices are sufficient to put Defendants on notice of the types of representations Plaintiffs believe form the basis of these claims. The court considers summary judgment upon a more fully developed record the most appropriate time to address these claims. Should any Plaintiff assert reliance on a fraudulent statement made directly to them or their physician by Zimmer agents or other persons, however, the court expects the factual allegations in Plaintiffs' fact sheets to satisfy Rule 9's particularity requirement. See *Trasylol*, 2009 WL 577726, at *12.

2012 WL 3582708

*13 Finally, Defendants ask this court to dismiss Plaintiffs' claim for punitive damages. Defendants contend that Plaintiffs have not pleaded sufficient facts to make a plausible claim that Defendants acted " 'with fraud, actual malice, deliberate violence or oppression, or ... willfully, or with such gross negligence as to indicate a wanton disregard for the rights of others.' " *Slovinski v. Elliot*, 237 Ill.2d 51, 58, 340 Ill.Dec. 210, 927 N.E.2d 1221, 1225 (2010) (quoting *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 384 N.E.2d 353, 359 (1978)). Because Plaintiffs' consumer fraud claim remains, and because Plaintiffs contend that Defendants alleged misrepresentations were not only

negligent, but reckless, the court concludes that dismissal would be premature.

CONCLUSION

For the above reasons, Defendants' Motion to Dismiss, in Part, Master Long Form Complaint and Jury Demand [258] is denied.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3582708

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 32

2019 WL 4861438

2019 WL 4861438

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

IOWA NETWORK SERVICES, INC., Plaintiff,

v.

AT&T CORP., Defendant.

Civil Action No. 3:14-cv-3439 (PGS) (LHG)

|

Signed 10/01/2019

|

Filed 10/02/2019

Attorneys and Law Firms

[Robert E. Levy](#), Scarinci Hollenbeck, Lyndhurst, NJ, for Plaintiff.

[Richard H. Brown, III](#), Day Pitney, LLP., Morristown, NJ, for Defendant.

MEMORANDUM AND ORDER[SHERIDAN](#), U.S.D.J.

*1 This matter comes before the Court on a motion filed by Defendant AT&T Corp. (“AT&T”) to maintain a stay of this case pending further action by the Federal Communications Commission (“FCC”) and the D.C. Circuit. The parties’ respective briefs raise the following issues regarding the motion to maintain the stay: (1) whether a stay is permitted under the Hobbs Act, [28 U.S.C. § 2341](#); (2) whether the Court should continue to invoke the primary jurisdiction doctrine to continue the stay until the final outcome of the FCC proceeding; and (3) whether it would be appropriate for the Court to issue a stay pending appeal of the FCC ruling to the D.C. Circuit under [Landis v. N. Am. Co.](#), 299 U.S. 248 (1936).

FACTS

Defendant AT&T is a provider of long-distance telecommunications services to all states. Plaintiff Iowa Network Services d/b/a Aureon (“INS”) provides telecommunication services known as Central Equal Access (“CEA”) services within Iowa. AT&T transports telecommunication traffic to and from local telephone

companies that serve end user customers. To transport communication traffic to end users in rural Iowa, AT&T delivers traffic to INS, then INS sends or switches the traffic to its network or the network of other local telephone companies who then, in turn, deliver the call to the end user. For INS services, INS charges AT&T a fee set forth in a tariff filed with the FCC, as discussed below.

AT&T has denied that it owes any fees to INS, and has filed counterclaims alleging that INS’s operational practices in imposing tariffed rates for CEA service violate several provisions of the Federal Communications Act (“Communications Act”), including those provisions proscribing unjust and unreasonable practices. Generally speaking, AT&T alleges that INS operated contrary to the FCC’s authorization by allegedly violating the Communications Act because, *inter alia*: (1) INS has refused to comply with certain FCC rate caps; and (2) INS has channeled most of its traffic through rural local exchanges. The critical facts underlying these two contentions are that these rural exchanges are authorized to charge higher tariff rates, and as a result, the cost of the services to AT&T substantially rises, even though INS could have more effectively routed the call through local exchanges whose rates were lower. This practice is referred to as “access stimulation.” AT&T alleges that, in order to stop access stimulation, the FCC capped such rates for those charges in 2011.

On October 14, 2015, the Court, among other things, referred this matter to the FCC pursuant to the primary jurisdiction doctrine. (*See* ECF No. 43). In determining whether to refer the matter to the FCC, the Court undertook an in-depth review of the facts alleged in AT&T’s counterclaims. (*See id.*; ECF No. 9). For context, some of these facts are recapitulated below.

i. ACCESS SERVICES

According to AT&T’s counterclaims, INS provides a service known as “exchange access” or more specifically, “switched access.” (Defendant’s Answer and Counterclaims (“Counterclaims”) ¶¶ 19-29, ECF No. 9). “Switched access” is offered by local exchange carriers (“LECs”) to long distance carriers (also known as interexchange carriers or “IXCs”) to complete long distance calls. (*Id.* ¶ 20). An LEC can be classified generally as an “incumbent” LEC (referred to herein as “ILEC”), which is the traditional provider of telephone services in a local exchange, or a “competitive” LEC (“CLEC”), which is a new entrant to the local telephone

market. (*Id.*). The LECs provide switch access services to IXC's pursuant either to tariffs or express contracts. (*Id.*) The counterclaims provide the following example of how a long distance call is completed through these carriers: On a traditional long distance call, a caller places a call from, for example, Des Moines, Iowa to a friend in, for example, Chicago, Illinois. The caller's local Iowa phone company accepts the outgoing call at a local switch that connects the caller's premises to its network, carries the call over the local network, and eventually hands off the call in or near Des Moines to the caller's selected long distance company. The long distance company (*i.e.*, the IXC) carries the call over its national network to a location near Chicago, and hands it off to a local phone company (an LEC) near Chicago that serves the called party. That Chicago LEC routes the call over its local network, including to a local "end office" switch that is directly connected to the called party's premises in Chicago, and the long distance call is completed. (*Id.* ¶ 21). In this example, the LEC that originated the call in Des Moines will assess an "originating" switch access charge on the IXC, and similar charges will be billed to the IXC for the "terminating" end of the call by the LEC in Chicago.

*2 In the most basic scenario, the IXC establishes a "direct connection" with an LEC. This type of arrangement is used in areas where the IXC and the LEC exchange a large volume of traffic. However, with smaller LECs, there may be insufficient traffic to justify a direct connection with a particular IXC's network, and the carriers may exchange traffic indirectly through another provider. (*Id.* ¶ 27). This "indirect" calling arrangement is approved by the FCC for use in Iowa and a few other states where competition for long distance services is developing. In order to successfully complete long-distance traffic through indirect exchanges, a CEA provider is utilized, and approved by the FCC. Because each remote ILEC had insufficient traffic volume to connect directly with each competing IXC, the remote ILECs cooperatively formed a CEA provider to transmit by long distance service to LEC. (*Id.* ¶ 28). The CEA provider should provide the services at a less costly rate due to economies of scale by handling larger volumes of access traffic. (*Id.*). Such CEA rates are provided by a tariff approved by the FCC.

ii. INS

INS was formed in 1987 by approximately 130 rural LECs to provide transport and other access services on behalf of the rural LECs. (*Id.* ¶ 29). INS was approved to provide CEA services and has deployed tandem switching and transport facilities in order to offer equal access to multiple competitive

IXCs at a single centralized location. (*Id.* ¶¶ 29, 32). At that time (*i.e.*, prior to the Telecommunications Act of 1996, which opened up local telephone service competition), there was only a single provider of local telephone service in a given area; there were no CLECs at that time. (*Id.* ¶ 30). Also at that time, prices for services offered by LEC were determined by "rate of return" regulation, which examined a carrier's reasonable costs and demand, and then rates were set to achieve a reasonable rate of return. (*Id.* ¶ 31).

INS offers a particular package of access services; specifically, INS offers access to a centralized telephone facility (called a "switch") in Des Moines, Iowa, and a network to transport calls across Iowa. (*Id.* ¶¶ 34-35). INS hands off the long distance calls to or from rural LECs, who use their own facilities to terminate or originate the calls placed to end user customers, and these carriers impose their own access charges on AT&T. Specifically, call routing works as follows:

[W]hen a customer of an IXC places a long distance call to a customer of one of the LECs that uses INS, the IXC carries the call over its network to INS's switch in Des Moines, and hands off the call to INS. INS then transports the call to a point on its fiber network that is close to the local facilities of the rural LEC. The rural LEC then picks up the call and transports it to the called party within its authorized local exchange.

(*Id.* ¶ 34). INS generally charges the IXCs a flat, per minute rate for each call. (*Id.* ¶ 35).

iii. ACCESS STIMULATION

AT&T's counterclaims describe an alleged "scheme" referred to as "access stimulation." (*Id.* ¶ 10). Under this "scheme," a remote LEC, which charges higher rates for access services under the FCC's rules, partners with a company that has less expensive rates due to its generation of a great deal of traffic through free calling services. (*Id.*) As a result of this "traffic-pumping," there is a sharp increase in the call traffic coming over the IXCs to the remote LECs and a sharp increase in the fees incurred by the IXC. (*Id.* ¶ 11). As set forth in the

counterclaims, such traffic in Iowa would typically be routed over INS's transport ring. (*Id.* ¶ 10). AT&T claims that as a result of these access stimulation practices, the mix of traffic that INS carries has changed significantly. Formerly, nearly all of the traffic transported by INS involved the aggregation of small volumes for each of the ILECs connected to ENS. Presently, it is alleged that about 89% of the traffic handled by INS consists of traffic from CLECs engaged in access stimulation. (*Id.* ¶ 39).

iv. FCC PRICE CAPS

The access services provided by LECs are regulated by the FCC. In 2011, the FCC created several new rules with respect to pricing, and capped all interstate access rates that were in effect at the time. See *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund* ("Connect America Order"), 26 F.C.C. Rcd. 17663, ¶ 18 (2011). LECs were also required over time to reduce access rates for intrastate calls to the same level as interstate calls. The parties' briefing, as well as this memorandum, refers to these rules at "rate caps."

v. AT&T'S DISPUTE WITH INS

*3 According to AT&T, after INS filed its tariffs with rates that AT&T claims exceeded the rate caps set by FCC rules, AT&T disputed INS's charges pursuant to the billing dispute provisions in INS's tariff. (Counterclaims ¶ 54). AT&T also began withholding payment on certain charges, but continued to pay INS some of the amounts it has billed based upon AT&T's own estimate of what the lawful charges should be. (*Id.*). Nevertheless, AT&T claims that it has paid millions of dollars in charges associated with access stimulation, of which it contends should be refunded. (*Id.* ¶ 55). In sum, AT&T alleges, *inter alia*, that INS, and the Iowa LECs that engage in access stimulation, have engaged in unreasonable, anticompetitive, and unlawful practices by (1) conspiring to refuse to allow AT&T to use more efficient means to transport access stimulation traffic, such as a direct connection with the LEC; and (2) insisting that AT&T route traffic through INS. AT&T seeks damages as well as declaratory and injunctive relief. INS, on the other hand, contends that it is owed monies for the CEA service that INS has provided and billed to AT&T, but for which AT&T has not fully compensated INS. (ECF No. 1).

PROCEDURAL HISTORY

After AT&T objected to fees charged by INS and withheld payment, INS brought this action to recover monies allegedly owed. (*See id.*). As discussed above, AT&T counterclaimed that INS had violated the FCC's rate caps, was engaged in access stimulation, and had conspired to deny AT&T the ability to transport traffic via a direct connection. (ECF No. 9). After considering a motion to dismiss and motion for summary judgment filed by INS and a motion to stay filed by AT&T, the court referred the matter to the "fair and unbiased experts of the FCC." (ECF No. 43). INS's motion for reconsideration and interlocutory appeal to the Third Circuit were both denied. (ECF Nos. 44, 51).

AT&T then initiated a formal complaint proceeding with the FCC, namely, by filing a complaint raising four allegations concerning: (1) unlawful billing by INS for CEA service in connection with "access stimulation" traffic; (2) FCC rate cap and rate parity rules violations; (3) FCC access stimulation rules violations; and (4) INS's unreasonable manipulation of its rates. (*See* AT&T Moving Br. at 4, ECF No. 78).

The FCC issued its initial liability order in November 2017 ("*Liability Order*"), partially finding in AT&T's favor:

- (1) The FCC found INS violated rate cap and rate parity rules. The FCC held that, as a dominant carrier, INS's rates must be consistent with longstanding rate-of-return regulations and that INS was subject to traditional rules for access services, which were established in 2011.
- (2) The FCC found that INS's tariffs were not lawfully filed and directed INS to file a new lawful tariff. The FCC stated that a subsequent damages phase of the proceeding would determine the appropriate rate between 2013 and 2018.
- (3) The FCC recognized there were "a number of significant questions about INS's CEA practices and rates that deserve[d] further exploration," but denied AT&T's claims relating to INS's purported violation of FCC access stimulation rules.

(*See id.* at 4-5; *see also* ECF No. 53, Ex. 1).

INS filed a petition for reconsideration. The FCC denied the petition, but ruled that—in light of the 2013 tariff being

voided—the 2012 tariff would be deemed to have remained in effect. The FCC, however, noted that AT&T would have the opportunity in the damages phase to demonstrate that, in connection with the 2012 tariff, INS furtively employed improper accounting practices to conceal potential rate of return violations. (*See* ECF No. 54-1).

AT&T then petitioned for reconsideration, claiming that imposing the 2012 rate was improper. The FCC denied the petition, noting that AT&T would have the opportunity to challenge the 2012 rate at the damages phase of the proceeding. Both parties appealed various aspects of the FCC’s orders. The FCC held the damages phase of the proceeding in abeyance.

Separately, the FCC directed INS to file a revised tariff within sixty days of the *Liability Order*, which it did on February 22, 2018. The FCC suspended the same, finding “substantial questions of lawfulness,” and later rejected the revised tariff because it exceeded the applicable benchmark and violated FCC affiliate transaction rules. INS’s second revised tariff was suspended and then rejected for similar reasons as the first. The FCC opened an investigation into INS’s ratemaking and accounting practices. INS was then directed to file another revised tariff filing no later than April 29, 2019.

*4 AT&T has appealed the FCC’s imposition of the 2012 tariff rate. INS has appealed the FCC’s classification of INS as a CLEC and the determination that INS’s rates were unlawful. INS has also challenged the FCC’s application of the CLEC benchmark rule in the investigation. The D.C. Circuit has consolidated these various petitions.

Concurrent to those proceedings, this Court considered a request by INS to lift the stay following the FCC’s *Liability Order* and August 1, 2018 Order on Reconsideration (“*First Reconsideration Order*”). (ECF No. 54). The Court denied that request and continued the stay to February 15, 2019. (ECF No. 69). Although the Court also encouraged the parties to engage in FCC-supervised mediation, those negotiations were unsuccessful. The stay imposed by this Court automatically expired on February 15, 2019. Currently pending before this Court is a motion filed by AT&T to maintain the stay of the proceedings pending the outcome of the D.C. Circuit proceeding and the damages phase of the FCC proceeding.

LEGAL STANDARD

Three distinct legal issues are presented in this motion. *First*, whether, as INS argues, maintaining a stay would violate the Hobbs Act. *Second*, whether, as AT&T argues, the Court should maintain the stay pursuant to primary jurisdiction doctrine. *Third*, whether the Court could properly exercise its inherent power to maintain the stay in this proceeding. The Court will address these legal issues in turn.

HOBBS ACT

INS argues that the Court lacks jurisdiction to issue the requested stay because the Hobbs Act confers exclusive jurisdiction to the federal courts of appeals with respect to stays of FCC orders. (INS Opp. Br. at 19-20, ECF No. 80). “The Hobbs Act provides the federal courts of appeal with ‘exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity’ of FCC orders.” *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1306-07 (11th Cir. 2015). “District courts may not determine the validity of FCC orders, including by refusing to enforce an FCC interpretation” *Id.* at 1306 (citation omitted). “If the Hobbs Act applies, a district court must afford FCC final orders deference and may only consider whether the alleged action violates FCC rules or regulations.” *Id.*

In particular, INS supports its position by citing *Silwa v. Bright House Networks, LLC*, No. 216CV235FTM29MRM, 2016 WL 3901378, at *4 (M.D. Fla. July 19, 2016), which, in relevant part, held: “Staying this case because the Circuit Court *may* conclude that FCC incorrectly interpreted the TCPA is the *opposite* of affording the Final Order deference.” However, the Court finds *Silwa* distinguishable from the present case. Specifically, in that case, the motion to stay was filed *after* the FCC issued a *final* order. *Silwa*, 2016 WL 3901378, at *2. Here, the FCC issued an order that pertains *only* to liability. The FCC noted that a subsequent damages phase will take place after the interlocutory appeal is decided.

Indeed, our sister courts have declined to find that the Hobbs Act precludes a district court from entering a stay. *See, e.g., Sessions v. Barclays Bank Delaware*, 276 F. Supp. 3d 1349, 1351 (N.D. Ga. 2017) (citation omitted) (“Because the decision in the [D.C. Circuit] ... ‘is likely to have a substantial or controlling effect on the claims and issues’ in this case, a

stay is appropriate.”); *Rajput v. Synchrony Bank*, 221 F. Supp. 3d 607, 616 (M.D. Pa. 2016).

*5 In short, the Court concludes that the Hobbs Act does not displace this Court’s power to stay the proceeding, which is “incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis*, 299 U.S. at 254 (1936); see also *Ethicon v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988) (citation omitted) (recognizing the district courts’ “inherent power to manage their dockets and stay proceedings, including the authority to order a stay pending conclusion of a [Patent and Trademark Office] reexamination”).

PRIMARY JURISDICTION

AT&T seeks an order from this Court maintaining the stay in this action until the D.C. Circuit and FCC have “completed their work.” (See AT&T Moving Br. at 13-22). Specifically, AT&T’s argument is premised on the doctrine of primary jurisdiction. Primary jurisdiction “is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within special competence of an administrative agency.” *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). The doctrine “is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.” *U.S. Western Pac. R. Co.*, 352 U.S. 59, 63 (1956). “[I]t is a principle of judicial administration designed to achieve consideration between administrative agencies and the Courts.” *James v. Global TelLink*, No. 13-cv-4989, 2014 WL 4425818, at *5 (D.N.J. Sep. 8, 2014). The doctrine applies “to claims properly cognizable in court that contain some issue within the special competence of an administrative agency.” *Reiter*, 507 U.S. at 268. The doctrine of primary jurisdiction should be invoked where “the matter involves technical or policy considerations which are beyond the court’s ordinary competence and within the agency’s field of expertise.” *MCI Commc’n Corp. v. Am. Telephone & Telegraph Co.*, 496 F.2d 214, 220 (3d Cir. 1974).

“The Third Circuit has stated that the doctrine applies when decision-making is divided between courts and administrative agencies [and] calls for judicial abstention in cases where protection of the integrity of a regulatory scheme dictates primary resort to the agency which administers the scheme.” *Global Naps, Inc. v. Bell Atlantic-Net Jersey, Inc.*, 287 F.Supp.2d 532, 549 (D.N.J. 2003) (quotation marks omitted)

(quoting *Cheyney State Coll. Faculty v. Hifstedler*, 703 F.2d 732, 736 (3d Cir. 1983)). Ordinarily, primary jurisdiction “comes into play whenever enforcement of a claim requires the resolution of issues which under a regulatory scheme have been placed within the special competence of an administrative body.” *James*, 2014 WL 4425818, at *6.

Generally, under the primary jurisdiction doctrine, the Court considers four factors in determining whether to refer a matter to an administrative agency: (1) whether the issues presented fall within the “conventional expertise” of judges; (2) whether the issues are within the agency’s discretion or require the exercise of the agency’s expertise; (3) whether there are any dangers of inconsistent rulings between the courts and agency; and (4) whether a prior application has been made to the agency. See *Oh v. AT&T Corp.*, 76 F. Supp. 2d 551, 557 (D.N.J. 1990). Under the circumstances at bar, the Court finds that all four of the *Oh* factors are present.

First, as the Court has already held in its October 14, 2015 referral order (ECF No. 43), many issues presented in this matter do not fall within the conventional expertise of the Court, which include, *inter alia*: (1) “access services” practices; (2) the terms within the Connect America Order; (3) the difference between CEA services and switched access service; and (4) the significance of whether INS is a rate of return carrier or a competitive local exchange carrier. *Second*, the remaining issues presented, currently before the FCC, relate to damages as a result of INS’s purported liability. Specifically, the FCC will need to determine, among other things, whether the 2012 rate is a lawful rate. This issue is beyond the expertise of the Court and within the agency’s discretion. *Third*, the FCC’s liability order is currently on appeal. If the Court now lifts the stay and issues a ruling in this action, an appellate court could reverse and/or remand the FCC order, which could result in inconsistent rulings. The FCC’s damages order could also be inconsistent with an order by this Court. Therefore, there is a high risk of inconsistent rulings between the courts and the agency. *Finally*, an application has plainly been made to the FCC, thus satisfying the fourth factor.

*6 As demonstrated above, all primary jurisdiction factors are present in this action. Therefore, the Court finds that a stay based on primary jurisdiction is warranted, particularly in view of the fact that the claims and issues before the Court are “factually and legally intertwined” with the issues “pending resolution before the FCC,” as well as the D.C. Circuit. See

Peerless Network, Inc. v. MCI Commc'ns Servs., Inc., 917 F.3d 538, 543-44 (7th Cir. 2019).

THE COURT'S INHERENT POWER TO STAY PROCEEDINGS

Alternatively, the Court also finds that its inherent power to stay judicial proceedings justifies continuing the stay in this case. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis*, 299 U.S. at 254. A court considering a motion to stay proceedings (or, as is the case here, a motion to continue, or reimpose, a stay) “must weigh competing interests and maintain an even balance.” *Id.* at 254-55. The party seeking a stay “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay ... will work damage to someone else.” *Id.* at 255.

Under *Landis* and its progeny, courts generally weigh a number of factors in determining whether a stay is appropriate, including:

whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party, (2) whether denial of the stay would create a clear case of hardship or inequity for the moving party; (3) whether a stay would simplify the issues and the trial of the case, and (4) whether discovery is complete and/or a trial date has been set.

Akishev v. Kapustin, 23 F. Supp. 3d 440, 446 (D.N.J. 2014) (citations and quotation marks omitted). Additional considerations also “arise depending upon the circumstances for which the movant requests a stay.” *Id.* “Where a stay is sought pending resolution of purportedly related litigation, ... courts consider whether resolution of the related litigation would substantially impact or otherwise render moot the present action.” *Id.* The Court reviews each of the above four factors below.

i. FACTOR ONE: WHETHER A STAY WILL RESULT IN PREJUDICE

INS sets forth two primary reasons why it will purportedly suffer prejudice if the stay in this matter is continued: (1) AT&T has not paid INS “the lawful rate for nearly five years ... for service provided to AT&T” (INS Opp. Br. at 25); and (2) the matter could be ongoing for a long time because: the D.C. Circuit has not yet set this matter for oral argument; after its decision, the case could be appealed to the Supreme Court; and there is also a subsequent damages proceeding before the FCC that will take place after the appeals process has concluded. (*See id.* at 25-28).

First, a determination of the lawful rate is precisely what has not yet been decided by the FCC. If the D.C. Circuit reverses the FCC, the agency will be forced to reconsider the liability determination. If the D.C. Circuit affirms the agency, it must assess damages. In either outcome, it remains unclear what the lawful rate will be. Thus, INS’s first contention actually supports a stay. *Second*, while it is true that this matter may continue for some time, “ ‘mere’ delay does not, without more, necessitate a finding of undue prejudice and clear tactical disadvantage.” *Nussbaum v. Diversified Consultants, Inc.*, No. CIV. 15-600, 2015 WL 5707147, at *2 (D.N.J. Sept. 28, 2015) (quoting *Akishev*, 23 F. Supp. 3d at 447). Accordingly, the Court is not persuaded by either INS’s arguments with respect to this factor.

ii. FACTOR TWO: WHETHER DENIAL OF THE STAY WOULD CREATE HARDSHIP OR INEQUITY FOR THE MOVING PARTY

*7 INS contends that denying the stay would result in no prejudice to AT&T and, in fact, continuing the stay would permit AT&T to continue nonpayment for services rendered. (*See* INS Opp. Br. at 27-28). However, the FCC has also recognized that “substantial questions of lawfulness” surround INS’s ratemaking and accounting practices. (AT&T Moving Br. at 20). Further, the FCC’s imposition of the 2012 tariff is an issue currently on appeal in the D.C. Circuit. In light of the uncertain legal footing upon which the imposition of the 2012 tariff sits, the Court does not find that the second factor weighs in favor of either party.

iii. FACTOR THREE: WHETHER A STAY WOULD SIMPLIFY THE ISSUES AND THE TRIAL OF THE CASE

The interests of judicial economy weigh in favor of continuing the stay. As mentioned above, several petitions for appellate review have been filed and consolidated before the D.C. Circuit. The issues currently pending before the D.C. Circuit include, *inter alia*: (1) imposition of the 2012 tariff rate; (2) classification of INS as a CLEC; (3) the FCC's application of the CLEC benchmark rule. (*See* AT&T Moving Br. at 9). Moreover, the FCC's decision could be reversed and/or remanded, creating a risk of inconsistent results in the two cases. Additionally, the action remains pending before the FCC.

Further, the Court notes that in *Nussbaum*, relied upon by INS, the court considered whether to stay pending the outcome of an ancillary case in which the defendant was an intervenor. With respect to the third factor, the court held: "Given that many of the relevant issues in the case before this Court fall outside the ambit of [the matter on appeal], the resolution of [that matter] seems unlikely to significantly simplify the issues before this Court or to substantially impact the outcome of the litigation." *Nussbaum*, 2015 WL 5707147, at *3. By contrast, here, the issues on appeal are substantially similar to those at issue in this case. The third factor therefore weighs strongly in favor of granting the motion.

iv. FACTOR FOUR: WHETHER DISCOVERY IS COMPLETE AND/OR A TRIAL DATE HAS BEEN SET

This matter has been on the Court's docket since 2014. However, while the parties may have engaged in discovery before the FCC (*see* INS Opp. Br. at 33), it appears that no significant amount of discovery has taken place in this action pending in this Court. INS filed a motion for summary judgment on AT&T's counterclaims before its motion to dismiss was decided. The matter has been stayed since this Court's October 14, 2015 order, which also denied the motion

to dismiss and the motion for summary judgment. Most of the documents that have been filed since that order relate to the Court lifting the stay. Therefore, although the case has been pending for a while, this factor weighs in favor of continuing the stay.

Based on this analysis, the Court finds that a stay is warranted based on the Court's inherent power to stay proceedings, in addition to the primary jurisdiction doctrine.

ORDER

This matter comes before the Court on a motion filed by AT&T to maintain the stay of this action pending the outcome of an appeal to the D.C. Circuit of an FCC proceeding involving substantially similar legal issues; and to also stay pending the FCC's consideration of the matter after the conclusion of the D.C. Circuit appeal. The Court held oral argument on this matter on April 9, 2019. Accordingly, for the reasons stated herein and for good cause shown;

IT IS on this 1 day of October, 2019;

ORDERED that AT&T's motion to stay (ECF No. 78) is granted in part; and it is further

ORDERED that this matter is stayed pending the outcome of the proceedings before the D.C. Circuit; and it is further

***8 ORDERED** that either party may move to further stay the proceedings after this matter is decided by the D.C. Circuit.

All Citations

Slip Copy, 2019 WL 4861438

TAB 33

2011 WL 198026

2011 WL 198026

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Tenisha JAMES, individually and on behalf
of all others similarly situated, Plaintiffs,
v.

JOHNSON & JOHNSON CONSUMER
COMPANIES, INC., Defendants.

Civil No. 10-cv-03049 (DMC)(JAD).

|
Jan. 20, 2011.

Attorneys and Law Firms

[Scott M. Lempert](#), Sandals & Associates, P.C., Philadelphia,
PA, for Plaintiff.

[Daniel B. Carroll](#), Drinker, Biddle & Reath, LLP, Florham
Park, NJ, for Defendant.

OPINION

[DENNIS M. CAVANAUGH](#), District Judge.

*1 This matter comes before the Court upon motion by Johnson & Johnson Consumer Companies, Inc. ("Defendant") to dismiss the Plaintiff's Consolidated Amended Class Action Complaint ("CACAC") pursuant to [Fed.R.Civ.P. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. Pursuant to [Fed. R. Civ. Pro 78](#), no oral argument was heard. After considering the submissions of the parties, and based upon the following, Defendants motion is **granted**.

I. BACKGROUND

The ten plaintiffs joined in this Complaint allege that Defendant J & J violated the FDA's ban on methylene chloride as an ingredient in cosmetic products, pursuant to [21 C.F.R. § 700.19](#). Attorney for Plaintiffs previously brought six virtually identical cases before this Court, four of which were dismissed on August 2, 2010 for lack of standing pursuant to a motion for reconsideration filed by Defendant Johnson & Johnson.¹ The CACAC allegedly raises new factual and legal issues that distinguish this Complaint from the others that were dismissed by this Court, including allegations that

Johnson & Johnson has been investigated by the FDA, and that methyl chloride is an ingredient in its baby shampoo.

¹ *Vercellono v. Gerber Products Co. et al.*, Case 2:09-cv-02905 DMC-MF, CLOSED 8/2/10; *Crouch v. Johnson and Johnson Consumer Cos., Inc. et al.*, Case 2:09-cv-02905 DMC-MF, CLOSED 8/2/10; *Levinson v. Johnson & Johnson Consumer Cos., Inc. et al.*, Case 2:09-cv-03317 DMC-MF, CLOSED 8/2/10; *Boyd v. Johnson & Johnson Consumer Cos. Inc.*, Case 2:09-cv-03135 DMC-MF; CLOSED 8/2/10.

II. LEGAL STANDARD

As the Supreme Court has long held, "Constitutional standing requires (1) injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Moreover, a "legally and judicially cognizable" injury-in-fact must be "distinct and palpable," not "abstract or conjectural or hypothetical." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (internal quotations omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), and *Los Angeles v. Lyons*, 461 U.S. 95, 101–02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). As the Third Circuit has held, "while it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms." See *Danvers Motor Co., Inc. v. Ford Motor Co.* 432 F.3d 286, 291 (C.A.3 (N.J.),2005).

"There is a fundamental difference of review under [Fed.R.Civ.P. 12\(b\)\(1\)](#), where the existence of disputed facts will not preclude the Court from evaluating the merits of the jurisdictional claim, and [Fed.R.Civ.P. 12\(b\)\(6\)](#) where the Court is required to accept as true all the allegations of the complaint and all inferences arising from them." *Anjelino v. New York*, 200 F.3d 73, 87 (Dd Cir., 1999). "[T]he threshold to withstand a motion to dismiss under [Rule] 12(b)(1) is thus lower than that required to withstand a Rule 12(b)(6) motion." *Kehr Packages, Inc. V. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir., 1991).

III. DISCUSSION

*2 The Court accepts Plaintiff's contention that economic injury is sufficient to confer Article III standing such that the Court has subject matter jurisdiction over this case. The Court notes the language of *Danvers Motor Co., Inc. v. Ford Motor Co.* 432 F.3d 286, 293 (C.A.3 (N.J.),2005) in which the Third Circuit held that "monetary harm is a classic form of injury-in-fact," and that "injury-in-fact is not Mount Everest." In spite of that language, however, Plaintiffs cannot clear the threshold requirement for showing economic injury. As the Court understands the CACAC, the economic injury for which Plaintiffs seeks redress is the price Plaintiffs paid for shampoo, which they then apparently used in bathing their children, without adverse health reactions. Whatever injury they claim to have suffered due to their subsequent discovery of methyl chloride in the shampoo could not, therefore, have been economic.² Simply put, Plaintiffs bought and used shampoo, and subsequently wished that they had not done so because they feared for the future safety of their children. Their assertion that because the product was tainted, the injury occurred at the moment of purchase, is unavailing. Plaintiff's reasoning in the CACAC is circular and unpersuasive as to the contention that Plaintiffs suffered an injury-in-fact. The CACAC avers that "had Plaintiffs known the true nature of Defendant's baby shampoo, they neither would have purchased it nor allowed their children to be exposed to it." This is undoubtedly correct, but the conclusion that "consequently, Plaintiffs have been economically damaged" simply does not follow. (See ECF Doc. 27, page ID# 483). Presumably, had Plaintiffs known about the alleged toxicity of the shampoo prior to using the product they would either have returned it unopened, or not purchased it in the first place. Once the product had been consumed, however, there was no economic injury for Plaintiffs to complain of, and the fear of future injury is legally insufficient to confer standing. Plaintiffs received the benefit of their bargain so long as there were no adverse health consequences, and the product worked as intended, meaning that the hair of Plaintiff's children was cleansed, and their eyes and skin were not irritated. There is nothing in the CACAC to suggest otherwise. The Court finds that the facts as pled in the CACAC are legally

insufficient to demonstrate an injury-in-fact of even the most *de minimis* amount, and that no further restyling of the CACAC could overcome this jurisdictional hurdle. It would be both foolish and impossible to parse and measure the amount of shampoo each Plaintiff used prior to the discovery of taint, and the Court will not entertain such a fractionated analysis. Short of seeking redress for the unused portion of a bottle of shampoo that was discarded subsequent to discovery of the alleged contamination, a practical and legal absurdity, there is simply no cognizable economic injury. The Court need not reach the issue on which the previous four cases were dismissed, namely the contention that methyl chloride was not an "ingredient" as that term is understood by the Food and Drug Administration, although the Court notes that Plaintiff's syllogistic reasoning, that methyl chloride was a "component," and therefore an "ingredient" is neither a factual nor a legal improvement over Plaintiff's previous allegations. To the extent that there is no injury-in-fact, either economic or otherwise, the "per se" adulteration of the product is simply irrelevant to these Plaintiffs, since they have no standing to bring the claim before this Court. Plaintiff should consider this issue to have been fully litigated and thus precluded for future consideration by the Court.

2 It should be noted that Plaintiffs have not alleged economic injury on a theory that they paid a premium price for this brand of shampoo based on Johnson & Johnson's misrepresentation of their product as being safe and non-toxic for children, more so than comparable but less expensive alternatives. See *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir., 2003).

III. CONCLUSION

*3 For the reasons contained herein, Defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) is **granted**. An appropriate order follows this opinion.

All Citations

Not Reported in F.Supp.2d, 2011 WL 198026

TAB 34



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [City of Greenville, Ill. v. Syngenta Crop Protection, Inc.](#), S.D.Ill., November 18, 2010

374 Fed.Appx. 257

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.

United States Court of Appeals,
Third Circuit.

Ruth KORONTHALY, individually and on behalf of all others similarly situated, Appellant

v.

L'OREAL USA, INC., a New York Corporation; The Procter and Gamble Distributing LLC, an Ohio Corporation.

No. 08-4625.

|

Argued Nov. 10, 2009.

|

Opinion Filed: March 26, 2010.

Synopsis

Background: Purchaser of lipstick products containing lead brought class action against companies that manufactured, marketed, and distributed the products. Defendants filed motions to dismiss. The United States District Court for the District of New Jersey, [Dennis M. Cavanaugh, J.](#), 2008 WL 2938045, granted the motions and subsequently denied plaintiff's motions for reconsideration and to file a second amended complaint. Plaintiff appealed.

Holdings: The Court of Appeals, [Roth](#), Circuit Judge, held that:

[1] plaintiff's subjective allegation that the trace amounts of lead in the lipsticks were unacceptable to her was not an injury-in-fact sufficient to confer constitutional standing, and

[2] to the extent plaintiff contended that she lost the "benefit of the bargain" in purchasing the lipsticks, she did not demonstrate a concrete injury-in-fact.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (2)

[1] **Products Liability** 🔑 Nature of Injury or Damage

Products Liability 🔑 Persons Entitled to Sue

Products Liability 🔑 Cosmetics, soaps, and hair-care products

Subjective allegation made by purchaser of lipstick products containing lead, that the trace amounts of lead in the lipsticks were unacceptable to her, was not an injury-in-fact sufficient to confer constitutional standing; purchaser's argument that she was misled into purchasing unsafe lipstick products was belied by Food and Drug Administration (FDA) report finding that lead levels in manufacturers' lipsticks were not dangerous and therefore did not require warnings, and purchaser conceded that she had suffered no adverse health effects from using the lipsticks. [Fed.Rules Civ.Proc.Rule 12\(b\)\(1\)](#), 28 U.S.C.A.

[16 Cases that cite this headnote](#)

[2] **Sales** 🔑 Standing

To the extent purchaser of lipstick products containing lead contended that she lost the "benefit of the bargain" in purchasing the lipsticks, she did not demonstrate a concrete injury-in-fact, as required for standing; because her purchases were not made pursuant to a contract, she could not have been denied the benefit of any bargain, and purchaser did not allege that she received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably have expected. [Fed.Rules Civ.Proc.Rule 12\(b\)\(1\)](#), 28 U.S.C.A.

[31 Cases that cite this headnote](#)

*258 On Appeal from the United States District Court for the District of New Jersey (District Court No. 2–07–cv–05588), District Judge: [Dennis M. Cavanaugh](#).

Attorneys and Law Firms

[Philip A. Tortoreti](#), Esquire, [Daniel R. Lapinski](#), Esquire (Argued), Wilentz, Golman & Spitzer, P.A., Woodbridge, NJ, for Appellant Ruth Koronthaly.

[Scott L. Haworth](#), Esquire (Argued), [Nora Coleman](#), Esquire, Sedgwick, Detert, Moran & Arnold, New York, NY, [Anthony J. Anscombe](#), Esquire, Sedgwick, Detert, Moran & Arnold, LLP, Chicago, IL, [James H. Keale](#), Esquire, Sedgwick, Detert, Moran & Arnold, LLP, Newark, NJ, for Appellee L'Oreal USA, Inc.

[Michael R. McDonald](#), Esquire (Argued), [Damian V. Santomauro](#), Esquire, Gibbons, P.C., Newark, NJ, for Appellee The Procter & Gamble Distributing, LLC.

Before: [AMBRO](#), [GARTH](#), and [ROTH](#), Circuit Judges.

OPINION

[ROTH](#), Circuit Judge:

**1 Ruth Koronthaly appeals from the District Court's order granting defendant Procter & Gamble Company's ("P & G") motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) for lack of standing and defendant L'Oreal USA, Inc.'s ("L'Oreal") motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#). We exercise plenary review over a grant of a motion to dismiss for lack of standing and review the factual elements underlying the standing determination for clear error. [Goode v. City of Phila.](#), 539 F.3d 311, 316 (3d Cir.2008). The burden of proving each standing element rests with the plaintiff. [Danvers Motor Co., Inc. v. Ford Motor Co.](#), 432 F.3d 286, 291 (3d Cir.2005). We assume the parties' familiarity with the factual and procedural history, which we describe only as necessary to explain our decision. We will affirm the District Court's order.

Koronthaly purchased lipstick products manufactured, marketed, and distributed by appellees L'Oreal and P & G. These lipstick products contain lead. The FDA does not regulate the presence of lead in lipstick, but Koronthaly asserts that the lipstick contains lead in far greater amounts

than permitted in candy by the FDA. Neither the packaging nor the products themselves contained any indication that the lipstick contained any lead.

Koronthaly did not know when she purchased the products that they contained any lead, and when she learned of the lead content she immediately stopped using them. Moreover, had she known of the lead she would not have purchased the products.

In November 2007, Koronthaly filed a class action complaint in the District Court for the District of New Jersey. She invoked the District Court's jurisdiction under the Class Action Fairness Act, [28 U.S.C. § 1332\(d\)\(2\)](#). After it was amended in March 2008, her complaint asserted claims for: (1) violation of the New Jersey Consumer Fraud Act, [N.J.S.A. § 56:8–1 et seq.](#); (2) breach of implied warranty under the New Jersey UCC; (3) breach of implied warranty under the Magnuson–Moss Warranty Act, [15 U.S.C. § 2310\(d\)\(1\)](#); (4) strict liability; (5) negligence per se; (6) unjust enrichment; and (7) injunctive relief.

*259 L'Oreal and P & G filed motions to dismiss pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) and [12\(b\)\(1\)](#), respectively. On July 25, 2008, the District Court granted those motions, finding that Koronthaly lacked standing to pursue the action. On October 24, 2008, the District Court denied Koronthaly's motion for reconsideration, and her motion for leave to file a second amended complaint. Koronthaly then filed a timely notice of appeal.

To prove constitutional standing, Koronthaly must demonstrate (1) an injury-in-fact that is actual or imminent and concrete and particularized, not conjectural or hypothetical, (2) that is fairly traceable to the defendant's challenged conduct, and (3) is likely to be redressed by a favorable judicial decision. [Summers v. Earth Island Inst.](#), — U.S. —, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009). In this case, standing founders on the first requirement, injury-in-fact.

**2 [1] Koronthaly's argument that she was misled into purchasing unsafe lipstick products is belied by the FDA's report finding that the lead levels in the Defendants' lipsticks were not dangerous and therefore did not require warnings. Moreover, Koronthaly concedes that she has suffered no adverse health effects from using the lipsticks. Koronthaly therefore has asserted only a subjective allegation that the trace amounts of lead in the lipsticks are unacceptable to her,

not an injury-in-fact sufficient to confer Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (injury-in-fact must be accompanied by “continuing, present adverse effects”) (citation omitted); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 636 (3d Cir.1996) (Wellford, J., concurring) (“Fear and apprehension about a possible future physical or medical consequence ... is not enough to establish an injury *in fact*.”).

[2] Furthermore, to the extent that Koronthaly contends that the injury-in-fact was the loss of her “benefit of the bargain,” she mistakenly relies on contract law. See *Rivera v. Wyeth–Ayerst Labs.*, 283 F.3d 315, 319–21 (5th Cir.2002) (plaintiff, whose only claim was that she “would like her money back” for having purchased a product that failed to

make certain disclosures and allegedly was defective, did not have an injury-in-fact sufficient to create standing). Her lipstick purchases were not made pursuant to a contract, and therefore she could not have been denied the benefit of any bargain. Absent any allegation that she received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably expect, Koronthaly has not demonstrated a concrete injury-in-fact.

For the foregoing reasons, we will affirm the order of the District Court granting the Defendants' motions to dismiss.

All Citations

374 Fed.Appx. 257, 2010 WL 1169958

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 35

2011 WL 3652311



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Cline v. Advanced Neuromodulation Systems, Inc.](#),
N.D.Ga., June 15, 2012

2011 WL 3652311

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia,
Atlanta Division.Karneshiha LEONARD, Individually, and
as Administrator of the Estate of Lorenzo
Leonard, Deceased, Christopher Leonard,
Yolanda Wilson, as Legal Guardian of Shakiya
Ricks, and Jushonda Ricks, Plaintiffs,

v.

MEDTRONIC, INC., Defendant.

Civil Action No. 1:10-CV-03787-JEC.

|

Aug. 19, 2011.

Attorneys and Law Firms[Romero T. Pearson](#), Pearson Law Group, Lawrenceville, GA,
for Plaintiffs.[Lori Gail Cohen](#), Greenberg Traurig, Atlanta, GA, for
Defendant.**ORDER and OPINION**[JULIE E. CARNES](#), Chief Judge.

*1 Before the Court is defendant's Motion to Dismiss [5] this case pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#). Upon review of the parties' arguments and the record, determines that defendant's motion is meritorious. Nevertheless, given the plaintiffs' request to amend their complaint, the Court **DENIES without prejudice** defendant's motion [5].

BACKGROUND

The facts, viewed in the light most favorable to Plaintiffs, are as follows. Plaintiffs are heirs of Lorenzo Leonard ("Leonard"), who is deceased. (Plaintiffs' Complaint [1] at ¶ 5.) Defendant Medtronic, Inc. manufactures and sells

implantable cardiac defibrillators ("ICDs").¹ (*Id.* at ¶ 2.) On February 14, 2003, Leonard was implanted with Medtronic's Marquis VR, Model 7230 ICD ("Marquis 7230 ICD"). (*Id.* at ¶ 5.) In February 2005, Medtronic recalled four ICD models, including the model Leonard had, because of a potential battery shorting problem which could cause the device to fail or malfunction. (*Id.* at ¶¶ 54, 57–58.) On November 17, 2007, Leonard was admitted to The Medical Center in Columbus, Georgia. (*Id.* at ¶ 78.) Leonard stated he had felt a spasm and chest pain, and that his ICD "went off" for the first time. (*Id.*) Leonard's ICD fired three times. (*Id.*) On November 20, 2007, while Leonard was still in the hospital, Medtronic reviewed and adjusted his ICD but did not tell him that his device had been recalled. (*Id.*)

¹ "ICDs are implantable, silver-dollar size, highly-technical electronic devices designed to detect, and almost-instantaneously treat, ventricular tachycardia, or fibrillation, a life-threatening condition. A properly functioning ICD administers an electrical pulse which reestablishes a regular heartbeat." [Clark v. Medtronic, Inc.](#), 572 F.Supp.2d 1090, 1091 (D.Minn.2008).

Plaintiffs filed this action against Medtronic on November 17, 2010. The complaint raises eight common law claims under Georgia law: (1) negligence; (2) strict liability for a design and manufacturing defect; (3) negligence per se; (4) strict liability for failure to warn; (5) breach of implied warranty; (6) breach of express warranty; (7) misrepresentation by omission; and (8) unjust enrichment.

Medtronic has filed a motion to dismiss the complaint pursuant to [FED. R. CIV. P. 12\(b\)\(6\)](#). Medtronic asserts three grounds for dismissal: (1) the complaint is inadequately pled; (2) the claims are untimely under Georgia's two-year statute of limitations; and (3) the claims are preempted by the Medical Device Amendments ("MDA") to the Food, Drug, and Cosmetic Act ("FDCA") under [21 U.S.C. § 360k\(a\)](#), as interpreted by the Supreme Court in [Riegel v. Medtronic, Inc.](#), 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008). The Court will discuss each ground in turn.

DISCUSSION**I. Adequacy of Complaint**

A proper pleading requires a "short and plain statement of the claim showing that the pleader is entitled to relief." [FED. R.](#)

CIV. P. 8(a)(2). A pleading that fails “to state a claim upon which relief can be granted” is subject to dismissal under Rule 12(b)(6). FED. R. CIV. P. 12(b)(6). The amount of facts necessary to defeat a motion to dismiss must be enough to make the claim “plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).² A claim is facially plausible if the court can draw a reasonable inference from the factual allegations that the defendant is liable for the alleged wrongdoing. *Ashcroft v. Iqbal*, —U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). A claim is not facially plausible if it shows only “a sheer possibility that a defendant has acted unlawfully.” *Id.* Although a court must accept the complaint’s factual allegations as true, this tenet does not apply to legal conclusions. *Id.* The Supreme Court has incorporated these principles into a two-step process when analyzing a motion to dismiss: “1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, ‘assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.’” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir.2010) (quoting *Iqbal*, 129 S.Ct. at 1950).

² Plaintiffs mistakenly argue that “[a] complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts entitling him to relief.” (Pls.’ Resp. to Def.’s Mot. to Dismiss [9] at 4.) *Twombly* retired the “no set of facts” test previously used by the Supreme Court, referring to it as “an incomplete, negative gloss on an accepted pleading standard.” *Id.* at 562–63; *Speaker v. U.S. Dep’t of Health and Human Servs. Ctrs. for Disease Control and Prevention*, 623 F.3d 1371, 1380 (11th Cir.2010).

*2 Applying this approach, the Court may disregard most of plaintiffs’ allegations in the complaint as unsubstantiated legal conclusions. For example, plaintiffs allege in Count One that “[d]efendant carelessly manufactured, marketed, distributed, and sold” defective ICDs, and that Defendant negligently used a manufacturing process that “did not satisfy the Food and Drug Administration’s Pre-Market Approval standards for the devices.” (Pls.’ Compl. [1] at ¶¶ 71–72). This count does not specify any particular federal standard the manufacturing process violated or state how Medtronic violated that standard. Further, plaintiffs fail to allege any facts linking Medtronic’s alleged violations of the premarket approval standards to Leonard’s injuries. Plaintiffs mention earlier in their complaint that the ICD at issue was recalled

because of a battery shorting problem, but plaintiffs never allege that Leonard’s ICD battery malfunctioned or that a battery failure caused his injuries. Thus, they fail to plead any facts that would lead the Court to infer plausibly that Medtronic’s alleged noncompliance with the FDA premarket approval standards caused Leonard harm.

The rest of plaintiffs’ claims similarly suffer from a lack of well-pleaded facts. In Count Two, plaintiffs re-allege that Medtronic manufactured an unreasonably dangerous product for which it is strictly liable. In Count Three, plaintiffs assert that Medtronic was negligent per se for violating the adulteration and misbranding provisions of the FDCA. In Count Four, plaintiffs claim Medtronic failed to provide timely and adequate warnings about the manufacturing and design defects. In Counts Five and Six, plaintiffs allege that Medtronic breached an implied and express warranty that its products are safe and fit for their intended use. In Count Seven, plaintiffs state that Medtronic misrepresented the ICD’s mechanical soundness and reliability by concealing its known defects from the public. In Count Eight, plaintiffs allege that Medtronic unjustly benefitted from Leonard’s payment for an ICD that was not safe or medically effective.

All of these allegations are nothing more than “naked assertions devoid of further factual enhancement.” *Iqbal*, 129 S.Ct. at 1949 (quotation marks and citation omitted). As part of their formulaic recitation of the causes of action, plaintiffs conclude Counts One through Seven with the bare allegation that Leonard suffered injuries and died as “a direct and proximate result of Defendant’s conduct.” (Pls.’ Compl. [1] at ¶¶ 76, 84, 89, 95, 101, 107, 114.) However, as the Supreme Court has instructed, Rule 8(a) “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S.Ct. at 1949.

Once the complaint’s conclusory statements and formulaic recitations are excluded, the terse factual allegations contained in the complaint do not satisfy Supreme Court standards. The only facts mentioned about Leonard are that he was implanted with a Medtronic ICD in February 2003 and he experienced chest pain in November 2007, at which time his ICD fired three times and was reviewed and adjusted by Medtronic. There is no allegation that the ICD improperly fired during the November 2007 incident or that the ICD injured Leonard at that time. In fact, the complaint never alleges that Leonard’s ICD malfunctioned at any time. Although the complaint alleges that Leonard died as a result of Medtronic’s conduct, the complaint fails

to disclose when Leonard died, why he died, or how his death in any way relates to his ICD or Medtronic's actions. Even accepting plaintiffs' factual allegations as true, the Court cannot plausibly infer that Medtronic is liable for the alleged misconduct. *See id.* at 1952 (concluding the complaint required more factual content in order to transform the claim “‘from conceivable to plausible’”); *Twombly*, 550 U.S. at 555 (explaining that while a complaint “does not need detailed factual allegations,” the allegations “must be enough to raise a right to relief above the speculative level”).

*3 In plaintiffs' response to Medtronic's motion to dismiss, they allege for the first time that Leonard suffered pain on November 30, 2008 when his ICD constantly misfired, causing his heart to respond in a *tachycardia*, and that he died that same day after going into *cardiac arrest*. (Pls.' Resp. to Def.'s Mot. to Dismiss [9] at 5.) Plaintiffs assert, without specific citation to the complaint, that the complaint makes these allegations. But these allegations appear nowhere in the complaint. As pled, none of their claims pass muster as they all fail to state a plausible claim for relief under Rule 8(a). *See Twombly*, 550 U.S. at 555, 570; *Iqbal*, 129 S.Ct. at 1499. Accordingly, all of plaintiffs' claims are due to be dismissed.

II. Timeliness of Complaint

As this case is a diversity action, the Court must apply Georgia's statute of limitations to determine whether the complaint is timely. *See Cambridge Mut. Fire Ins. Co. v. City of Claxton*, 720 F.2d 1230, 1232 (11th Cir.1983) (“[S]tate statutes of limitations are substantive laws and must be followed by federal courts in diversity actions.”). Georgia law requires that “[a]ctions for injuries to the person shall be brought within two years after the right of action accrues” O.C.G.A. § 9–3–33; *see also Smith, Miller and Patch v. Lorentzson*, 254 Ga. 111, 112, 327 S.E.2d 221 (1985) (applying O.C.G.A. § 9–3–33 to products liability claims based on personal injuries); *Daniel v. Am. Optical Corp.*, 251 Ga. 166, 167, 304 S.E.2d 383 (1983) (holding that O.C.G.A. § 9–3–33 applies to personal injury actions brought under theories of strict liability and negligence). A cause of action accrues “when the plaintiff could first have maintained his or her action to a successful result.” *Colormatch Exteriors, Inc. v. Hickey*, 275 Ga. 249, 251, 569 S.E.2d 495 (2002) (brackets, quotation marks, and citation omitted).

Medtronic argues that the complaint is untimely because the latest date specified in the complaint is in November 2007, three years before the complaint was filed in November 2010. Plaintiffs respond that their complaint was filed on November

17, 2010, which is less than two years after Leonard died on November 30, 2008. Although the Court must construe all factual allegations in the complaint as true on a motion to dismiss, *see Iqbal*, 129 S.Ct. at 1499, the date of Leonard's death is not alleged in the complaint itself. Accordingly, as currently pled, the action is untimely because the latest event asserted therein occurred more than two years before the complaint was filed.

III. Preemption

Medtronic's final argument in its motion to dismiss is that all of Plaintiffs' claims are preempted by the MDA. Plaintiffs respond that they have asserted parallel claims which are not subject to preemption.

A. Statutory Framework

Since 1976, the MDA, which are amendments to the Food and Drug Act, has subjected medical devices to detailed federal oversight. *Riegel*, 552 U.S. at 316. As a Class III device, the Marquis 7230 ICD falls into the most strictly regulated category.³ *Blunt v. Medtronic, Inc.*, 315 Wis.2d 612, 618, 760 N.W.2d 396 (2009). New Class III devices must undergo a “rigorous” premarket approval process by the FDA. *Riegel*, 552 U.S. at 317 (quotation marks and citation omitted). This process typically involves a multivolume application by the manufacturer, which includes reports of all studies about the device's safety and effectiveness as well as a full description of the manufacturing process. *Id.* at 317–18. “The FDA spends an average of 1,200 hours reviewing each application.” *Id.* at 318. After weighing the risks and benefits of the device, the FDA may grant premarket approval “only if it finds there is a ‘reasonable assurance’ of the device's ‘safety and effectiveness.’” *Id.* (citing 21 U.S.C. § 360e(d)).

³ A Class III device is “ ‘purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health,’ or ‘presents a potential unreasonable risk of illness or injury.’ ” *Riegel*, 552 U.S. at 317 (citing 21 U.S.C. § 360c(a)(1)(C) (ii)).

*4 Following premarket approval, the FDA continues to oversee the medical device. *Id.* at 319. A manufacturer is prohibited from changing the design, manufacturing process, label, or any other attribute that would affect the device's safety or effectiveness, unless the FDA grants supplemental premarket approval. *Id.* (citing 21 U.S.C. § 360e(d)(6)(A)(I)).

2011 WL 3652311

Additionally, the manufacturer must report to the FDA any new investigations or studies it knows of about the device and any incidents connecting the device to death or serious injury. *Id.* The FDA “must withdraw approval if it determines that a device is unsafe or ineffective under the conditions in its labeling.” *Id.* at 319–20.

The MDA contains the following express preemption clause:

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement-

- (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a). The exception noted in subsection (b) allows exemption of some state and local requirements from preemption. *Riegel*, 552 U.S. at 316.

Riegel established a two-part test for determining if a state-law claim is preempted under § 360k (a). *Id.* at 321–22. A court must first determine whether there are federal law requirements that apply to the device at issue. *Id.* at 321. In *Riegel*, the Supreme Court held that FDA premarket approval for a particular device imposes federal “requirements” for purposes of § 360k. *Id.* at 322–23. Here, Plaintiffs do not contest that the premarket approval for Leonard's ICD imposes federal requirements for that device and therefore satisfies the first prong of *Riegel* 's preemption test. *See id.*; *see also Wolicki–Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296, 1297–98, 1301 (11th Cir.2011) (finding that a Class III pump system's premarket approval “imposes specific requirements on it that are sufficient to preempt a state law claim”).

Next, a court must decide if the common-law claims are based upon state law “requirements” that are “ ‘different from, or in addition to’ the federal ones, and that relate to safety and effectiveness.” *Riegel*, 552 U.S. at 321–22 (citing § 360k(a)). *Riegel* involved state law claims for strict products liability, breach of implied warranty, and negligence in the design, testing, inspection, distribution, labeling, marketing, and sale of a Class III catheter that had received FDA premarket approval. *Id.* at 320. All of the plaintiffs' claims

related to the safety and effectiveness of the catheter, so the critical inquiry was whether the state claims constituted “requirements” subject to preemption under the MDA. *Id.* at 323. The Supreme Court answered yes. *Id.* at 323–24. “State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect.” *Id.* at 325.

*5 Even though state common law claims constitute requirements, they will not be preempted unless they are “ ‘different from, or in addition to,’ the requirements imposed by federal law.” *Id.* at 330 (citing § 360k(a)(1)). “Thus, § 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case ‘parallel,’ rather than add to, federal requirements.” *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). Because the claims in *Riegel* alleged the catheter violated state tort law despite compliance with federal requirements, the claims involved state requirements that were different from, or in addition to, federal requirements. *See id.* The *Riegel* plaintiffs belatedly argued that their lawsuit raised parallel claims, but the Supreme Court declined to address that argument. *Id.* Accordingly, the Supreme Court affirmed the dismissal of the plaintiffs' claims as preempted. *See id.* at 320–21, 330.

At issue here is whether the Plaintiffs have sufficiently alleged parallel claims so as to avoid preemption under § 360k and *Riegel*.⁴ The Eleventh Circuit recently addressed this issue in *Wolicki–Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296 (11th Cir.2011). In considering whether the plaintiffs had raised a parallel claim, the court noted that a plaintiff “cannot simply incant the magic words” that a defendant has violated federal regulations. *Id.* at 1301 (internal citation omitted). Rather, the parallel claims must be specifically stated in the initial pleadings and the plaintiff must allege that the defendant violated a particular federal specification concerning the device at issue. *Id.* To properly allege parallel claims, the complaint must further set forth facts pointing to specific [pre-market approval] requirements that have been violated. *Id.* In short, a bare allegation, devoid of factual detail, that the manufacturing processes did not satisfy the FDA's Pre-Market Approval standards for the device is insufficient to satisfy the requisite elements of a parallel claim, as set forth in *Riegel*. The complaint in *Wolicki–Gables* contained Florida state law claims for strict liability and negligence concerning alleged design and manufacturing defects in a pump system for back pain, as well as a strict liability claim for failure

to warn. *Id.* at 1301. The district court determined that each claim was preempted by the MDA and dismissed the claims on summary judgment. *Id.* at 1299. The Eleventh Circuit agreed because none of the claims alleged a failure to comply with a FDA regulation that could be linked to the alleged injury. *Id.* at 1301–02. Accordingly, the Eleventh Circuit concluded that the complaint did not contain the elements of a parallel claim, and the state common law claims were therefore preempted. *Id.* at 1302.

4 The parties agree that all of Plaintiffs' claims relate to the "safety and effectiveness" of Medtronic's ICD within the meaning of 21 U.S.C. § 360k(a). See *Riegel*, 552 U.S. at 321–22.

Although the preemption issue in *Wolicki–Gables* arose at the summary judgment stage, rather than pursuant to a Rule 12(b)(6) motion, the Eleventh Circuit's discussion about the pleading requirements for a parallel claim remains instructive here. With these principles in mind, the Court turns to the specific causes of action raised in the complaint.

B. Plaintiffs' Claims

1. Count One—Negligence

*6 In Count One, plaintiffs contend that Medtronic negligently manufactured Leonard's ICD because "the failure of the manufacturing processes for the defibrillators and certain of their components to satisfy the Food and Drug Administration's Pre-Market Approval standards for the devices resulted in unreasonably dangerous manufacturing defects(.)" (Pls.' Compl. [1] at ¶ 72.) Besides being a general, conclusory allegation, the complaint does not point to specific premarket approval requirements that have been violated or allege any facts as to how those violations occurred. Without these allegations, Count One amounts to nothing more than the speculative proposition that "full compliance would have resulted in a problem-free device." *Clark v. Medtronic, Inc.*, 572 F.Supp.2d 1090, 1094 (D.Minn.2008). Yet, as other courts have recognized, negligence is not the only reason a Medtronic ICD may fail. Other factors such as "medical complications, body rejection phenomena, allergic reaction, and surgical techniques" can all play a role in its proper operation. *Id.*

Nor does the complaint allege any facts causally linking the alleged violations to injuries or harm suffered by plaintiff Leonard. See *Franklin v. Medtronic, Inc.*, 2010 WL 2543579, at *10 (D.Colo. May 12, 2010) ("Thus, merely alleging some

violation of FDA regulation will not suffice to establish a 'parallel' claim, unless Plaintiff can factually demonstrate that the violation actually caused her injuries."). Plaintiffs allude to Medtronic's recall of ICDs, but never allege in the complaint that Leonard was harmed because his ICD suffered the battery shorting problem that prompted the recall. Compare *Phillips v. Stryker Corp.*, 2010 WL 2270683, at *2, 7 (E.D.Tenn. June 3, 2010) (finding parallel claim raised where complaint alleged plaintiff required surgery because his device had the same manufacturing defect which had caused the device's recall). This causal connection is "a critical element" of a properly pled parallel claim because premarket approval does not mean that a medical device will never result in injuries, only that the benefits outweighs the risks of probable injuries. *Franklin*, 2010 WL 2543579, at *10; *Riegel*, 552 U.S. at 318 (noting approval of a ventricular assist device for children with failing hearts even though the device had less than a 50 percent success rate in keeping those children alive). Accordingly, Count One's unsubstantiated allegations of FDA violations do not state a proper parallel claim under *Riegel*.⁵ See *Wolicki–Gables*, 634 F.3d at 1301; *Parker v. Stryker Corp.*, 584 F.Supp.2d 1298, 1301 (D.Colo.2008) (finding that complaint's unsupported allegations that artificial hip implant device did not satisfy the FDA's premarket approval standards "are not sufficient to sustain plaintiff's burden of pleading under *Twombly*"). Accordingly, because Plaintiffs have failed to raise a valid parallel claim, their negligence claim in Count One is preempted under § 360k. See *Wolicki–Gables*, 634 F.3d at 1301–02.

5 Plaintiffs urge the Court to follow *Hofts v. Howmedica Osteonics Corp.*, 597 F.Supp.2d 830, 840–41 (S.D.Ind.2009), in which the district court concluded that the plaintiff satisfied *Twombly* merely by alleging that the manufacturing process did not satisfy the FDA's premarket approval standards. The *Hofts* decision has been criticized by several courts for its lax interpretation of *Twombly*'s standards. See, e.g., *Anthony v. Stryker Corp.*, 2010 WL 1387790, at *5 (N.D. Ohio Mar.31, 2010); *Covert v. Stryker Corp.*, 2009 WL 2424559, at *13 (M.D.N.C. Aug.5, 2009). More importantly, the Court must apply Eleventh Circuit law, which requires more than a general allegation of an FDA violation to state a valid parallel claim. See *Wolicki–Gables*, 634 F.3d at 1301.

2. Count Two—Strict Liability: Design and Manufacturing Defect

*7 Plaintiffs repeat the same conclusory allegation of an FDA violation in Count Two, *albeit* this time calling the unspecified violation, a strict liability tort. Specifically, plaintiffs state that Medtronic's "manufacturing process for the [defibrillators](#) and certain of their components did not satisfy the Food and Drug Administration's Pre-Market Approval standards for the devices ... which resulted in unreasonably dangerous manufacturing defects." (Pls.' Compl. [1] at ¶ 80.) Plaintiffs again allege no facts to identify the particular premarket approval requirements that were violated. The complaint also fails to allege how those requirements were violated, or link any violations to Leonard's alleged injuries and death. Like Count One, Count Two does not raise a valid parallel claim, and it is therefore preempted under § 360k. *See Wolicki-Gables*, 634 F.3d at 1301.

3. Count Three—Negligence Per Se

In Count Three, plaintiffs allege that Medtronic's acts, including designing, manufacturing, labeling, and distributing the recalled ICDs, "constitute an adulteration, misbranding, or both" which is prohibited by the Food and Drug Act. *See* 21 U.S.C. §§ 331(a) and 333(a)(2). (Pls.' Compl. [1] at ¶¶ 87–88.) Plaintiffs further allege that Medtronic's acts constitute a breach of duty subjecting it to civil liability under theories of negligence per se. (*Id.* at ¶ 88.)

In Georgia, a defendant is considered negligent per se based upon violation of a statute if there is evidence that the defendant violated the statute, the injured person was in the class the statute was intended to protect, the injured person suffered the type of harm the statute intended to guard against, and the alleged negligence per se proximately caused the injuries. *Norman v. Jones Lang LaSalle Americas, Inc.*, 277 Ga.App. 621, 628, 627 S.E.2d 382 (2006). In general, the MDA does not preempt a state law prohibiting the manufacture of adulterated or misbranded devices, unless the state law imposes a substantive requirement—for example, a labeling requirement—that differs from, or adds to, a federal requirement under the MDA. *See* 21 C.F.R. § 808.1(d)(6)(ii) (2008).

Plaintiffs do not, however, allege that Medtronic is negligent per se for violating a state misbranding law. Rather, Count Three alleges that Medtronic violated the FDCA's prohibition against adulteration and misbranding. There is no private

right of action for violations of the FDCA. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n. 4, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001) ("The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions."). Instead, all proceedings to enforce or restrain violations of the FDCA "shall be by and in the name of the United States." 21 U.S.C. § 337(a). Consequently, "a private litigant cannot bring a state-law claim against a defendant when the state-law claim is in substance (even if not in form) a claim for violating the FDCA—that is, when the state claim would not exist if the FDCA did not exist." *Riley v. Cordis Corp.*, 625 F.Supp.2d 769, 777 (D.Minn.2009).

*8 For example, the Supreme Court held in *Buckman* that a state-law claim that a defendant made fraudulent statements to the FDA, in violation of FDCA disclosure laws, was impliedly preempted by § 337(a) because the claim "would not be relying on traditional state tort law which had predated the federal enactments in question." *Buckman*, 531 U.S. at 352–53. The same is true here—plaintiffs' claim of negligence per se would not exist prior to the enactment of the FDCA misbranding and adulteration laws because the claim only alleges violation of that law. Plaintiffs cannot create a private right of action under the guise of a state law claim. *See Parker*, 584 F.Supp.2d at 1301 (explaining that plaintiffs "cannot escape preemption by reference to provision of the FDCA that govern the sale of adulterated and misbranded devices because there is no private right of action under the FDCA"); *accord Franklin*, 2010 WL 2543479, at *8 (concluding that § 337(a) impliedly preempted a negligence per se claim that alleged Medtronic violated the FDCA by selling a misbranded and adulterated ICD). Accordingly, Count Three is impliedly preempted by § 337(a).

4. Count Four—Strict Liability: Failure to Warn

Plaintiffs allege in Count Four that Medtronic "failed in providing timely and adequate warnings or instruction regarding its devices with a known design and/or manufacturing defect." (Pls.' Compl. [1] at ¶ 94.) Additionally, Count Four claims that these defects render Leonard's ICD "inherently dangerous for its intended use" and that Medtronic is strictly liable to Leonard's heirs for the pain and suffering he suffered as a result of Medtronic's conduct. (*Id.* at ¶¶ 95–96.) In their response, plaintiffs explain that their failure to warn claim is based on a manufacturer's duty under Georgia's learned intermediary doctrine to warn

2011 WL 3652311

the patient's doctor of dangers involved with a product. (Pls.' Resp. to Def.'s Mot. to Dismiss [9] at 15.)

This claim is preempted by the MDA. The Eighth Circuit concluded a similar failure to warn claim, about alleged "known defects" associated with a wire in an ICD, was preempted under § 360k:

In the Master Consolidated Complaint, Plaintiffs alleged that Medtronic failed to adequately warn consumers of "known defects" and that the Sprint Fidelis Leads presented an unreasonably dangerous risk beyond what the ordinary consumer would reasonably expect. These claims are preempted by § 360k. The FDA's [premarket] approval includes specific language for Class III device labels and warnings. Plaintiffs did not allege that Medtronic modified or failed to include FDA-approved warnings. Rather, they alleged that, by reason of state law, Medtronic was required to give additional warnings, precisely the type of state requirement that is "different from or in addition to" the federal requirement and therefore preempted. *See Riegel*, 552 U.S. at 330, 128 S.Ct. 999, 169 L.Ed.2d 892.

In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig., 623 F.3d 1200, 1205 (8th Cir.2010). As in the latter case, plaintiffs do not allege that Medtronic failed to give the FDA-approved warnings or instructions associated with Leonard's ICD. Nonetheless, plaintiffs contend that Medtronic still violated a state law duty to warn physicians about the ICD's manufacturing and design defects. Plaintiffs' claim would thus impose different requirements under state law than those required under federal law. Consequently, it is preempted under § 360k. *See id.*

*9 Plaintiffs also cannot base a parallel claim on Georgia's learned intermediary doctrine.⁶ Even if Medtronic breached a state law duty to warn a physician, plaintiffs have "not pointed the court to any FDA regulation that requires a device manufacturer to unilaterally contact doctors ... regarding a potential device defect without FDA involvement." *Franklin*, 2010 WL 2543579, at *6. In order to state a parallel claim, the state and federal requirements must be "genuinely equivalent." *Wolicki-Gables*, 634 F.3d at 1300 (quotation marks and citations omitted). "State and federal requirements are not genuinely equivalent if a manufacturer could be held liable under the state law without having violated the federal law." *Id.* (quotation marks and citation omitted). Given that Plaintiffs have not identified any federal law requiring manufacturers to warn individual doctors about the safety and effectiveness of a device, their claim would hold Medtronic

liable under state law without having violated an equivalent federal law. Moreover, it would impose a duty under state law that is different from that required under federal law. Accordingly, plaintiffs have failed to raise a parallel claim that escapes preemption under § 360k. *See id.*; *Franklin*, 2010 WL 2543579, at *6.

⁶ Under the learned intermediary doctrine, the manufacturer of a medical device has a duty to give adequate warnings about the device's dangers to the patient's doctor, who serves as a learned intermediary between the manufacturer and the patient. *McCombs v. Synthes (U.S.A.)*, 277 Ga. 252, 253, 587 S.E.2d 594 (2003).

5. Count Five—Breach of Implied Warranty

In Count Five, plaintiffs state that Medtronic "impliedly warranted its products to be of merchantable quality and safe and fit for their intended use." (Pls.' Compl. [1] at ¶ 99.) Contrary to this warranty, plaintiffs allege the ICD is unreasonably dangerous and unfit for its intended purpose. (*Id.* at ¶ 100.)

Riegel affirmed the dismissal of this same claim, as preempted under § 360k. *Riegel*, 552 U.S. at 320–21, 330. As the Court explained, state law that requires a device "to be safer, but hence less effective," than the FDA-approved model would interfere with the federal regulatory scheme. *Id.* at 325. In order to avoid preemption and qualify as a parallel claim, the Supreme Court stated the claim would have to be based on a violation of FDA regulations. *Id.* at 330. Here, Count Five does not allege any FDA violation. The claim is therefore not a parallel claim and is preempted under § 360k. *Id.*

In their response, plaintiffs cite a FDA regulation that lists examples of state requirements that are not preempted under the MDA, including the Uniform Commercial Code's warranty of fitness. *See* 21 C.F.R. § 808.1(d)(1). Whether or not this regulation applies to plaintiffs' claim, plaintiffs failed to plead in their complaint a U.C.C. violation. A pleading must give a defendant " 'fair notice' " of the basis for a claim. *Am. Dental Ass'n*, 605 F.3d at 1288 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Plaintiffs did not do so here. The Court therefore dismisses Count Five on grounds of preemption.

6. Count Six—Breach of Express Warranty

2011 WL 3652311

*10 Plaintiffs state in Count Six that Medtronic's "promotional statements and product literature expressly warranted to plaintiff that the ICD was safe, capable of reducing risk or severity of heart failure, [and] was a highly reliable product in comparison to the conventional product line." (Pls.' Compl. [1] at ¶ 103.) Medtronic allegedly breached this warranty by selling an ICD with known design and manufacturing defects. (*Id.* at ¶ 106.)

Riegel did not address a breach of express warranty claim.⁷ Nor has the Eleventh Circuit decided whether a breach of express warranty claim can be preempted by the MDA. Other federal courts remain divided over the issue. See *Franklin*, 2010 WL 2543579, at *7 (noting "continuing split amongst the courts" post-*Riegel*); *Parker*, 584 F.Supp.2d at 1302–03 (collecting pre-*Riegel* cases on both sides of the issue). Plaintiffs rely on the Seventh Circuit's pre-*Riegel* observation that express warranties "arise from the representations of the parties and are made as the basis of the bargain between them." *Mitchell v. Collagen Corp.*, 126 F.3d 902, 915 (7th Cir.1997). The Seventh Circuit suggested that an express warranty claim might escape preemption because a state judgment that a party has breached an express representation might not necessarily interfere with the FDA's premarket approval system. *Id.* These comments were merely dicta, however, because the plaintiffs had not specifically raised an express warranty claim. *Id.*

⁷ Although the district court did not initially dismiss this claim as preempted, the district court subsequently dismissed it on summary judgment, and the plaintiff did not appeal this issue to the Supreme Court. *Riegel*, 552 U.S. at 321 n. 2.

In any event, the express representation claims in this case would interfere with the FDA's premarket approval regime. Plaintiffs claim that Medtronic expressly warranted the ICD to be safe and highly reliable. In order to prove that Medtronic breached this warranty, Plaintiffs would need to show that the ICD was not safe and reliable, a finding that would directly conflict with the FDA's premarket approval of the device as reasonably safe and effective. See 21 U.S.C. § 360e(d). Moreover, if these warranties were made in materials approved by the FDA in the premarket approval process, then allowing a claim to proceed under Georgia law would subject Medtronic to state duties above and beyond the federal requirements. See *Wheeler v. DePuy Spine, Inc.*, 706 F.Supp.2d 1264, 1271 (S.D.Fla.2010) (finding preempted a breach of express warranty claim based on statements in

a FDA-approved brochure). This claim thus falls within § 360k's preemption clause prohibiting state requirements that are in addition to, or different from, federal requirements. See *In re Medtronic*, 623 F.3d at 1208 ("The district court correctly concluded that this express warranty claim interferes with the FDA's regulation of Class III medical devices and is therefore conflict preempted.").

In their response, plaintiffs argue that their "warranty claim parallels the FDA regulation" because they do not allege that Medtronic's FDA-approved label was defective. (Pls.' Resp. to Def.'s Mot. to Dismiss [9] at 17.) Plaintiffs declare they are "perfectly happy with the label" but that "Medtronic did not live up to the FDA-approved promises contained in its label and that Lorenzo Leonard died as a result." (*Id.* at 17–18.) Plaintiffs lift this language verbatim from the district court's decision in *Hofst*. See *Hofst*, 597 F.Supp.2d at 839 (relying on *Mitchell*, 126 F.3d at 915, to find that a breach of express warranty claim is a parallel claim and not preempted).

*11 *Hofst*, however, conflicts with the Supreme Court's and the Eleventh Circuit's definition that a parallel claim is a state law claim "premised on a violation of FDA regulations[,] not on a defendant complying with one." *Riegel*, 552 U.S. at 330; *Wolicki-Gables*, 634 F.3d at 1300–01. Here, plaintiffs concede that Medtronic complied with the FDA's labeling requirements. A finding that Medtronic violated state law by not living up to the FDA-approved promises in its label would necessarily conflict with the FDA's determination that the label was not false or misleading. See *Riegel*, 552 U.S. at 318 ("The FDA evaluates safety and effectiveness under the conditions of use set forth on the label, § 360c (a)(2)(B), and must determine that the proposed labeling is neither false nor misleading, § 360e (d)(1)(A)."). Thus, Plaintiffs' claim is not based on state duties that parallel federal requirements. See *id.* at 330; *Parker*, 584 F.Supp.2d at 1303 ("Plaintiff's express warranty claim would contradict the FDA's determination that the representations made on the label were adequate and appropriate and, thus, impose requirements different from or in addition to the federal requirements."). Count Six is therefore preempted under § 360k.

7. Count Seven—Misrepresentation by Omission

Count Seven alleges that Medtronic "misrepresented the mechanical soundness and reliability of its ICD devices to the general public through promotional and marketing campaigns." (Pls.' Compl. [1] at ¶ 109.) Further, Count Seven states that Medtronic concealed and withheld information about the ICD's "manufacturing defects and high risks

of failure.” (*Id.* at ¶ 111.) Plaintiffs clarify in their response that Count Seven is actually a fraud claim; they contend that Medtronic “knowingly concealed, intentionally misrepresented, and knew or should have known the dangers of their ICD.”⁸ (Pls.’ Resp. to Def.’s Mot. to Dismiss [9] at 19.)

⁸ In reply, Medtronic contends that plaintiffs have not pled their fraud claim with the requisite particularity under [Federal Rule of Civil Procedure 9\(b\)](#). Rule 9(b) entails a heightened level of specificity which means a complaint must typically identify “(1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the plaintiffs; and (4) what the defendants gained by the alleged fraud.” *Ambrosia Coal & Const. Co. v. Pages Morales*, 482 F.3d 1309, 1316–17 (11th Cir.2007). As previously discussed, all of plaintiffs’ claims fail to satisfy the pleading requirements of [Rule 8\(a\)](#). The Court also agrees with Medtronic that the fraud claim’s general allegations do not meet any of the particularity requirements of [Rule 9\(b\)](#). See *id.*

This claim is preempted because it would require Medtronic to give different, additional warnings about the ICD’s safety and effectiveness, which is strictly prohibited without FDA approval. “Once a device has received premarket approval, the MDA forbids the manufacturer to make, without FDA permission, changes in ... labeling ... that would affect safety or effectiveness.” *Riegel*, 552 U.S. at 319. Plaintiffs do not contend in Count Seven that Medtronic violated any FDA regulations concerning the device’s FDA-approved warnings and instructions. Plaintiffs’ fraud claim thus necessarily imposes state requirements that are “ ‘different from, or in addition to’ ” the federal ones. *Id.* at 330. Consequently, Count Seven does not state a parallel claim and is preempted under § 360k. See *id.* at 330; *In re Medtronic*, 623 F.3d at 1205 (finding preempted a claim that Medtronic failed to adequately warn consumers of known defects about a device notwithstanding compliance with federal requirements).

8. Count Eight—Unjust Enrichment

*12 Plaintiffs allege in Count Eight that “[a]s an intended and expected result of their conscious wrongdoings as set forth in this Complaint, defendant has profited and benefited [sic] from payments Lorenzo Leonard made for the Medtronic

Device.” (Pls.’ Compl. [1] at ¶ 117.) Plaintiffs claim that Leonard expected the ICD to be safe and medically effective, and that Medtronic’s failure to meet this expectation unjustly enriched Medtronic. (*Id.* at ¶¶ 118–19).

As with plaintiffs’ other claims, success on this claim depends on a finding that Leonard’s ICD was not safe and effective, despite FDA premarket approval. Count Eight does not specifically name a FDA violation by Medtronic, referring only generally to the “wrongdoings” set forth in the complaint. (*Id.* at ¶ 117.) As discussed, plaintiffs’ unsubstantiated allegations in Counts One and Two that Medtronic failed to satisfy the FDA’s premarket approval standards do not sufficiently state the elements of a parallel claim. See *Wolicki–Gables*, 634 F.3d at 1301–02. Moreover, “because this claim is entirely contingent upon Defendant’s liability for the above preempted claims, this claim is similarly preempted.” *Franklin*, 2010 WL 2543579, at *10 (finding preempted plaintiff’s claim for negligent infliction of emotional distress because it was derivative of plaintiff’s other preempted claims). Plaintiffs’ claim of unjust enrichment is therefore preempted under § 360k.

IV. Leave to Amend Complaint

In their response, plaintiffs request an opportunity to amend their complaint should the Court find that dismissal is warranted. (Pls.’ Resp. to Def.’s Mot. to Dismiss [9] at 22.) Under [Federal Rule of Civil Procedure 15\(a\)](#), leave to amend shall be freely given “when justice so requires.” [FED. R. CIV. P. 15\(a\)\(2\)](#). Plaintiffs make several new factual allegations in their response related to Leonard’s injuries and death which are not in the original complaint. These allegations relate to plaintiffs’ ability to state a valid claim for relief and to the timeliness issue. Further, the complaint was filed several months before the Eleventh Circuit’s decision in *Wolicki–Gables*, which set the parameters for a valid parallel claim under *Riegel*. In the interests of justice, the Court will grant plaintiffs leave to amend their complaint.

CONCLUSION

In sum, plaintiffs’ complaint is replete with conclusory allegations that fail to state a valid claim for relief under [Rule 8\(a\)](#). Additionally, none of plaintiffs’ claims, as currently pled, contain the elements of a parallel claim so as to avoid preemption by the MDA. Defendant’s motion to dismiss is therefore meritorious, and the Court would grant this

2011 WL 3652311

motion, except for the plaintiff's request to be allowed to amend its complaint. Because the Court will permit the plaintiff to amend its complaint, the Court therefore **DENIES WITHOUT PREJUDICE** defendant Medtronic's Motion to Dismiss [5].

***13** Plaintiffs may amend their complaint **within 28 days** of this Order. The plaintiffs are on notice, however, that *any* defects in an amended complaint will result in dismissal with prejudice of the particular count. Should plaintiffs *not* amend

their complaint within the above time period, the Court will then order the case to be dismissed with prejudice. The Clerk shall submit this action 29 days after the issuance of this Order.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 3652311

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 36

2010 WL 421091

 KeyCite Red Flag - Severe Negative Treatment
 On Reconsideration [Levinson v. Johnson & Johnson Consumer Companies, Inc.](#), D.N.J., August 2, 2010

2010 WL 421091

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Erika LEVINSON and Maria Watkins,
 individually and on behalf of all
 others similarly situated, Plaintiffs,

v.

JOHNSON & JOHNSON CONSUMER
 COMPANIES, INC. and Wal-
 mart Stores, Inc., Defendants.

Civil Action No. 09–CV–3317 (DMC).

Feb. 1, 2010.

West KeySummary

1 **Antitrust and Trade Regulation**  Nature and form

Products Liability  Economic losses; damage to product itself

Products Liability  Cosmetics, soaps, and hair-care products

Products Liability  Nature and form of remedy

Store customers failed to state a consumer fraud claim against a store under New Jersey law. Although the customers alleged that they suffered only economic harm, their underlying claims arose out of the store's allegedly defective baby shampoo which contained toxins that created a potential for harm to their children. Therefore the customer's claims were subsumed by the New Jersey Product Liability Act (PLA) which precluded recovery for solely economic harm. [Fed.Rules Civ.Proc.Rule 12\(b\)\(1\)](#), 28 U.S.C.A.; N.J.S.A. 2A:58C–1b(2).

2 Cases that cite this headnote

Attorneys and Law Firms

[Rosalee B. Connell](#), Finkelstein Thompson LLP, Washington, DC, for Plaintiffs.

[Daniel B. Carroll](#), [Theodore James McEvoy](#), Drinker, Biddle & Reath, LLP, [David E. Sellinger](#), Greenberg Traurig LLP, Florham Park, NJ, [John C. McGuire](#), [Joseph F. Falgiani](#), Sedgwick, Detert, Moran, & Arnold, LLP, Newark, NJ, for Defendants.

OPINION

[DENNIS M. CAVANAUGH](#), District Judge.

***1** This matter comes before the Court upon motion by Johnson & Johnson Consumer Companies, Inc. and Wal-Mart Stores, Inc. (“Defendants”) to dismiss the complaint of Erika Levinson and Maria Watkins, individually and on behalf of all others similarly situated, (“Plaintiffs”) for failure to state a claim pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) and for lack of subject matter jurisdiction pursuant to Fed. R. Civ. 12(b)(1). Pursuant to [Fed.R.Civ.P. 78](#), no oral argument was heard. After considering the submissions of all parties, it is the decision of this Court for the reasons herein expressed that Defendants' motion to dismiss is **granted in part** and **denied in part**.

I BACKGROUND

The Amended Class Action Complaint is brought individually and behalf of all class purchasers (“Class Members”) against Johnson & Johnson Consumer Companies, Inc. (“J & J”) and Wal-Mart Stores, Inc. (“Wal-Mart”) (collectively “Defendants”). Plaintiffs allege that J & J's Baby Shampoo and Wal-Mart's Equate Tearless Baby Wash include and consequently, exposed Plaintiffs' children to “toxic and potentially cancer-causing chemicals[,]” including methylene [chloride](#), an ingredient banned [for use in cosmetics] by the Food and Drug Administration (“FDA”), 1,4–dioxane and formaldehyde.” (See Plaintiffs' Complaint (“Pl.Compl.”), ¶ 3). “Along with increased risk of [cancer](#), skin irritation and other serious health problems, chronic exposure to low levels of chemicals can lead to [asthma](#) and hypersensitivity in children.” (Pl.Compl., ¶ 38).

“Independent Lab Tests found methylene [chloride](#) levels [between .35 ppm and] 1.1 ppm, 1,4–dioxane levels [between 20 ppm and] 38 ppm, and formaldehyde levels of [between

2010 WL 421091

150 and 230] ppm” in J & J Baby Shampoo. (Pl.Compl., ¶ 43). The chemicals are allegedly not disclosed on the J & J label. (Pl.Compl., ¶ 44). “Independent Lab Tests of Equate Tearless Baby Wash revealed methylene **chloride** levels of 0.57 ppm, 1,4-dioxane levels of 39 ppm and formaldehyde levels of 360 ppm.” (Pl.Compl., ¶ 11).

“Plaintiffs and the Class Members were damaged by Defendants' omissions and failure to warn that their Children's Personal Care Products were contaminated with toxic and potentially cancer-causing chemicals.” (Pl.Compl., ¶ 4). The J & J Baby Shampoo contains descriptive messages, such as “as gentle to the eyes as pure water[,]” “Ultra Mild” and “Hypoallergenic” and “rinses clean ... gentle enough even for newborns.” (Pl.Compl., ¶ 13). Wal-Mart's Equate Tearless Baby Wash contains descriptive messages, such as “an extra mild ... **cleanser** that won't sting baby's eyes,” “rinses completely,” and is a “hypoallergenic formula.” (Pl.Compl., ¶ 51). Plaintiffs assert that the offensive chemicals could have been removed by a process called “vacuum stripping.” (Pl.Compl., ¶ 14). Lastly, Plaintiffs remark that children are especially vulnerable and susceptible to the chemicals in question. (Pl.Compl., ¶¶ 35–38).

*2 Count I of the complaint asserts a claim for breach of implied warranty pursuant to the **Uniform Commercial Code (“UCC”) § 2–314**. (Pl. Compl. at 71). Count II of the complaint asserts a claim for breach of implied warranties of merchantability and fitness for a particular use. (Pl.Compl., ¶ 83). Count III of the complaint asserts a claim for unfair and deceptive trade practices. (Pl.Compl., ¶ 90). Count IV of the complaint asserts a claim for unjust enrichment. (Pl.Compl., ¶ 98).

II. STANDARD OF REVIEW

“There is a fundamental difference of review under **Rule 12(b)(1)**, where the existence of disputed facts will not preclude the court from evaluating the merits of the jurisdictional claim, and **Rule 12(b)(6)** where the court is required to accept as true all the allegations of the complaint and all inferences arising from them.” *Anjelino v. New York*, 200 F.3d 73, 87 (3d Cir.1999). “[T]he threshold to withstand a motion to dismiss under [**Rule**] 12(b)(1) is thus lower than that required to withstand a **Rule 12(b)(6)** motion.” *Kehr Packages Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991)).

A. Fed.R.Civ.P. 12(b)(6)

“The [d]istrict [c]ourt, in deciding a motion under **Fed.R.Civ.P. 12(b)(6)**, [is] required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [Plaintiff].” *Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir.2008). “While a complaint attacked by a **Rule 12(b)(6)** motion to dismiss does not need detailed factual allegations, [] a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “[A court is] not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). “Factual allegations must be enough to raise a right to relief above a speculative level, [] on the assumption that all factual allegations in the complaint are true (even if doubtful in fact).” *Bell*, 550 U.S. at 555–56.

B. Fed.R.Civ.P. 12(b)(1)

“On a **Rule 12(b)(1)** motion, no presumption of truthfulness attaches to the allegations of the plaintiff.” *CNA v. United States*, 535 F.3d 132, 139 (3d Cir.2008). A facial attack “concerns ‘an alleged pleading deficiency’ whereas a factual attack concerns the actual failure of [a plaintiff's] claims to comport [factually] with the jurisdictional prerequisites.” *Id.* (citing *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir.2007)).

III. DISCUSSION

A. Standing

To bring a suit in a federal court, the plaintiff must have standing pursuant to Article III of the United States Constitution. To establish standing under Article III, the plaintiff must show: (1) injury in fact; (2) causation; and (3) redressability. *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455 (3d Cir.2003); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

*3 First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural

2010 WL 421091

or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (citing *AT & T Communications of N.J., Inc. v. Verizon N.J., Inc.*, 270 F.3d 162, 170 (3d Cir.2001)). “The injury must affect the plaintiff in a personal and individual way.” *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir.2000); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir.2009).

“[O]rdinarily, one may not claim standing to vindicate the constitutional rights of some third party.” *Pitt*, 215 at 362. “We apply this prudential rule against third party standing even when the requirements of Article III have been met, to ‘avoid deciding questions of broad social import ... [and] to limit access to the federal courts to those litigants best suited to assert a particular claim.’” *Id.* (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99–100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). “[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.” *Berg v. Obama*, 586 F.3d 234, 239 (2009) (citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Furthermore, “[t]he standing inquiry does not change in the context of a putative class action....[S]tanding cannot be predicated on an injury which the plaintiff has not suffered, nor can it be acquired through the back door of a class action.” *Koronthal v. L’Oreal*, 2008 U.S. Dist. LEXIS 59024, *12 (D.N.J. July 25, 2008).

As a threshold matter, Defendants contend that Plaintiffs lack standing to sue in the instant action given that Plaintiffs failed to allege an injury-in-fact or that the product failed to perform the hair-cleansing benefits for which it was sold. Moreover, in reliance upon this Court's decision in *Koronthal*, Defendants assert that Plaintiffs' demand for a refund of the purchase price as a consequence of exposure to Defendants' products fails to establish an injury-in-fact and therefore, is not sufficient to confer standing where the alleged harm is no more than

speculative. As a result, Defendants claim that the absence of a cognizable injury and thereby standing in this matter requires dismissal pursuant to Fed.R.Civ.P. 12(b)(1).

In response, Plaintiffs contend that economic injury is sufficient to confer standing in this matter, relying upon *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) and *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286 (3d Cir.2005). Plaintiffs contend that where the product contains undisclosed toxins and an ingredient banned by the FDA, the injury arises at the time of purchase. In distinguishing the *Koronthal v. L’Oreal* case, citing to this Court's disposition on a motion for reconsideration, Plaintiffs assert that unlike *Koronthal* where this Court determined that plaintiff “provided no authoritative evidence that the lead levels in defendants' lipstick products constitute[d] a dangerous amount or [were] in some way prohibited[,]” the present action involves methylene chloride, a substance banned by the FDA for use in cosmetics. 2008 U.S. Dist. LEXIS 86419, *11 (D.N.J. Oct. 24, 2008). Further, Plaintiffs contend that the Environment Protection Agency (“EPA”) classifies the other chemicals at issue as probable carcinogens. Lastly, Plaintiffs assert that their claims should stand because Plaintiffs have at least raised an issue of fact with respect to whether the chemicals contained in Defendants' products are dangerous in amount.

*4 The *Koronthal* case involved the purchase of a lipstick containing lead, the content of which was not subject to FDA regulation. *Id.* at *2–3. However, the lead content of the lipstick appeared dangerous when compared to the lead content regulation imposed by the FDA on candy. *Id.* In the absence of an FDA regulation concerning lead content in lipstick, or other legal prohibition, the plaintiff could not “seek a remedy for a harm that she ha[d] not actually or allegedly suffered.” Moreover, this Court accorded great weight to the decision in *Williams v. Purdue Pharma Co.*, 297 F.Supp.2d 171 (D.D.C.2003), concluding that the “plaintiffs' allegation of an economic injury in a products liability action was insufficient to establish injury-in-fact” because “without alleging that a product failed to perform as advertised, a plaintiff has received the benefit of his bargain and has no basis to recover purchase costs.” *Id.* at *13–14. Therefore, the *Williams* Court “remarked that benefit of the bargain injury could not sustain a claim of injury in fact.” *Id.*

“The term ‘cosmetic’ means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for

2010 WL 421091

cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.” 21 U.S.C. § 321(i). “In its definition of the term ‘cosmetic,’ the Federal Food, Drug, and Cosmetic Act specifically excludes soap. The term ‘soap’ is nowhere defined in the act. In administering the act, the Food and Drug Administration interprets the term ‘soap’ to apply only to articles that meet the following conditions:”

- (1) The bulk of the nonvolatile matter in the product consists of an alkali salt of fatty acids and the detergent properties of the article are due to the alkali-fatty acid compounds; and
- (2) The product is labeled, sold, and represented only as soap.

21 § C.F.R. 701.20. Plaintiff asserts and Defendants do not appear to dispute that the Baby Shampoo is classified as a cosmetic rather than soap. Therefore, the allegedly defective products will be treated as a cosmetics subject to the FDA regulation banning methylene chloride.

While the Court agrees that the assertion of an economic injury is not an automatic bar to standing, *Koronthal* demonstrates that an exception has been recognized in the context of claims concerning defective products, absent a specific legal prohibition precluding particular ingredients or usages. Insofar as Plaintiffs claims pertain to allegedly toxic chemicals that have not been banned by the FDA for use in cosmetics, including 1,4-dioxane and formaldehyde, in accordance with *Koronthal*, this Court concludes that any potential injury is too remote, hypothetical and/or conjectural to establish standing in this matter. However, insofar as Plaintiffs claims pertain to methylene chloride, a chemical explicitly banned for use by the FDA in any cosmetic, this Court declines to dismiss Plaintiffs' claims pursuant to Fed.R.Civ.P. 12(b)(1) for lack of standing.

B. Choice of Law

*5 As a federal district court sitting in diversity, this Court must apply the choice of law rules of New Jersey, the forum state. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). New Jersey's choice of law rules mandate that the determinative law is that of the state with the greatest interest in governing the particular issue. The first step is to determine whether a conflict exists between the law of interested states, and

then any conflict shall be determined on an issue-by-issue basis. “Under general conflict of laws principles, where the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a “false conflict,” and the Court should avoid the choice-of-law question.” *Williams v. Stone*, 109 F.3d 890, 894 (3d Cir.1997). If there is a conflict, then the Court must identify the governmental policies underlying the law of each state and how those policies are affected by each state's contacts to the litigation. If the state's law is not related to its contacts with the litigation, then the state does not have an interest in having its law applied to the underlying issue. See *Vezey v. Doremus*, 103 N.J. 244, 510 A.2d 1187, 1189 (N.J.1986). That is, if there is an actual conflict between the two states' laws, the court then determines “which state has the most meaningful connections with and interests in the transaction and the parties.” *Spence–Parker v. Del. Riv. & Bay Authority*, 2009 U.S. Dist. LEXIS 75187, *20, 2009 WL 2602094 (D.N.J. Aug. 21, 2009). Where no actual conflict of law exists, no choice of law need be made. See *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 333 (D.N.J.2005). “If there is no actual conflict, the Court must apply the law of New Jersey.” *LNT Merck Co. v. Dyson, Inc.*, 2009 U.S. Dist. LEXIS 62308, *6 (D.N.J. July 21, 2009) (citing *Lebegern v. Forman*, 471 F.3d 424, 428 (3d Cir.2006)). In that instance, a motion to dismiss under Fed.R.Civ.P. 2(b) (6) should be decided under New Jersey law. See *Gallerstein v. Berkshire Life Ins. Co. of America*, 2006 U.S. Dist. LEXIS 64487, *3, 2006 WL 2594862 (D.N.J. Sept. 11, 2006).

The parties' respective moving papers recognize that the outcome is the same regardless of whether New Jersey State Law or Missouri State Law is applied to this diversity action. Therefore, the parties assert that no conflict of laws issue is present in the instant matter.

C. New Jersey State Law Breach of Warranty, Consumer Fraud and Unjust Enrichment Claims

Defendants assert that dismissal is required with respect to all Plaintiffs' claims because the claims are based on alleged harm caused by a product and as a consequence, are subsumed by the New Jersey Product Liability Act (“PLA”). Plaintiffs contend that the PLA does not apply because their claims are essentially classic breach of warranty and consumer fraud causes of action. Plaintiffs argue that “[w]hile the PLA covers and subsumes causes of action involving physical harms caused by a product, the [Consumer Fraud Act (“CFA”)] and other remedies remain available when the plaintiffs only claim economic injuries involving a product.” (Pl. Br. at 18).

2010 WL 421091

Further, Plaintiffs argue that the PLA does not apply because Plaintiffs do not assert themselves as “claimants” or allege “harm” as defined by the PLA.

*6 The New Jersey Supreme Court decision in *Sinclair v. Merck & Co.* is instructive. In *Sinclair v. Merck & Co.*, the Plaintiffs “alleged that as a result of their direct and prolonged consumption of *Vioxx*, they are at enhanced risk of serious undiagnosed and unrecognized *myocardial infarction*, commonly referred to as “silent *heart attack*,” and other latent and unrecognized injuries.” 195 N.J. 51, 55, 948 A.2d 587 (2008). In that case, the plaintiffs asserted claims for negligence, violation of the Product Liability Act, violation of the Consumer Fraud Act, breach of express and implied warranties and unjust enrichment. *Id.* In dismissing the complaint in its entirety, New Jersey Supreme Court determined the following,

[p]laintiffs seek to avoid the requirements of the PLA by asserting their claims as CFA claims. However, the Legislature expressly provided in the PLA that claims for “harm caused by a product” are governed by the PLA “irrespective of the theory underlying the claim.” N.J.S.A. 2A:58C-1b(3). We explained in *Lead Paint*, *supra*, that “[t]he language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action in relating to harms caused by consumer and other products.” 191 N.J. at 436–37, 924 A.2d 484. As a result, we declared that “[i]n light of the clear intention of our Legislature to include all [product liability] claims within the scope of the PLA, we find no ground on which to conclude that the claims being raised by plaintiffs, regarding an ordinary household product used by consumers, were excluded from the scope of” the PLA. We reach the same conclusion here.

The language of the PLA represents a clear legislative intent that, despite the broad reach we give to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product. The heart of plaintiffs' case is the potential for harm caused by Merck's drug. It is obviously a product liability claim. Plaintiffs' CFA claim does not fall within an exception to the PLA, but rather clearly falls within its scope. Consequently, plaintiffs may not maintain a CFA claim.

Id. ^{1 2}

1 Although this Court permitted the CFA claims to proceed in *Nafar v. Hollywood Tanning Sys., Inc.*, in that case, the Plaintiff's claims and basis for distinction of the CFA from the PLA was the purchase of services, rather than the purchase of a defective product. 2007 U.S. Dist. LEXIS 26312, *12–14 (D.N.J. Apr. 5, 2007). CFA claims rooted in services are clearly distinguishable from claims grounded in products. The present action does not involve a claim for defective services.

2 Further, Plaintiffs misconstrue *In re Ford Motor Co. E-350 Van Products*, 2008 U.S. Dist. LEXIS 73690, *48 n. 9 (D.N.J. Sept. 3, 2008), where the Court did indeed find the *Sinclair* case “inapposite” “because, by design, the PLA ‘except[s] actions for harm caused by breach of an express warranty[,]’ which plaintiffs expressly allege[d.]” On the basis of an express warranty, the Court concluded that *Sinclair* decision “does not mandate dismissal of unjust enrichment and state consumer fraud claims where a party does not plead a PLA claim.” *Id.* (internal citations omitted). Plaintiffs do not assert a claim for breach of an express warranty in the present action.

Similarly, at the heart of this matter is the potential for harm caused by the defective products, J & J Baby Shampoo and Wal-Mart Equate Tearless Baby Wash, containing allegedly “toxic chemicals linked to increased *cancer* risk, adverse skin reactions, and other serious health problems.” (See Pl. Compl., ¶ 2). Plaintiffs directly assert that they “were damaged by Defendants' omissions and failure to warn that their Children's Personal Care Products were contaminated with toxic and potentially cancer-causing chemicals.” (Pl. Compl., ¶ 4). Therefore, consistent with the *Sinclair* decision, this Court concludes that the PLA subsumes all of Plaintiffs' claims, effectively precluding Plaintiffs' claims with respect to the CFA, and otherwise, in the absence of “harm” as defined by the PLA. The Court does not agree that articulating a claim in terms of pure economic harm where the core issue is the potential injury arising as a consequence of the products' allegedly harmful chemicals converts the underlying defective product claim into an independent and unrelated consumer fraud issue. Limiting a claim to economic injury and the remedy sought to economic loss cannot be used to obviate the PLA.

*7 The assertion of a claim pursuant to the PLA is premised upon a requisite level of harm, including:

(a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

N.J.S.A. 2A:58C–1b(2). Harm, for purposes of the PLA, does not include pure economic loss. Insofar as Plaintiffs concede that their injury is purely economic, Plaintiffs' claims cannot survive. Therefore, with respect to New Jersey law, in accordance with *Sinclair*, Plaintiffs' complaint is dismissed without prejudice in its entirety.

D. Missouri State Law Breach of Warranty, Consumer Fraud and Unjust Enrichment Claims

Despite the parties' respective beliefs that there is no conflict of law issue present in the instant matter, it is not clear to the Court that product liability laws of Missouri subsume related claims in the same manner as the New Jersey PLA. Therefore, upon dismissal of all New Jersey State Law claims and for purposes of inclusion, the Court will proceed by addressing the viability of Plaintiffs' claims under Missouri State Law. If Plaintiffs have asserted viable claims pursuant to Missouri State Law, then a conflict of law exists and the Court will undertake to ascertain which state has the superior interest in the litigation.

i. Consumer Fraud

Defendants contend that Plaintiffs have no viable claims pursuant to Missouri State Law because Plaintiffs fail to allege any non-speculative, ascertainable loss and fail to plead their claims with particularity in accordance with [Fed.R.Civ.P. 9\(b\)](#). Plaintiffs assert that they “suffered ascertainable losses to the extent that they paid for and got something less than what was promised” and to the extent that Defendants engaged in material omissions of fact with respect to the presence of toxic chemicals in the products at issue. (Pl. Br. at 29, 33). Plaintiffs also present the Court with the results of independent lab tests detecting the presence of methylene [chloride](#) in the allegedly defective products.

“A party must plead the circumstances of each element of fraud with particularity.” *Owen v. GMC*, 533 F.3d 913, 921 (8th Cir.2008); [Fed.R.Civ.P. 9\(b\)](#). “Although the [Missouri Merchandising Practices Act (“MMPA”)] does not sound in tort and does not require a showing of a product defect as a matter of course, the plain language of the MMPA demands a causal connection between the ascertainable loss and the unfair or deceptive merchandising practice.” *Id.* at 922. However, if “the alleged unfair practice is the failure to disclose a product defect, there must be a showing that the [product] in fact suffered that defect, or evidence from which the defect reasonably could be inferred, in order to demonstrate an ascertainable loss as a result of [defendant's] failure to disclose the defect.” *Id.* at 923. “The MMPA prohibits “deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce” by defining such activity as an unlawful practice.” *Plubell v. Merck & Co.*, 289 S.W.3d 707, 711 (Mo.App.S.D.2009) (citing *Mo. Ann. Stat. § 407.020*). “Civil actions may be brought under the MMPA to recover actual damages by ‘[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice].’ ” *Id.* (citing *Mo. Ann. Stat. § 407.025.1*). “The MMPA also specifically authorizes class actions where an unlawful practice ‘has caused similar injury to numerous other persons.’ ” *Id.* (citing *Mo. Ann. Stat. § 407.025.2*). To the extent that Plaintiffs' claims pursuant to Missouri State Law concern methylene chloride, a chemical banned by the FDA for use in cosmetics and detected in Defendants' products, Plaintiffs claims may proceed under Missouri State Law.

*8 Although foreclosed by application of the PLA in the instant case, the CFA was enacted to “protect the consumer against imposition and loss as a result of fraud and fraudulent practices by persons engaged in the sale of goods and services.” *Smith v. Alza*, 400 N.J.Super. 529, 552, 948 A.2d 686 (2008). “The MMPA was enacted to preserve fundamental honesty, fair play, and right dealings in public transactions.” *Owen v. GMC*, 533 F.3d 913, 922 (8th Cir.2008) (citing *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 160 (Mo.Ct.App.2006)). Beyond the underlying governmental purpose of the MMPA, the representative Plaintiffs in this action reside in Missouri and presumably,

2010 WL 421091

the purchases of the allegedly defective products occurred in Missouri. J & J is a New Jersey corporation engaged in business throughout the United States, including Missouri. Wal-Mart is an Arkansas corporation engaged in business throughout the United States, including Missouri. Therefore, the Missouri State contacts in the instant matter seem to outweigh New Jersey State contacts. Missouri State Law prevails with respect to this issue.

ii. Breach of Implied Warranty

Defendants assert that Plaintiffs' breach of implied warranty claims should be dismissed because Plaintiffs' complaint fails to allege that the products were not merchantable or failed to perform the function for which they were sold, and because the complaint fails to allege any purpose that is separate and apart from the ordinary purpose. (Def. Br. at 28–29). Plaintiffs' complaint asserts a claim for breach of implied warranties because the goods were allegedly not fit for their ordinary purpose or particular use on children and further, because the products fail to conform to the promises and representations made on the labels. Specifically, Plaintiffs allege that the products are not merchantable because they are contaminated with methylene chloride. (Pl. Br. at 36).

“In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained.” *Worthy v. Specialty Foam Products*, 591 S.W.2d 145, 149 (Mo.App. S.D.1979). “After establishing the existence of this warranty,” there must be a showing; “(1) that the implied warranty of merchantability had been broken, and (2) that the breach of this warranty was the proximate cause of its loss.” *Id.* “Crucial to the issue of whether or not a seller has breached an implied warranty of merchantability, is the determination of whether or not the goods in question are merchantable.” *Id.* “Merchantable goods must be at least as such as[.]”

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

*9 (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

Mo. Ann. Stat. § 407.2–314. The Uniform Commercial Code (“UCC”) limits the recovery of damages to those proximately caused by the breach of warranty and imposes an obligation on the buyer to minimize damages in good faith. *Groppel Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 59 n. 11 (1981). Assuming, without concluding, that the descriptive messages on the alleged defective products constitute promises or affirmations, then, in accordance with the foregoing limitations, Plaintiffs' claims for breach of implied warranties pursuant to Missouri State Law are permitted to proceed.

Although foreclosed by application of the PLA in the instant matter, the underlying purpose of the UCC as recognized by the New Jersey Supreme Court, is “to simplify, clarify and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and to make uniform the law among various jurisdictions.” *N.J. S.A. 12A:1–102(1)*; *Alloway v. General Marine Indus., L.P.*, 149 N.J. 620, 630, 695 A.2d 264 (1997). Codified under chapter 400 of Missouri State Law, Missouri State Law adheres to the same underlying purposes as New Jersey. *See Excel Bank v. Nat'l Bank of Kansas City*, 290 S.W.3d 801, 803–04 (Mo.App. W.D.2009). Similar to the foregoing analysis, Missouri's contacts with the representative Plaintiffs and the transactions that are the source of the representative Plaintiffs' claims favors the application of Missouri law over New Jersey with respect to this issue.

iii. Unjust Enrichment

Defendants assert that unjust enrichment is not a proper remedy available in this case because Plaintiffs fail to assert that the products failed to perform. By contrast, Plaintiffs assert that they purchased the products conferring a monetary benefit upon the Defendants for useless products that they would not otherwise have purchase, but for the representations that the products were safe, gentle and/or mild. “The elements of a claim of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant

2010 WL 421091

of that benefit under circumstances in which retention without payment would be inequitable.” *Mays–Maune & Co. v. Werner Bros., Inc.*, 139 S.W.3d 201, 205 (Mo.App. E.D.2005). Equitable remedies are coercive remedies like declaratory judgments and injunctions, the latter of which includes specific performance and some types of restitution. *State ex rel Leonardi v. Sherry*, 137 S.W.3d 462, 470 (2004). “Damages and, in some instances, restitution constitute the legal remedies.” *Id.* (internal citations omitted). Generally, equitable remedies are only available when there is a showing of irreparable injury and/or the absence of an adequate remedy at law. See *State ex rel General Dynamics Corp. v. Luten*, 566 S.W.2d 452, 461 (1978). “There is nothing more basic in law than the proposition that there is neither irreparable injury nor lack of an adequate remedy at law when the only harm would be the payment of money, which clearly can be recovered if, in fact, the plaintiff succeeds on the merits of its claims [I]f plaintiff were to prevail, it would have a legal remedy that would allow it to recover any funds

that, *arguendo*, were paid wrongfully.” *Shipley v. Cates*, 200 S.W.3d 529, 541 (2006). Plaintiffs explicitly and exclusively allege economic injury. Therefore, there is no indication that a remedy at law would be inadequate. To the extent that Plaintiffs assert a claim for unjust enrichment pursuant to Missouri State Law, Plaintiffs' complaint is dismissed.

IV. CONCLUSION

*10 For the foregoing reasons, Defendants' motion is **granted in part** and **denied in part**. Plaintiff's complaint is **partially dismissed without prejudice** pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6). An appropriate order accompanies this opinion.

All Citations

Not Reported in F.Supp.2d, 2010 WL 421091

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 37

758 Fed.Appx. 777

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2. United States Court of Appeals, Eleventh Circuit.

Robert N. MARKLAND, as the Personal Representative of the Estate of Carolyn S. Markland, Deceased, Plaintiff-Appellant,
v.
INSYS THERAPEUTICS, INC., a Delaware Corporation, Defendant-Appellee.

No. 17-14607

Non-Argument Calendar

(December 19, 2018)

Synopsis

Background: Deceased patient's husband, as personal representative of patient's estate, brought wrongful death action against prescription drug manufacturer, alleging that drug caused patient to suffer respiratory depression and ultimately death. Manufacturer moved to dismiss for lack of subject matter jurisdiction and for failure to state claim. The United States District Court for the Middle District of Florida, [Marcia Morales Howard, J.](#), [270 F.Supp.3d 1318](#), granted the motion to dismiss. Husband appealed.

[Holding:] The Court of Appeals held that husband's state law claim was impliedly preempted by federal law.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (1)

[1] [Products Liability](#)  [Warnings or Instructions](#)

[Products Liability](#)  [Drugs in general](#)[States](#)  [Product safety; food and drug laws](#)

Substance of state-law negligent marketing claim brought by deceased patient's husband against prescription drug manufacturer was allegation that manufacturer violated the Federal Food, Drug, and Cosmetic Act (FDCA), and thus, husband's state law claim was impliedly preempted by federal law; husband alleged that patient's death stemmed from manufacturer's off-label promotion of drug, rather than from manufacturer's failure to satisfy any independent state law duty of care. Federal Food, Drug, and Cosmetic Act §§ 301, 310, [21 U.S.C.A. §§ 331\(a\), 337\(a\)](#).

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

*[778 Bryan Scott Gowdy, Meredith Abernathy Ross, Creed & Gowdy, Jacksonville, FL, Charles Wayne Alford, Charles Wayne Alford, Jr., Alford Law Group, PA, Jacksonville, FL, for Plaintiff-Appellant](#)

[Joseph H. Lang, Jr., Adam P. Schwartz, Mariko Shitama Outman, David J. Walz, Carlton Fields Jorden Burt, PA, Tampa, FL, for Defendant-Appellee](#)

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 3:16-cv-00997-MMH-PDB

Before [MARCUS](#), [WILLIAM PRYOR](#), and [ANDERSON](#), Circuit Judges.

Opinion

PER CURIAM:

Plaintiff Robert Markland appeals the district court's dismissal of his wrongful death claim against Insys Therapeutics, Inc. In his complaint, Markland alleged that his wife, Carolyn Markland ("Carolyn"), died shortly after receiving a prescription drug manufactured by Insys, and he brought a single claim of "negligent marketing" under Florida law. On appeal, Markland argues the district court erred in finding the claim preempted by the Federal Food,

Drug, and Cosmetic Act (“FDCA”), 21 U.S.C. §§ 301–399h. After careful review, we affirm.

The tragic facts of this case are these.¹ Insys Therapeutics is a pharmaceutical company that manufactures, among other things, a prescription painkiller called Subsys. Subsys is a spray form of [Fentanyl](#), a powerful opioid that is a Schedule II controlled substance. [See 21 U.S.C. § 812\(c\)](#), sched. II (b) (6). The intended use of Subsys is to treat [cancer](#) patients with “breakthrough pain,” i.e., sharp, sudden episodes of pain that occur despite constant treatment with other pain medications. While this is the sole FDA-approved use of Subsys, Markland alleges that Insys engaged in a “fraudulent” and “unlawful” marketing scheme to push doctors to prescribe Subsys “off label” for patients with other kinds of pain.

¹ Because the district court decided this case on a motion to dismiss, we take the facts alleged in the complaint as true. [See Furry v. Miccosukee Tribe of Indians](#), 685 F.3d 1224, 1226 n.2 (11th Cir. 2012).

Carolyn Markland received Subsys, in what the complaint alleges is a prime example of an off-label use of the drug. At the time, she was receiving treatment for chronic back pain resulting from a [degenerative disc disease](#). She regularly took a different opioid, Exalgo, and her pain management physician prescribed Subsys for pain on an as-needed basis. One morning after her physician administered a dose of Subsys, Carolyn suffered respiratory distress and died. Subsys is known to cause respiratory problems, and the medical examiner identified the cause of death as [drug toxicity](#). Robert Markland filed this wrongful death suit as the personal representative of his wife’s estate.

We review [de novo](#) the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. [Ray v. Spirit Airlines, Inc.](#), 836 F.3d 1340, 1347 (11th Cir. 2016). We accept the allegations in the complaint as [*779](#) true and view them in the light most favorable to the plaintiff. [Id.](#) Regardless of the district court’s reasoning, “we are free to affirm the district court’s decision on any ground that is supported by the record.” [United States v. Elmes](#), 532 F.3d 1138, 1142 (11th Cir. 2008).

As a starting point, we note that the FDCA says that its requirements may only be enforced by the United States government. 21 U.S.C. § 337(a). In [Buckman Co. v. Plaintiff’s Legal Committee](#), 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001), the Supreme Court explained how

this bar on private enforcement of the FDCA interacts with the background of state tort law. There, patients injured by a medical device sued a consulting company for allegedly making false representations to the FDA in order to get approval to market the device. [Id. at 343](#), 121 S.Ct. 1012. The plaintiffs’ theory was that if the defendant had not made those false statements, the devices would not have been approved and they never would have been injured. The Supreme Court held that these “fraud-on-the-FDA” state tort claims were in conflict with federal law and were therefore preempted. [Id. at 348](#), 121 S.Ct. 1012. The conflict “stem[med] from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against” it in pursuit of a “somewhat delicate balance of statutory objectives.” [Id.](#) In other words, Congress made a specific choice to allow only the government to enforce the FDCA’s requirements, and allowing private litigants to sue for misrepresentations made to the FDA would conflict with that policy decision. [Id. at 348-51](#), 121 S.Ct. 1012.

After [Buckman](#), this Court noted a distinction between claims that rely on FDCA violations and claims derived from “traditional state tort law that predated the federal enactments in question.” [Mink v. Smith & Nephew, Inc.](#), 860 F.3d 1319, 1327 (11th Cir. 2017) (quotations and modifications omitted). Traditional state-law tort claims are not preempted “so long as they don’t seek to privately enforce a duty owed to the FDA.” [Id.](#) The Court’s different treatment of two claims in that case is instructive: a claim based on the defendant’s failure to file a required report with the FDA was held to be preempted, but a traditional manufacturing defect products liability claim was not. [Id. at 1330](#). The key distinction was that a manufacturing defect claim involves a duty that both predates the FDCA and is owed to the individual patient, not to the FDA. [Id.](#)

Here, Markland’s claim is styled as a “negligent marketing” claim, which is not a recognized tort under Florida law. Markland alleges that after Subsys was approved to treat pain in [cancer](#) patients, Insys “unlawfully and negligently began an aggressive marketing campaign to get physicians to prescribe Subsys for other uses including relieving chronic back pain.” More specifically, Markland asserts that Insys made payments to physicians and other medical professionals who prescribed the drug, at the same time urging them to write off-label prescriptions. Among other things, he alleges that Insys paid health care professionals through a sham “Speakers Bureau,” which rewarded physicians who prescribed Subsys under the guise of providing compensation for travel and speeches. He

adds that Insys “intentionally violated requirements imposed by the FDA” regarding the proper use of the drug.

The district court “read the substance of Mr. Markland’s complaint as alleging that Insys violated federal law” and held that his claim was preempted. We agree. A critical premise of Markland’s complaint is that Insys’s promotion of off-label uses was improper, a proposition that can only *780 be established by pointing to federal law. Although the FDCA does not expressly regulate off-label prescriptions, the FDA has penalized companies for the promotion of off-label uses under the misbranding provisions of the Act. *See, e.g., United States v. Caronia*, 703 F.3d 149, 154 (2d Cir. 2012) (“The government has repeatedly prosecuted -- and obtained convictions against -- pharmaceutical companies and their representatives for misbranding based on their off-label promotion.”). At the same time, however, the FDA also generally permits the off-label prescription of drugs by physicians. *See* 21 U.S.C. § 396; *cf. Buckman*, 531 U.S. at 350, 121 S.Ct. 1012 (explaining that the off-label use of medical devices “is an accepted and necessary corollary of the FDA’s mission to regulate in this area without directly interfering with the practice of medicine”).

Notably, Markland has not pointed to any traditional state-law duty owed by Insys to Carolyn that was breached by the company’s marketing of Subsys for off-label use. It is only because of the FDCA and FDA enforcement decisions that

the promotion of off-label uses is prohibited. Indeed, the very concept of a drug use being “off-label” is derived from the FDCA and FDA policymaking decisions.

Markland is correct that under Florida tort law, a negligence claim can be premised on a duty created by a federal statute or regulation. *See Godfrey v. Precision Airmotive Corp.*, 46 So.3d 1020, 1023 (Fla. Dist. Ct. App. 2010). But preemption is an issue of federal law, and a duty derived from a federal statute is insufficient to prevent preemption. One cannot say that a claim based on a federal statutory duty “rel[ies] on traditional state tort law which [predates] the federal enactments in question[].” *Buckman*, 531 U.S. at 353, 121 S.Ct. 1012. As with the *Buckman* plaintiffs, Markland seeks to enforce a duty that “exist[s] solely by virtue of the FDCA.” *Id.* That kind of claim is preempted.

Because we affirm on the ground that Markland’s claim is preempted, we need not express any view on the viability of a negligent marketing claim under Florida law or the application of the learned intermediary doctrine to this case.

AFFIRMED.

All Citations

758 Fed.Appx. 777

TAB 38

147 Fed.Appx. 239

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7) United States Court of Appeals, Third Circuit.

MDNET, INC., Appellant,
v.
PHARMACIA CORPORATION, and Greenstone Ltd. t/d/b/a Greenstone Healthcare Solutions.

No. 03-4782.

|
Submitted Under Third Circuit
LAR 34.1(a) Jan. 11, 2005.

|
Decided June 13, 2005.

Synopsis

Background: Internet company that developed virtual private networks for doctors and hospitals sued pharmaceutical company and its wholly owned subsidiary, alleging breach of contract, promissory estoppel, and fraudulent misrepresentation. The United States District Court for the Western District of Pennsylvania, [Gary L. Lancaster](#), J., dismissed for failure to state claim upon which relief could be granted. Internet company appealed.

Holdings: The Court of Appeals, Shapiro, Circuit Judge, held that:

[1] pharmaceutical company and subsidiary were not liable, under Pennsylvania law, for breach of alleged oral agreement;

[2] Internet company failed to state claim for promissory estoppel under Pennsylvania law; and

[3] pharmaceutical company and subsidiary were not liable in fraud.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (4)

[1] [Contracts](#) [Parol Modification](#)

Under Pennsylvania law, parties could waive or modify clause in prior contract requiring any further agreements between them to be in writing. [Restatement \(Second\) of Contracts § 224](#).

[2 Cases that cite this headnote](#)

[2] [Contracts](#) [Parol Modification](#)

Pharmaceutical company and its subsidiary did not intend to waive or modify provision of their prior contract with Internet company that required all future agreements to be in writing, and their alleged oral assent to subsequent oral agreement did not impliedly waive or modify requirement of written contract, and therefore pharmaceutical company and subsidiary were not liable, under Pennsylvania law, for breach of alleged subsequent oral agreement.

[8 Cases that cite this headnote](#)

[3] [Estoppel](#) [Future Events; Promissory Estoppel](#)

Internet company failed to state claim for promissory estoppel against pharmaceutical company and its subsidiary under Pennsylvania law, given that parties' prior written contract required any future agreements to be in writing and Internet company alleged no facts showing intention by pharmaceutical company or subsidiary to waive or modify that requirement, so as to show that Internet company could reasonably rely on alleged oral promises by pharmaceutical company or subsidiary to fund Internet company's continued development of virtual private network, and that Internet company pleaded that consideration existed for parties' exchange of promises, while promissory estoppel applied to enforce promise

not supported by consideration. [Fed.Rules Civ.Proc.Rule 12\(b\)\(6\)](#), 28 U.S.C.A.

18 Cases that cite this headnote

[4] Fraud **Relations and Means of Knowledge of Parties**

Continued negotiation of proposed contract between Internet company and pharmaceutical company and its subsidiary, in which parties defined many of essential terms of agreement, made it unreasonable for Internet company to rely on tentative oral statements made by pharmaceutical company or its subsidiary during course of negotiations, precluding their liability to Internet company for alleged fraudulent misrepresentation under Pennsylvania law.

8 Cases that cite this headnote

***240** On Appeal from the United States District Court for the Western District of Pennsylvania. District Court No. 02–CV–1237. District Judge: The Honorable [Gary L. Lancaster](#).

Attorneys and Law Firms

[Edwin J. Strassburger](#), [David A. Strassburger](#), Strassburger, McKenna, Gutnick & Potter, Pittsburgh, PA, for Appellant.

[Troy S. Brown](#), Morgan, Lewis & Bockius, Philadelphia, PA, for Pharmacia Corporation, and Greenstone Ltd. t/d/b/a Greenstone Healthcare Solutions.

***241** Before [ROTH](#) and [CHERTOFF](#), * Circuit Judges, and SHAPIRO, ** District Judge.

* This case was submitted to the panel of judges Roth, Shapiro * * and Chertoff. Judge [Chertoff](#) resigned after submission, but before the filing of the opinion. The decision is filed by a quorum of the panel. [28 U.S.C. § 46\(d\)](#).

** Honorable [Norma L. Shapiro](#), Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION

SHAPIRO, District Judge.

****1** MDNet, Inc. (“MDNet”) filed this action against Pharmacia Corporation (“Pharmacia”) and Greenstone Ltd. (“Greenstone”) for breach of contract, promissory estoppel, and fraudulent misrepresentation. MDNet appeals the district court dismissal for failure to state a claim upon which relief can be granted.

I. FACTS AND PROCEDURAL HISTORY

MDNet is an “Internet e-Health Company” that develops virtual private networks (“VPNs”) for doctors and hospitals.¹ Pharmacia makes and distributes pharmaceuticals. Greenstone is a wholly owned subsidiary of Pharmacia, and does data-mining, data modeling, e-business applications and other marketing tasks. This dispute arose when Greenstone and Pharmacia ended contract negotiations with MDNet. MDNet alleges an oral contract had been formed; Pharmacia and Greenstone disagree.

1 A VPN is a private computer network that uses a public network such as the Internet to connect users together securely.

In May, 1999, Greenstone and MDNet entered into a three-month trial business arrangement, memorialized in a written contract (“the May 1999 Agreement”); MDNet provided marketing data to Greenstone for \$30,000. The firms found the trial arrangement beneficial, and wanted to expand their venture so that MDNet would develop VPNs for doctors and hospitals and create sales opportunities for Greenstone and Pharmacia. The venture included the development of a VPN for a group of Texas urologists (“Prime Medical”) that would enable Pharmacia to market the prescription drug “[Detrol](#)” to the urologists.

In October, 1999, MDNet, Greenstone, Pharmacia, and Prime Medical agreed by written contract (“the October 1999 Agreement”) that MDNet would develop a VPN for Prime Medical, and Greenstone would have access to the urologists and their data. Greenstone orally agreed to provide \$700,000 in funding. The October 1999 Agreement contained the following clauses:

10. Prime Medical, MDNet, and Greenstone/PNU intend to maintain a dialogue to consider further exploration of their business relationship. However, any binding agreement resulting from such dialogue must be entered into in writing.

[...]

14. This agreement shall continue in effect until any party gives at least 30 days' advance notice of its intention to terminate to the others, provided that this agreement may not be terminated prior to December 31, 2002, except by a non-breaching party upon any breach, default or other failure to perform by any other party hereto.

Representatives of MDNet and Prime Medical met with representatives of Pharmacia and Greenstone on August 17, 2000 to negotiate expansion of the venture. MDNet alleges that Pharmacia and Greenstone *242 entered into an oral agreement with MDNet ("the August 2000 Agreement"). MDNet claims the terms of the August 2000 Agreement were as follows: 1) Pharmacia would provide \$2,000,000 in funding over two years; 2) Pharmacia would make available a marketing and sales support team; and 3) Pharmacia would receive exclusive access to MDNet's VPN business model and the Prime Medical urologists to promote *Detrol* and other drugs. The parties proceeded to exchange proposed written contracts to formalize the agreement, but they could not reach agreement. Before a written contract was signed, Pharmacia and Greenstone abandoned the negotiations and refused to provide \$2,000,000 in additional funding.

**2 MDNet filed this action alleging the August 2000 Agreement was an oral contract breached by Pharmacia and Greenstone. The breach of contract claim also alleged Pharmacia and Greenstone breached the October 1999 Agreement, but the complaint did not specify the obligations that were unperformed. Additionally, MDNet alleged promissory estoppel and fraudulent misrepresentation. It attached to the complaint copies of the May 1999 and October 1999 Agreements, and a proposed written contract of September, 2000 ("the September 2000 Proposed Contract") that MDNet claims memorialized the August 2000 Agreement.

Pharmacia and Greenstone moved to dismiss all claims for failure to state a claim upon which relief can be granted. They argued an oral contract had not been formed, because the October 1999 Agreement contained a clause requiring that

any further agreements must be in writing. The magistrate judge issued a report and recommendation recommending that the district court grant the motion. The district court adopted the report and recommendation, and granted the motion. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a). This court has jurisdiction pursuant to 28 U.S.C. § 1291. Our review of a district court dismissal of a complaint pursuant to Rule 12(b)(6) is plenary, and we apply the same test as the district court. *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183 (3d Cir.2000). A motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *Id.* A court may consider undisputedly authentic exhibits attached to a complaint without converting a motion to dismiss into a motion for summary judgment. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.1993); Fed.R.Civ.P. 10(c). While our standard of review requires us to accept as true all factual allegations in the complaint, we need not accept as true unsupported conclusions and unwarranted inferences. *Doug Grant, Inc.*, 232 F.3d at 183–184. The district court determined, and the parties agree, that Pennsylvania law applies to all substantive questions of law.

III. DISCUSSION

The district court concluded the parties could not have formed an oral contract because a clause in the October 1999 Agreement required further agreements to be in writing. The court held the clause operated as a condition precedent to the formation of a contract, and MDNet had not alleged any conduct on the part of defendants showing their intent to waive the requirement. The court also dismissed *243 the claim for breach of the October 1999 Agreement, since MDNet failed to specify the obligations Pharmacia and Greenstone had failed to perform. Finally, the court dismissed the claims for promissory estoppel and fraud because MDNet could not have reasonably relied on the oral agreement or defendants' alleged misrepresentations.

A. Breach of Contract

**3 A breach of contract claim requires MDNet to show a contract between the parties, the essential terms of the contract, a breach of a duty under the contract, and resultant

damages. See *Electron Energy Corp. v. Short*, 408 Pa.Super. 563, 597 A.2d 175 (1991), *aff'd*, 533 Pa. 66, 618 A.2d 395 (1993). A valid, binding contract exists when the parties have manifested an intent to be bound, the terms are sufficiently definite, and there is consideration. *In re Estate of Hall*, 731 A.2d 617, 621 (1999), *appeal denied*, 561 Pa. 697, 751 A.2d 191 (2000). Parties may bind themselves contractually prior to the execution of a written document through mutual manifestations of assent, even where a later formal document is contemplated. *Luber v. Luber*, 418 Pa.Super. 542, 614 A.2d 771, 773 (1992), *appeal denied*, 535 Pa. 636, 631 A.2d 1008 (1993). MDNet alleges Pharmacia and Greenstone manifested the intent to be bound during the August 2000 negotiations because their authorized representatives stated they were “in” and “Pharmacia was their partner in this venture.” The complaint states the terms of the contract were definite, and the consideration was two million dollars and a sales support team in exchange for exclusive access to the MDNet business model and the Prime Medical VPN. The complaint also alleges Pharmacia failed to provide the two million dollars, and MDNet's value was diminished as a result.

[1] The district court erred in finding the parties could not have formed an oral contract because the clause requiring a written agreement created a condition precedent. The court relied on *Franklin Interiors v. Wall of Fame Management Co.*, 510 Pa. 597, 511 A.2d 761, 762 (1986). In *Franklin Interiors*, the court held that a document was not a contract because it contained a clause stating that the document would not become a contract until approved by an officer of Franklin Interiors; no officer had approved it. *Franklin Interiors* does not directly apply to the facts of this action. A condition precedent to a contract is formed not by past contracts, but the instant contract. See *Restatement (Second) of Contracts* § 224 (1981). The usual examples are option contracts, or contracts requiring financing or insurance. See *Shovel Transfer & Storage Inc. v. PLCB*, 559 Pa. 56, 739 A.2d 133, 139 (1999); *Cambria Sav. & Loan v. Estate of Gross*, 294 Pa.Super. 351, 439 A.2d 1236, 1239 (1982). Where a requirement is contained in a former contract, the parties may waive the requirement by a later oral modification of the former contract. Parties may orally agree to modify a written contract, even where the written contract contains language prohibiting oral modifications. *Universal Builders, Inc. v. Moon Motor Lodge, Inc.*, 430 Pa. 550, 244 A.2d 10, 15 (1968); *C.I.T. Corp. v. Jonnet*, 419 Pa. 435, 214 A.2d 620 (1965). Whether the clause at issue is described as a condition precedent is irrelevant, since parties can waive a condition

precedent. “The requirement of a written authorization may also be considered a condition which has been waived.” *Universal Builders, Inc.*, 244 A.2d at 15 (citing 5 Williston on Contracts § 689 (3rd ed.1961)).

****4 [2]** An oral waiver or modification of a written contract must be proved by clear, precise and convincing evidence, including conduct by the parties that “clearly shows ***244** the intent to waive the requirement that the amendments be made in writing.” *Somerset Community Hospital v. Allan Mitchell & Assocs.*, 454 Pa.Super. 188, 685 A.2d 141, 146 (1996). As the Pennsylvania Supreme Court forcefully stated:

An oral contract changing the terms of a written contract must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they had previously solemnized by a formal document. The oral evidence must be of such a persuasive character that it moves like an ink eradicator across the written paper, leaving it blank so that the parties in effect start afresh in their negotiations and mutual commitments.

Gloeckner v. School Dist. of Baldwin Tp., 405 Pa. 197, 175 A.2d 73, 75 (1961).

In light of the exhibits attached to MDNet's complaint, MDNet failed to plead facts from which one could reasonably infer Pharmacia and Greenstone intended to waive the clause requiring a written agreement. MDNet's complaint makes no reference at all to the writing requirement. MDNet's complaint does not allege that Pharmacia and Greenstone intended to waive or modify Paragraph 10 of the October 1999 Agreement. The complaint does not allege that an authorized agent of Pharmacia or Greenstone ever made any statement waiving the requirement of a writing. MDNet appears to argue that Greenstone and Pharmacia, by oral assent to the August 2000 Agreement, impliedly waived or modified the requirement of written modification. This is not clear and convincing evidence as a matter of law. The district court correctly dismissed the claim for breach of contract.

B. Promissory Estoppel

[3] To make a claim for promissory estoppel, MDNet must allege: 1) Pharmacia and Greenstone made a promise they should have reasonably expected to induce action or forbearance on the part of MDNet; 2) MDNet actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise. See *Crouse v. Cyclops Industries*, 560 Pa. 394, 745 A.2d 606, 610 (2000). Promissory estoppel is applied to enforce a promise not supported by consideration, where there is no binding contract. See, e.g., *Bethlehem Steel Corp. v. Litton Indus., Inc.*, 507 Pa. 88, 488 A.2d 581, 593 (1985).

MDNet's complaint alleges Pharmacia expressly and intentionally promised \$2,000,000 in funding to induce MDNet to continue development of the VPN and forgo other business opportunities. MDNet alleges its reliance was reasonable and justifiable. The district court found MDNet could not have reasonably relied on the oral promises made by appellees because their prior agreement required a writing for a further binding agreement. The requirement of a written contract does not necessarily prevent an oral waiver or modification, but MDNet alleges no facts showing an intention to waive or modify the requirement of a writing. Additionally, MDNet pled that there was consideration for the exchange of promises, where promissory estoppel is applied to enforce a promise not supported by consideration. See, e.g., *Bethlehem Steel Corp.*, 488 A.2d at 593. The district court correctly dismissed the claim for promissory estoppel.

C. Fraudulent Misrepresentation

****5** [4] A plaintiff alleging fraud must plead: (1) a representation; (2) material to the transaction; (3) made falsely, with knowledge of its falsity or recklessness as to its falsity; (4) with the intent of misleading another to rely on it; (5) justifiable reliance on the misrepresentation; and, (6) resulting injury proximately caused by the reliance. *Bortz v. Noon*, 556 Pa. 489, 729 A.2d 555, 560 (1999). "There

is a special ***245** kind of proximate cause requirement for fraud and misrepresentation, and plaintiff must demonstrate that a specific statement *caused* a specific harm." *Hurt v. Philadelphia Hous. Auth.*, 806 F.Supp. 515, 530 n. 25 (E.D.Pa.1992) (emphasis in original).

A pleading of fraud is subject to heightened specificity requirements. See Fed.R.Civ.P. 9(b). Plaintiff may not simply point to a bad result and allege fraud, but must "inject precision and some measure of substantiation into the allegations." *In re Chambers Dev. Sec. Litig.*, 848 F.Supp. 602, 616 (W.D.Pa.1994). When multiple defendants are involved, the complaint must plead with particularity by specifying the allegations of fraud applying to each defendant. *Cinalli v. Kane*, 191 F.Supp.2d 601, 609 (E.D.Pa.2002). MDNet failed to specify the defendant or agent making the alleged fraudulent statement.

The district court found MDNet could not prove justifiable reliance because no party could justifiably rely on an oral promise foreclosed by the requirement that a subsequent agreement be in writing. MDNet alleges no facts from which one could reasonably infer an intention to waive or modify the writing requirement. The continued negotiation of the September 2000 Proposed Contract, defining many of the essential terms of an agreement, made reliance on tentative oral statements unreasonable. The district court correctly dismissed the claim for fraudulent misrepresentation.

IV. CONCLUSION

For reasons other than those relied on by the district court, we affirm the dismissal of the MDNet complaint.s

All Citations

147 Fed.Appx. 239, 2005 WL 1385906

TAB 39

2011 WL 159674



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Loreto v. Procter & Gamble Co.](#), 6th Cir.(Ohio), February 22, 2013

2011 WL 159674

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Michelle and John MEDLEY, Christina Benson,
Kristin Cox et al., individually and on behalf
of all others similarly situated, Plaintiffs,

v.

JOHNSON & JOHNSON CONSUMER
COMPANIES, INC., Defendants.

Civil No. 10-cv-02291 (DMC)(JAD).

Jan. 18, 2011.

Attorneys and Law Firms[Scott M. Lempert](#), Sandals & Associates, P.C., Philadelphia,
PA, for Plaintiffs.[Daniel B. Carroll](#), Drinker, Biddle & Reath, LLP, Florham
Park, NJ, for Defendants.**OPINION**[DENNIS M. CAVANAUGH](#), District Judge.

*1 This matter comes before the Court upon motion by Johnson & Johnson Consumer Companies, Inc. ("Defendant") to dismiss the Plaintiff's Consolidated Amended Class Action Complaint ("CACAC") pursuant to [Fed.R.Civ.P. 12\(b\)\(1\)](#) for lack of subject matter jurisdiction. Pursuant to [Fed. R. Civ. Pro 78](#), no oral argument was heard. After considering the submissions of the parties, and based upon the following, Defendants motion is **granted**.

I. BACKGROUND

The ten plaintiffs joined in this Complaint allege that Defendant J & J violated the FDA's ban on methylene chloride as an ingredient in cosmetic products, pursuant to [21 C.F.R. § 700.19](#). Attorney for Plaintiffs previously brought six virtually identical cases before this Court, four of which were dismissed on August 2, 2010 for lack of standing pursuant

to a motion for reconsideration filed by Defendant Johnson & Johnson.¹ The CACAC allegedly raises new factual and legal issues that distinguish this Complaint from the others that were dismissed by this Court, including allegations that Johnson & Johnson has been investigated by the FDA, and that methyl chloride is an ingredient in its baby shampoo.

¹ *Vercellono v. Gerber Products Co. et al.*, Case 2:09-cv-02905 DMC-MF, CLOSED 8/2/10; *Crouch v. Johnson and Johnson Consumer Cos., Inc. et al.*, Case 2:09-cv-02905 DMC-MF, CLOSED 8/2/10; *Levinson v. Johnson & Johnson Consumer Cos., Inc. et al.*, Case 2:09-cv-03317 DMC-MF, CLOSED 8/2/10; *Boyd v. Johnson & Johnson Consumer Cos. Inc.*, Case 2:09-cv-03135 DMC-MF; CLOSED 8/2/10.

II. LEGAL STANDARD

As the Supreme Court has long held, "Constitutional standing requires (1) injury-in-fact, which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Moreover, a "legally and judicially cognizable" injury-in-fact must be "distinct and palpable," not "abstract or conjectural or hypothetical." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (internal quotations omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), and *Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). As the Third Circuit has held, "while it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms." See *Danvers Motor Co., Inc. v. Ford Motor Co.* 432 F.3d 286, 291 (C.A.3 (N.J.), 2005).

"There is a fundamental difference of review under [Fed.R.Civ.P. 12\(b\)\(1\)](#), where the existence of disputed facts will not preclude the Court from evaluating the merits of the jurisdictional claim, and [Fed.R.Civ.P. 12\(b\)\(6\)](#) where the Court is required to accept as true all the allegations of the complaint and all inferences arising from them." *Anjelino v. New York*, 200 F.3d 73, 87 (Dd Cir., 1999). "[T]he threshold to withstand a motion to dismiss under [\[Rule\] 12\(b\)\(1\)](#) is thus lower than that required to withstand a [Rule 12\(b\)\(6\)](#) motion."

2011 WL 159674

Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir., 1991).

III. DISCUSSION

*2 The Court accepts Plaintiff's contention that economic injury is sufficient to confer Article III standing such that the Court has subject matter jurisdiction over this case. The Court notes the language of *Danvers Motor Co., Inc. v. Ford Motor Co.* 432 F.3d 286, 293 (C.A.3 (N.J.),2005) in which the Third Circuit held that "monetary harm is a classic form of injury-in-fact," and that "injury-in-fact is not Mount Everest." In spite of that language, however, Plaintiffs cannot clear the threshold requirement for showing economic injury. As the Court understands the CACAC, the economic injury for which Plaintiffs seeks redress is the price Plaintiffs paid for shampoo, which they then apparently used in bathing their children, without adverse health reactions. Whatever injury they claim to have suffered due to their subsequent discovery of methyl chloride in the shampoo could not, therefore, have been economic.² Simply put, Plaintiffs bought and used shampoo, and subsequently wished that they had not done so because they feared for the future safety of their children. Their assertion that because the product was tainted, the injury occurred at the moment of purchase, is unavailing. Plaintiff's reasoning in the CACAC is circular and unpersuasive as to the contention that Plaintiffs suffered an injury-in-fact. The CACAC avers that "had Plaintiffs known the true nature of Defendant's baby shampoo, they neither would have purchased it nor allowed their children to be exposed to it." This is undoubtedly correct, but the conclusion that "consequently, Plaintiffs have been economically damaged" simply does not follow. (See ECF Doc. 27, page ID# 483). Presumably, had Plaintiffs known about the alleged toxicity of the shampoo prior to using the product they would either have returned it unopened, or not purchased it in the first place. Once the product had been consumed, however, there was no economic injury for Plaintiffs to complain of, and the fear of future injury is legally insufficient to confer standing. Plaintiffs received the benefit of their bargain so long as there were no adverse health consequences, and the product worked as intended, meaning that the hair of Plaintiff's children was cleansed, and their eyes and skin were not irritated. There is nothing in the CACAC to suggest otherwise. The

Court finds that the facts as pled in the CACAC are legally insufficient to demonstrate an injury-in-fact of even the most *de minimis* amount, and that no further restyling of the CACAC could overcome this jurisdictional hurdle. It would be both foolish and impossible to parse and measure the amount of shampoo each Plaintiff used prior to the discovery of taint, and the Court will not entertain such a fractionated analysis. Short of seeking redress for the unused portion of a bottle of shampoo that was discarded subsequent to discovery of the alleged contamination, a practical and legal absurdity, there is simply no cognizable economic injury. The Court need not reach the issue on which the previous four cases were dismissed, namely the contention that methyl chloride was not an "ingredient" as that term is understood by the Food and Drug Administration, although the Court notes that Plaintiff's syllogistic reasoning, that methyl chloride was a "component," and therefore an "ingredient" is neither a factual nor a legal improvement over Plaintiff's previous allegations. To the extent that there is no injury-in-fact, either economic or otherwise, the "per se" adulteration of the product is simply irrelevant to these Plaintiffs, since they have no standing to bring the claim before this Court. Plaintiff should consider this issue to have been fully litigated and thus precluded for future consideration by the Court.

² It should be noted that Plaintiffs have not alleged economic injury on a theory that they paid a premium price for this brand of shampoo based on Johnson & Johnson's misrepresentation of their product as being safe and non-toxic for children, more so than comparable but less expensive alternatives. See *Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir., 2003).

III. CONCLUSION

*3 For the reasons contained herein, Defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) is **granted**. An appropriate order follows this opinion.

All Citations

Not Reported in F.Supp.2d, 2011 WL 159674

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 40

2017 WL 2063008

2017 WL 2063008

Only the Westlaw citation is currently available.

United States District Court, W.D.

Texas, San Antonio Division.

Jo Ann MONK, Individually and as Personal
Representative of the Estate of Jesse Monk, Plaintiff,
v.

WYETH PHARMACEUTICALS,
INC., et al., Defendants.

Civil Action No. SA-16-CV-1273-XR

Signed 05/11/2017

Attorneys and Law Firms

Jack Edward Urquhart, Craig D. Henderson, Kathryn Snapka,
The Snapka Law Firm, Corpus Christi, TX, for Plaintiff.

Glenn S. Kerner, Nilda M. Isidro, Goodwin Procter LLP, New
York, NY, Michael A. Walsh, Strasburger & Price, Dallas, TX,
Elizabeth Ross Hadley, Greenberg Traurig LLP, Austin, TX,
Lori Gail Cohen, Sara K. Thompson, Greenberg Traurig, LLP,
Atlanta, GA, for Defendants.

ORDER

XAVIER RODRIGUEZ, UNITED STATES DISTRICT
JUDGE

*1 On this date, the Court considered Defendant Teva
Pharmaceuticals' Motion to Dismiss (Docket no. 21),
Defendants Eon Labs and Sandoz Inc.'s Motion to Dismiss
(Docket no. 22), and the corresponding responses and replies.
After careful consideration, the motions to dismiss are
GRANTED IN PART AND DENIED IN PART.

BACKGROUND**I. Plaintiff's Factual Allegations**

Jesse Monk had [atrial fibrillation](#). Docket no. 18 at 6. Doctors
prescribed [amiodarone](#) as a treatment. *Id.* He never received a
Medication Guide describing certain risks associated with his
use of [amiodarone](#) and his pharmacy did not have Medication
Guides to provide to him. *Id.* at 7. After taking [amiodarone](#)
as prescribed for approximately eight years, Monk died in

January 2015. *Id.* at 1, 6. His autopsy revealed that the cause
of death was [amiodarone poisoning](#). *Id.* at 8. Monk's spouse,
Jo Ann Monk, is the plaintiff in this lawsuit, and brings claims
individually and as personal representative of Jesse Monk's
estate. *Id.* at 1. Defendants Teva Pharmaceuticals USA, Inc.,
Eon Labs, Inc., and Sandoz, Inc. are distributors of a generic
form of [amiodarone](#). *Id.* at 6. Defendants are required by Food
and Drug Administration ("FDA") regulations and the Food,
Drug, and Cosmetics Act ("FDCA") to provide Medication
Guides to Monk via his pharmacy. *Id.* at 7-8; *see* 21 C.F.R.
§ 280.24(b).

Jesse Monk was prescribed [amiodarone](#) "off label"—that
is, for a use for which it was not fully approved by the
FDA. *Id.* at 6. In particular, [amiodarone](#) was approved
by the FDA through a limited "special needs" process,
meaning that it was only approved "as a drug of last
resort for patients suffering from documented recurrent life-
threatening [ventricular fibrillation](#) and [ventricular tachycardia](#)
when these conditions would not respond to other available
anti-arrhythmic drugs and therapies." *Id.* at 5-6. Despite
being approved only for these purposes, doctors prescribed
[amiodarone](#) to Monk for treatment of [atrial fibrillation](#). *Id.*

When Monk had his prescription filled at a local Walgreen's
pharmacy, he was never given a Medication Guide. *Id.* at
7. According to the complaint, Monk did not know that he
was prescribed [amiodarone](#) off label or of the risks of taking
[amiodarone](#), the Medication Guide would have given him this
information, and he would not have taken [amiodarone](#) had he
been fully informed. *Id.*

Plaintiff's live complaint asserts causes of action for
negligence, negligence per se, and gross negligence:

[Defendants] have a duty to market
[amiodarone](#) in such a way as
to avoid unreasonable harm to
patient consumers. [Defendants] were
required to provide a Medication
Guide ... They failed to comply with
that requirement and in doing so
breached parallel Texas State law
duties. [Defendants'] failure to provide
[amiodarone](#) Medication Guides as
required breached the Texas state
common law duty to adequately warn

2017 WL 2063008

of risks association with prescription medicines.

Id. at 11.

Defendant Teva filed a motion to dismiss on March 14, 2017. Docket no. 21. Defendants Eon and Sandoz filed a similar motion that same day. Docket no. 22.

II. The FDA's Drug Approval Framework¹

¹ This background is taken from prior case law and the allegations in Plaintiff's live complaint; it is meant merely to provide context for the factual and legal contentions in this case and not as a comprehensive primer on FDA requirements and regulations.

*2 Brand-name prescription drugs must be approved by the FDA before they go to market. Docket no. 18 at 5. To begin this process, the sponsor of a drug submits a new drug application ("NDA"). *Id.* NDAs include a litany of information relating to a drug's safety, effectiveness, proposed uses, warnings, and potential adverse reactions. *Id.* In 1984, Wyeth, a pharmaceutical company that was initially named as a defendant in this lawsuit but has since been voluntarily dismissed by Plaintiff, sponsored approval of [amiodarone](#) under the brand name [Cordarone](#). *Id.* at 5; see also Docket no. 20. In doing so, however, [Cordarone](#) obtained FDA approval under an abbreviated "special needs" process whereby a drug is not subject to the full rigor of an NDA but is approved only for certain, limited "special needs." Docket no. 18 at 5. As such, [Cordarone](#) "was approved only as a drug of last resort for patients suffering from documented recurrent life-threatening [ventricular fibrillation](#) and [ventricular tachycardia](#) when these conditions would not respond to other available anti-arrhythmic drugs and therapies." *Id.* at 5–6.

The above procedure applied only to the initial approval of a Wyeth's *brand-name* formulation of [amiodarone](#), but the remaining defendants in this action are manufacturers of a *generic* form of [amiodarone](#). *Id.* at 5. As such, they are governed by a slightly different regulatory process:

In 1984, through the Hatch–Waxman Amendments, Congress

modified these procedures for generic drug manufacturers, creating an expedited process for approving generic drugs. See DRUG PRICE COMPETITION AND PATENT TERM RESTORATION ACT OF 1984, Pub. L. 98–417, 98 Stat. 1585 (codified in scattered sections of 21 and 35 U.S.C.). In essence, these amendments allow a generic drug manufacturer to piggy-back on the FDA approval of a brand name drug—greatly accelerating the process for receiving approval—provided that the generic drug has active ingredients and labeling identical to that of the FDA-approved brand name drug. [PLIVA, Inc. v. Mensing](#), 564 U.S. 604, 612–13, n. 2 (2011). After the generic drug receives approval, the generic manufacturer is prohibited from making changes to the drug itself or from unilaterally changing the drug's label. See [Mutual Pharmaceutical Co., Inc. v. Bartlett](#), 133 S. Ct. 2466, 2471 (2013).

[Eckhardt v. Qualitest Pharm., Inc.](#), 751 F.3d 674, 676 (5th Cir. 2014) (citations modified).

Defendants all received FDA approval to manufacture, market, sell, and distribute their generic formulas of [amiodarone](#). Docket no. 18 at 6. Accordingly, they were required by the FDA and FDCA to provide certain labels, warnings, and information. *Id.* Most notably for purposes of this lawsuit, the FDCA and its regulations require generic drug manufacturers to disseminate Medication Guides:

(b) Each manufacturer who ships a container of drug product for which a Medication Guide is required under this part is responsible for ensuring that Medication Guides are available for distribution to patients by either:

(1) Providing Medication Guides in sufficient numbers to distributors, packers, or authorized dispensers to permit the authorized dispenser to provide a Medication Guide to each patient receiving a prescription for the drug product; or

2017 WL 2063008

(2) Providing the means to produce Medication Guides in sufficient numbers to distributors, packers, or authorized dispensers to permit the authorized dispenser to provide a Medication Guide to each patient receiving a prescription for the drug product. ...

(e) Each authorized dispenser of a prescription drug product for which a Medication Guide is required under this part shall, when the product is dispensed to a patient (or to a patient's agent), provide a Medication Guide directly to each patient (or to the patient's agent) unless an exemption applies under 208.26.

21 C.F.R. § 208.24(b), (e); see also *McLeod v. Sandoz, Inc.*, 4:16-CV-01640-RBH, 2017 WL 1196801, at *9 (D.S.C. Mar. 31, 2017) ("Specifically, 21 C.F.R. § 208.24 provides that '[e]ach manufacturer who ships a container of drug product for which a Medication Guide is required under this part is responsible for ensuring that Medication Guides are available for distribution to patients.'").

DISCUSSION

*3 Defendants attack Plaintiff's state law claims in three ways. First, they argue that these claims are preempted by federal law under *Buckman Co. v. Plaintiff's Legal Comm.*, 531 U.S. 341 (2001). Second, they argue that Plaintiff has not pled the existence of a duty under Texas law because the learned intermediary doctrine requires pharmaceutical distributors to give warnings only to prescribing physicians rather than directly to patients. Third, they argue that Texas law does not recognize a negligence per se claim based on alleged violations of the FDCA or FDA regulations. More generally, Defendants also argue that Plaintiff's complaint does not meet federal pleading standards because it does not differentiate its allegations as between the three defendants.

For the following reasons, most of these arguments fail. The only one of Defendants' arguments that succeeds is that Plaintiff's negligence per se claims should be dismissed; to this extent, the motions to dismiss are GRANTED. In all other respects, the motions are DENIED.

I. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim for relief must contain: (1) "a short and plain statement of the grounds for the court's jurisdiction"; (2) "a short and plain statement of the claim showing that the pleader is entitled to the relief"; and (3) "a demand for the relief sought." FED. R. CIV. P. 8(a). In considering a motion to dismiss under Rule 12(b)(6), all factual allegations from the complaint should be taken as true, and the facts are to be construed favorably to the plaintiff. *Fernandez-Montez v. Allied Pilots Assoc.*, 987 F.2d 278, 284 (5th Cir. 1993). To survive a 12(b)(6) motion, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

II. Plaintiff properly alleges that Defendants did not comply with the applicable federal regulations.

Initially, the Court dispenses with an argument asserted by Defendants Sandoz and Eon—that Plaintiff's complaint does not allege that Sandoz and Eon violated any FDA regulations. In particular, Sandoz and Eon argue that Plaintiff does not allege their non-compliance with § 208.24(b) because "[t]he mere allegation that [they] did not provide Medications Guides to the Decedent's pharmacy is not sufficient to allege a violation of this regulation." Docket no. 22 at 8. With reference to the regulatory language quoted above, they point out that one way a manufacturer complies with the regulations is by "[p]roviding the means to produce Medication Guides," meaning that their failure to provide Medication Guides itself does not violate the regulations. See 21 C.F.R. § 208.24(b)(2).

Sandoz and Eon misread the allegations of the complaint. They focus narrowly on Plaintiff's allegation that "Medication guides were not provided to that pharmacy by ... Eon, Sandoz, or any of their distributors." Docket no. 18 at 7. Plaintiff, however, goes further by adding the following allegations: "Defendants failed to provide a Medication Guide that would reach Jesse Monk," *id.* at 3; "Jesse Monk's pharmacy did not have Teva, Eon, or Sandoz Medication Guides to provide Jesse Monk as these defendants each failed to distribute them as required," *id.* at 7. Though the complaint does not track the regulatory language verbatim, the allegation that the pharmacy did not have the Medication Guides necessarily follows from the premise that the pharmacy lacked the Guides themselves and the means to produce them.

*4 Sandoz and Eon also argue that § 208.24(e) imposes no legal obligation to ensure actual delivery of a Medical

2017 WL 2063008

Guide to a patient. Instead, they argue, this regulation applies only to authorized distributors, which the pharmacy is but they are not. Sandoz and Eon ignore that subsection (e) does not absolve manufacturers of the requirements of subsection (b) but instead imposes separate requirements on authorized distributors *in addition to* those imposed on manufacturers. As explained above, the complaint adequately alleges that Sandoz and Eon did not comply with subsection (b); thus, whether they also complied with subsection (e) is irrelevant. Accordingly, Sandoz and Eon's argument that the complaint does not adequately allege a violation of the applicable federal regulations is without merit.

III. Under state law, Plaintiff adequately alleges negligence claims but does not adequately allege negligence per se claims.

a. Plaintiff's state law claims are not preempted by *Buckman*.

Defendants argue that under the Supreme Court's decision in *Buckman*, Plaintiff's Texas law claims that are based on Defendants' failure to provide an FDA-required Medication Guide are preempted. 531 U.S. 341, 352–53 (2001); see also 21 U.S.C. § 337(a) (“[A]ll such proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States.”). *Buckman* dealt with “fraud-on-the-FDA” claims involving a medical device manufacturer allegedly using fraudulent tactics to obtain FDA approval for a device and plaintiffs subsequently bringing private causes of action against that manufacturer for its misrepresentations to the FDA.² 531 U.S. at 345–46. Recognizing that private, state law causes of action for fraud-on-the-FDA conflict with federal law because they skewed “a somewhat delicate balance of statutory objectives” covered by the FDA, the Supreme Court found that these claims were preempted. *Id.* at 348. The broader lesson from *Buckman*, which Defendants seek to invoke here, is that state law claims that exist “solely by virtue” of FDCA requirements are preempted. *Buckman*, 531 U.S. 341, 352–53 (2001); see also *Perdue v. Wyeth Pharm., Inc.*, 209 F. Supp. 3d 847, 851 (E.D.N.C. 2016) (holding that a state law claim is preempted under *Buckman* if “ ‘the existence of these federal enactments is a critical element in [plaintiff's] case,’ and [if] a plaintiff's claims ‘exist solely by virtue of the FDCA ... requirements.’ ” (quoting *Buckman*, 531 U.S. at 352)). Indeed, this preemptive effect of *Buckman* has been

extended beyond the fraud-on-the-FDA context by some courts. See, e.g., *Perdue*, 209 F. Supp. 3d at 851–52.

- 2 After two failed attempts to obtain FDA approval for its device, the manufacturer split the device into component parts and obtained piecemeal FDA approval for these parts. *Buckman*, 531 U.S. at 345–46.

Crucially, however, the *Buckman* Court distinguished preempted “fraud-on-the-agency” claims from those based on “traditional state tort law principles of the duty of care,” recognizing that “certain state-law causes of actions that parallel federal safety requirements” are not preempted. *Buckman*, 531 U.S. at 352–53; see also *Perdue*, 209 F. Supp. 3d at 847 (noting that a state law claim is not preempted under *Buckman* if it rests on “ ‘traditional state tort law principles of the duty of care,’ the establishment of which ‘predated the federal enactments in question.’ ... In this manner, *Buckman* does not extend so far as to restrict ‘certain state-law causes of actions that parallel federal safety requirements.’ ” (quoting *Buckman*, 531 U.S. at 352)). This distinction is logical—the reason for preempting fraud-on-the-agency claims is primarily to protect the “somewhat delicate balance of statutory objectives” that could be skewed by interference from private enforcement, but pre-existing state law tort principles alone do not implicate that same concern.

*5 Recently, the Fifth Circuit addressed a claim similar to this one involving a pharmaceutical company's failure to provide FDA-required warnings. In *Eckhardt v. Qualitest Pharmaceuticals, Inc.*, the plaintiff attempted to assert a cause of action based on generic drug manufacturers' failure to provide the plaintiff or his physician with any FDA-approved warnings. 751 F.3d 674, 679 (5th Cir. 2014). Ultimately, the Fifth Circuit affirmed the district court's dismissal of these claims because the plaintiff did not make adequate factual allegations. *Id.* Before doing so, however, the court indicated that because “failing to provide FDA-approved warnings *would be a violation of both state and federal law*, this is a parallel claim that is not preempted.” *Id.* (emphasis added).

Other decisions from this Court have followed *Eckhardt*. In *Mitchell v. Wyeth*, a case involving similar allegations based on generic amiodarone manufacturers' failure to provide Medication Guides, Magistrate Judge Mark Lane recommended that the district court deny the pharmaceutical defendants' motion to dismiss:

[Defendant] argues that under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 349 n.4 (2001), [plaintiff] does not have a private right of action to the manufacturer's duty to provide the Medication Guide. However, despite rejecting a variety of allegedly parallel state tort claims as preempted by *Mensing* and *Bartlett*, the Fifth Circuit recently held in *Eckhardt v. Qualitest Pharms., Inc.*, 751 F.3d 674, 679 (5th Cir. 2014), that an allegation that generic drug manufacturers "failed to provide [plaintiff] or his physician with any of the FDA-approved warnings ... would be a violation of both state and federal law, [and] this is a parallel claim that is not preempted." *Id.* at 679–80....

To the extent [plaintiff] seeks to allege that Defendants failed to comply with their obligation to supply distributors with the FDA-required Medication Guides, and this failure proximately caused [the decedent] to take amiodarone without knowledge of the FDA-approved warnings, such a claim would survive federal preemption under *Eckhardt's* reasoning.

Case No. 1:16-CV-574-LY-ML, Docket no. 73 at 8–9 (W.D. Tex. Jan. 1, 2017) (some citations omitted). The district court summarily adopted this recommendation after a *de novo* review. *Id.* at Docket no. 75 (W.D. Tex. Feb. 9, 2017). Judge Lane previously made similar recommendations in two more amiodarone cases. See *Rusk v. Wyeth*, Case No. 1:14-CV-549-LY-ML, 2015 WL 3651434 (W.D. Tex. June 11, 2005);³ *Priest v. Sandoz*, Case no. 1:15-CV-822-ML-LY, Docket no. 65 (W.D. Tex. December 29, 2016).⁴ As in *Mitchell*, the district court summarily adopted both of these recommendations after conducting a *de novo* review. *Rusk*, Case no. 1:14-CV-549-LY, Docket no. 46 (W.D. Tex. October 16, 2015); *Priest*, Case no. 1:15-CV-822-LY, Docket no. 67 (W.D. Tex. January 31, 2016).

³ "Plaintiffs in this case allege that [defendant] was responsible for providing an FDA-mandated 'Medication Guide.' Plaintiffs further allege that [the decedent] never received the Medication Guide, and that 'the Pharmacies' assert 'no manufacturer' was providing the Guides to pharmacists or patients. To the extent Plaintiffs seek to allege that Sandoz failed to comply with its obligation to supply distributors with the FDA-required Medication Guides, and this failure proximately caused [the decedent] to take amiodarone [sic] without knowledge of the FDA-

approved warnings, such a claim would survive federal preemption under *Eckhardt's* reasoning." *Rusk*, 2015 WL 3651434 at *7 (citations omitted).

⁴ "[D]espite rejecting a variety of allegedly parallel state tort claims as preempted ... the Fifth Circuit recently held in *Eckhardt v. Qualitest Pharms., Inc.*, 751 F.3d 674, 679 (5th Cir. 2014) that an allegation that generic drug manufacturers 'failed to provide [plaintiff] or his physician with any of the FDA-approved warnings ... would be a violation of both state and federal law, [and] this is a parallel claim that is not preempted.' *Id.* at 679–80 ... To the extent Plaintiff seeks to allege that [defendant] failed to comply with its obligation to supply distributors with the FDA-required Medication Guides, and this failure proximately caused [the decedent] to take amiodarone without knowledge of the FDA-approved warnings, such a claim would survive federal preemption under *Eckhardt's* reasoning." *Priest*, Case no. 1:15-CV-822-ML-LY, Docket no. 65 at 11–12 (W.D. Tex. December 29, 2016).

*6 Defendants challenge *Eckhardt* and its progeny for failing to provide reasoning based in Texas law to support the proposition that these Medication Guide claims allege a breach of a parallel duty under Texas law. Defendants ignore, though, that regardless of the explanation in *Eckhardt*, this Court is bound by Fifth Circuit precedent, which expressly recognizes that a claim for failure to provide FDA-approved warnings alleges "a violation of both [Texas] and federal law" and that such a claim "is a parallel claim that is not preempted." 751 F.3d at 679.

Defendants also seek to avoid the *Eckhardt* line of cases by arguing that "neither *Mitchell* nor *Eckhardt* contains any substantive preemption analysis under *Buckman* whatsoever." E.g., Docket no. 30 at 8. In *Mitchell*, Judge Lane's recommendation addressed the argument that *Buckman* preempted the plaintiff's Medication Guide claim. *Mitchell*, Case No. 1:16-CV-574-LY-ML, Docket no. 73 at 8. Defendants may disagree with the analysis or object to its depth, but to say that the recommendation does not contain such an analysis is incorrect. As to *Eckhardt*, whether the court meant that the parallel claims were preempted under *Buckman* or under another source of preemption is irrelevant because the court found that "failing to provide FDA-approved warnings would be a violation of state and federal law ... [and] is a parallel claim." Because "certain state-law causes of actions that parallel federal safety requirements"

2017 WL 2063008

are not preempted under the express language of *Buckman*, 531 U.S. at 353, and the Fifth Circuit in *Eckhardt* found that claims for failing to provide FDA approved warnings (like Plaintiff's here) are indeed parallel claims, this Court, at most, takes the simple step of connecting the rule of *Buckman* with the finding of *Eckhardt*.⁵

⁵ The court in *Eckhardt* may well have meant that *Buckman* does not preempt these claims, undermining Defendants' argument entirely. Still, Defendants are correct that the court did not mention *Buckman* by name. At most, it is possible that the court never analyzed whether *Buckman* would also warrant preemption in light of its finding that the state law claims there paralleled federal law.

Other case law does not warrant a contrary result. Defendants cite a variety of cases from the Fifth Circuit dealing with other pharmaceutical claims, but none of these cases dealt with the potential preemptive effect of *Buckman* on state law negligence claims such as the ones here. A large number of these cases involved fraud-on-the-FDA claims, like those in *Buckman* that the Supreme Court found skewed the "somewhat delicate balance of statutory objectives" involved in FDA regulation. See, e.g., *Estes v. Lanx, Inc.*, 660 Fed.Appx. 260, 261 (5th Cir. 2016). Another case cited by Defendants, *Morris v. PLIVA, Inc.*, deals specifically with a pharmaceutical manufacturer's labeling of its products, and was not a barrier to the Fifth Circuit's subsequent decision in *Eckhardt* (or any of Judge Lane's recommendations). 713 F.3d 774, 777–78 (5th Cir. 2013). Defendants also cite a variety of cases from district courts outside the Fifth Circuit that have found similar claims to be preempted, but these cases interpret other states' laws and lack the binding guidance of a case like *Eckhardt*. See, e.g., *McDaniel v. Upsher-Smith Pharm., Inc.*, 216CV02604JPMC GC, 2017 WL 657778, at *4 (W.D. Tenn. Jan. 26, 2017) (interpreting Tennessee law and correctly characterizing *Eckhardt* as "only persuasive and not binding authority.").

In sum, the Court finds that Plaintiff's claims are not preempted because under *Buckman*, parallel claims are not preempted, and under *Eckhardt*, claims such as Plaintiff's are parallel claims.

b. The learned intermediary doctrine does not bar Plaintiff's claims at this stage.

*7 Under Texas law, "[t]he elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). Thus, in order to state a cause of action for negligence, Plaintiff must allege the existence of a legal duty under Texas law. Whether Plaintiff has done so turns on Texas' learned intermediary doctrine.

Texas law has long limited a manufacturer or supplier's duty to warn end users of its products in certain situations where an intermediary separates the supplier from the end user. See *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 591 (Tex. 1986) ("[A] manufacturer or supplier may, in certain situations, depend on an intermediary to communicate a warning to the ultimate user of a product."). The Texas Supreme Court in *Alm*—a products liability case involving the manufacture of an aluminum bottle cap—hypothesized about the applicability of this doctrine in the prescription drug context while summarizing the reasoning and holdings from lower Texas courts:

In some situations, courts have recognized that a warning to an intermediary fulfills a supplier's duty to warn ultimate consumers. For example, when a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product, the manufacturer is excused from warning each patient who receives the drug. The doctor stands as a learned intermediary between the manufacturer and the ultimate consumer. Generally, only the doctor could understand the propensities and dangers involved in the use of a given drug. In this situation, it is reasonable for the manufacturer to rely on the intermediary to pass on its warnings. However, even in these circumstances, when the warning to the intermediary is inadequate or misleading, the manufacturer remains

2017 WL 2063008

liable for injuries sustained by the ultimate user.

Id. at 591–92 (citations omitted). The Texas Supreme Court ultimately found that there was some evidence in the record to support the jury’s finding that the warnings given by the manufacturer of the bottle cap to the bottler (i.e., the intermediary) were inadequate. *Id.* at 593

Picking up on this language from *Alm*, the Texas Supreme Court later held that the learned intermediary doctrine applies to a pharmaceutical manufacturer’s duty to warn consumers of dangers associated with prescription drugs. *Centocor, Inc. v. Hamilton*, 372 S.W.3d 140, 156 (Tex. 2012). Previously, the Texas Supreme Court “[had] not considered a case that squarely present[ed] the applicability of the learned intermediary doctrine within the context of prescription drug products-liability cases.” *Id.* at 157. But in *Centocor*, the court extended the rule to such a situation:

[W]e hold that a prescription drug manufacturer fulfills its duty to warn end users of its product’s risks by providing adequate warnings to the intermediaries who prescribe the drug and, once fulfilled, it has no further duty to warn the end users directly. *But as we have previously indicated, when the warning to the prescribing physician is inadequate or misleading, the prescription drug manufacturer remains liable for the injuries sustained by the patient.*

Id. at 15 (emphasis added).

Plaintiff correctly highlights the emphasized language from *Centocor*. Unlike Defendants’ characterization of Plaintiff’s argument, this language does not signify an exception to the learned intermediary doctrine, but rather is the rule itself. Where warnings to a learned intermediary are adequate, a drug manufacturer fulfills its duty to warn end users of its products under Texas law, but this result occurs *only if* the drug manufacturer provided adequate warnings. Accordingly, the application of the learned intermediary doctrine does not bar Plaintiff’s claims, as this Court recognized in *Mitchell*.

Case No. 1:16–CV–574–LY–ML, Docket no. 73 at 8–9 (“Texas’s learned intermediary doctrine also does not defeat this cause of action.”). Plaintiff has pled that Defendants failed to provide adequate warnings of the dangers of their products, and under Texas law, this sufficiently states a claim. Whether those warnings were in fact adequate—such that the learned intermediary doctrine would shield Defendants from liability—can be considered at the summary judgment phase after the parties have conducted discovery on the issue.

c. Plaintiff’s negligence per se claims are dismissed.

*8 Defendants argue that Plaintiff’s negligence per se claim should be dismissed because Texas law does not recognize a cause of action for negligence per se based on alleged violations of the FDCA. Docket no. 21 at 14. The Court agrees.

“Negligence per se is a tort theory whereby courts use statutes or regulations to define the standard of reasonably prudent conduct.” *Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 594 (W.D. Tex. 2002) (citing *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979)). The Court has relatively little guidance on this question because neither the Fifth Circuit nor the Texas Supreme Court has stated whether a violation of the FDCA and FDA regulations can give rise to a negligence per se claim. *Hackett*, 246 F. Supp. 2d at 594.

To support their arguments, Defendants rely primarily on *Hackett*, where this Court found that Texas law did not recognize such a claim. 246 F. Supp. 2d at 546. The Court was persuaded by the thorough analysis of a Texas trial court, which found that under the applicable factors set forth by the Texas Supreme Court, the FDCA and FDA regulations did not give rise to a cause of action for negligence per se under Texas law. *Id.* (discussing and following *Baker v. Smith & Nephew Richards, Inc.*, Case No. 95–58737, 1999 WL 811334, at *8–11 (Tex. Dist. June 7, 1999)⁶). At least two other federal district courts in Texas have relied on *Hackett* and *Baker* to summarily find that “Texas courts ... refuse to recognize a cause of action for negligence per se based on violations of the [FDCA] and FDA regulations.” *Holland v. Hoffman–La Roche, Inc.*, 3–06–CV–1298–BD, 2007 WL 4042757, at *3 (N.D. Tex. Nov. 15, 2007) (quoting *Hackett*, 246 F. Supp. 2d at 594); *see also Jackson v. Tae Jin Kim*, 2:02–CV–200, 2004 WL 6040969, at *4 (E.D. Tex. Sept. 27, 2004) (citing *Baker*, 1999 WL 811334 at *8). The Court is persuaded by the cases cited by Defendants, and agrees that Texas law likely does not

2017 WL 2063008

recognize a cause of action for negligence per se based solely on the violation of the FDCA and FDA regulations.

6 *Baker* was affirmed, but the appellate court expressly withheld a ruling on this question. See *McMahon v. Smith & Nephew Richards, Inc.*, Case No. 14-99-00616-CV, 2000 WL 991697, at *3, n. 2 (Tex. App.—Houston [14th Dist.] July 20, 2000, no pet.).

Plaintiff's arguments to the contrary are unavailing. First, Plaintiff argues that the cases cited by Defendants were summary judgment decisions that came long after the pleadings stage. *Hackett's* dismissal of the negligence per se claims, however, came on a Rule 12(c) motion for judgment on the pleadings. 246 F. Supp. 2d at 593–94. Further, all of these cases, despite being postured as summary judgment decisions, conducted a legal (not factual) analysis of negligence per se claims. Plaintiff next relies on an out-of-circuit decision interpreting Oklahoma law as recognizing a negligence per se claim in these circumstances, but this case is far from binding in any respect and is countered by other out-of-circuit decisions that reach the opposite result. Compare Docket no. 28 at 13 (citing *Howard v. Zimmer*, 718 F.3d 1209, 1210 (10th Cir. 2013) for the proposition that Oklahoma law recognizes FDA-based negligence per se claims) with *Talley v. Danek Medical, Inc.*, 179 F.3d 154, 157–61 (4th Cir. 1999) (finding that Virginia law did not permit plaintiff to enforce certain violations of FDA regulations through a negligence per se claim). Finally, Plaintiff argues that Judge Lane permitted similar negligence per se claims to proceed in his recommendations in *Rusk* and *Priest*, but as Defendants note, Judge Lane never analyzed these claims; the refusal to dismiss these claims *sua sponte*, especially in the absence of argument from the parties, is not an affirmation of the validity of these claims. Accordingly, Plaintiff's negligence per se claims are dismissed.

IV. Plaintiff's complaint is not deficient for failing to differentiate its allegations among the three defendants.

*9 Finally, the Court dispenses with Defendants Sandoz and Eon's argument that Plaintiff's complaint is inadequate for failing to differentiate its allegations as to each of the three defendants. Docket no. 22 at 13. Though Plaintiff's complaint does not separate its allegations, it specifically identifies each defendant and specifically describes all Defendants' allegedly wrongful conduct. See, e.g., Docket no. 18 at 6 ¶ 31; 7 ¶ 39; 7–8 ¶ 40; 11 ¶ 57–61. The fact that Plaintiff accuses all three defendants of the same wrongdoings is not a basis for dismissal.

CONCLUSION

For the foregoing reasons, Defendant Teva's motion to dismiss (Docket no. 21) and Defendants Sandoz and Eon's motion to dismiss (Docket no. 22) are GRANTED IN PART AND DENIED IN PART. In their Rule 26 Report, the parties indicated that they would provide a status report by May 22, 2017. Docket no. 27. In preparation for a status conference (which will be set at a later time) the parties are ORDERED to provide this status update by June 5, 2017. In addition, the parties are further ORDERED to provide scheduling recommendations in accordance with the Court's form (available at Docket no. 15) by June 5, 2017.

It is so ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2063008

TAB 41

2004 WL 57084, 2004 DNH 013

2004 WL 57084
United States District Court, D. New Hampshire.

Linda E. MOORE and Wallace Moore, Plaintiffs

v.

MEDEVA PHARMACEUTICALS, INC., a/
k/a Celltech Pharmaceuticals, Inc., and
Celltech Pharmaceuticals Ltd., Defendants

No. Civ. 01-311-M.

|
Jan. 13, 2004.

Attorneys and Law Firms

John H. O'Neil, Jr., Smith, Elliott, Smith & Garmey, Saco, ME, for Plaintiffs.

Jennifer Humphreys, Pierce & Atwood, Portland, ME, Daniel P. Gibson, Gibson & Behman PC, Burlington, MA, David M. Cohen, Peter C. Neger, Bingham McCutchen LLP, New York, NY, Kevin H. O'Neill, Gibson & Behman PC, Manchester, NH, for Defendants.

ORDER

MCAULIFFE, J.

*1 Linda Moore says that in October of 1998, after receiving a flu vaccine allegedly manufactured, distributed, and/or sold by defendants (and their predecessors), she contracted a “paralytic ailment known as Guillain-Barre Syndrome and other consequential and incidental ailments.” Amended complaint (document no. 28), para. 8. Defendant Celltech Pharmaceuticals, Inc. (“CPI”) moves for summary judgment, claiming it did not manufacture, distribute, or sell the vaccine in question. Nor, says CPI, did it develop or supply the package information or other warnings included with the vaccine. Plaintiffs object, asserting that there are genuinely disputed material facts with regard to CPI's involvement in the vaccine's chain of distribution.

Standard of Review

When ruling on a party's motion for summary judgment, the court must “view the entire record in the light most hospitable to the party opposing summary judgment, indulging all

reasonable inferences in that party's favor.” *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir.1990). Summary judgment is appropriate when the record reveals “no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” *Fed.R.Civ.P. 56(c)*. In this context, “a fact is ‘material’ if it potentially affects the outcome of the suit and a dispute over it is ‘genuine’ if the parties' positions on the issue are supported by conflicting evidence.” *Intern'l Ass'n of Machinists and Aerospace Workers v. Winship Green Nursing Center*, 103 F.3d 196, 199–200 (1st Cir.1996) (citations omitted).

Discussion

I. Background.

Complicating the resolution of CPI's pending motion for summary judgment is the fact that the relationships between the entities responsible for manufacturing, distributing, and selling the vaccine is, to say the least, complex. In a prior memorandum, CPI described some of the relevant relationships as follows:

The influenza flu vaccine (the “Vaccine”) referenced [in plaintiffs'] interrogatories for the year 1998 was manufactured in the United Kingdom by Medeva Pharma Limited, a corporation organized under the laws of the United Kingdom. Medeva Pharma Limited was formerly known as Evans Medical Limited. The name change to Medeva Pharma Limited occurred on July 6, 1998. Medeva Pharma Limited merged into Celltech Pharmaceuticals, Ltd. on April 2, 2001. Medeva Pharma Limited has since sold the assets related to the manufacture of the Vaccine to Evans Vaccines Ltd. in October, 2000. Evans Vaccines Ltd. is an unrelated company to Medeva Pharma Limited and [CPI].

CPI's Answers to Plaintiffs' Interrogatories, Exhibit 2 to CPI's memorandum in support of its motion in limine (document no. 36). *See also* CPI's memorandum at 9 n. 3 (“Medeva Pharma Limited [formerly known as Evans Medical Limited]

2004 WL 57084, 2004 DNH 013

merged into Celltech Pharmaceuticals, Ltd. on April 2, 2001. On September 9, 2002, this Court granted Plaintiffs' Motion to Amend their Complaint to add Celltech Pharmaceuticals, Ltd. as a defendant in this case. As such, Evans is now essentially a defendant in this case.”).

*2 Based upon CPI's statement of the relationships between the various parties, it would appear that defendant Celltech Pharmaceuticals, Ltd. (“Celltech”) is the successor-in-interest to the entity that manufactured the vaccine in question. In fact, in its answer to plaintiffs' amended complaint, Celltech admitted that “prior to October 2, 1998, it manufactured Fluvirin Lot No. E20228KA”—the vaccine at issue in this case. Celltech's Answer (document no. 55) at para. 6. And, in response to plaintiffs' requests for admissions, Celltech admitted that:

it manufactured the [influenza](#) vaccine, Fluvirin, used during the 1998–1999 vaccine season and was responsible for its sale, including the development and provision of package labeling and other warnings approved by the Food and Drug Administration and/or other governmental entities. During the 1998–99 [influenza](#) vaccine season, Celltech Pharmaceuticals, Ltd. shipped packages of Fluvirin, including its approved package labeling directly to, and only to, General Injectables and Vaccines, Inc. (“GIV”), a Virginia corporation. The vaccine was then distributed by GIV. Defendant, Celltech Pharmaceuticals, Ltd. has no knowledge of GIV's distribution methods.

Exhibit 3 to CPI's memorandum (document no. 68), Celltech's Response to Plaintiffs' Request for Admissions at 1–2.

Notwithstanding Celltech's admitted (and, at least according to it and CPI, its exclusive) role in manufacturing the vaccine at issue in this case, preparing and shipping the package inserts approved by the FDA, and contracting for the vaccine's distribution in the United States through General Injectables and Vaccines, Inc., plaintiffs assert that CPI might still be liable to them, based upon the following three factors.

First, plaintiffs point out that CPI's “Medical Information department ... fielded questions from the medical community and its patients regarding medical questions concerning the flu vaccine generally, and Fluvirin, specifically.” Exhibit 1 to plaintiffs' memorandum, CPI's Amended Answer to Plaintiffs' Interrogatory No. 10 at 2. Second, CPI was listed in the Physicians' Desk Reference as an American affiliate of the vaccine's foreign manufacturer. Exhibit 2 to plaintiffs' memorandum, 1999 Physicians' Desk Reference at 3456. And, finally, CPI was registered with the Food and Drug Administration as the United States agent for the vaccine's foreign manufacturer. *See* Plaintiffs' memorandum at 5. *See also* 21 C.F.R. § 207.40(c) (each foreign drug manufacturer required to register with the FDA must provide the name and address of its United States agent).¹

¹ Section 207.40(c) of Title 21 of the Code of Federal Regulations provides, in pertinent, part:

Each foreign drug establishment required to register under paragraph (a) of this section shall submit the name, address, and phone number of its United States agent as part of its initial and updated registration information in accordance with subpart C of this part. Each foreign drug establishment shall designate only one United States agent.

(1) The United States agent shall reside or maintain a place of business in the United States.

(2) Upon request from the FDA, the United States agent shall assist FDA in communications with the foreign drug establishment, respond to questions concerning the foreign drug establishment's products that are imported or offered for import into the United States, and assist FDA in scheduling inspections of the foreign drug establishment. If the agency is unable to contact the foreign drug establishment directly or expeditiously, FDA may provide information or documents to the United States agent, and such an action shall be considered to be equivalent to providing the same information or documents to the foreign drug establishment.

II. Plaintiffs' Claims Against CPI.

Plaintiffs' complaint advances three substantive claims against CPI, as well as three derivative claims by Mr. Moore for loss of consortium. Unfortunately, in opposing CPI's motion for summary judgment, plaintiffs do not describe how the three factors listed above, even if proved at trial, might

2004 WL 57084, 2004 DNH 013

possibly give rise to liability on the part of CPI—an entity that did not manufacture, distribute, promote, sell, administer, or provide the package warnings or inserts with regard to the vaccine at issue in this case.²

² While it appears that CPI *did* distribute an influenza vaccine during the 1996–1997 flu season, that was the only year during which it did so; CPI did *not* distribute a vaccine during the 1998–1999 flu season and, perhaps more importantly, it did not distribute the particular vaccine at issue in this case: Fluvirin, Lot No. E20228KA.

*3 In count one of their amended complaint, plaintiffs allege that CPI was negligent insofar as it failed to warn Mrs. Moore of the risks associated with taking the vaccine and that it was “otherwise negligent in manufacturing, selling, and administering the Vaccine to Plaintiff Linda Moore.” Amended complaint at para. 14. First, since plaintiffs have failed to point to any evidence that might suggest CPI had a role in “manufacturing, selling, [or] administering” the vaccine, their negligence claim, to the extent it is based upon such conduct, necessarily fails.

Beyond that shortcoming in their amended complaint, plaintiffs have failed to articulate precisely how (or why) CPI had a duty, independent of those borne by the manufacturer and distributor, to warn Mrs. Moore of the potential risks associated with the vaccine. CPI’s role as United States agent for the vaccine’s manufacturer obligated it only to act as an intermediary between the manufacturer and the FDA; the regulations upon which plaintiffs rely do not purport to impose any further obligations on a United States agent of a foreign drug manufacturer. And, plaintiffs have failed to point to any case law (binding or persuasive) supporting their assertion that, as a result of its status as the United States agent for the manufacturer (or because it fielded questions about the vaccine, or because of its status as an “affiliate” of the vaccine’s manufacturer), CPI assumed the obligation to warn potential recipients of the vaccine of the risks associated with its use. Consequently, in light of the undisputed facts of record, CPI is entitled to judgment as a matter of law with regard to count one (negligence) of plaintiffs’ amended complaint.

In count three of their amended complaint, plaintiffs allege that the vaccine was defective and unreasonably dangerous. Amended complaint, para. 22. Accordingly, they say CPI is strictly liable to them for damages. As noted above,

however, the undisputed material facts demonstrate that CPI did not manufacture, sell, distribute, or administer the vaccine in question. And, plaintiffs have failed to articulate how CPI’s status as the manufacturer’s United States agent, or its listing in the Physicians’ Desk Reference as an “affiliate” of the manufacturer, might give rise to strict liability for an (allegedly) unreasonably dangerous product. Nor have plaintiffs cited any judicial opinions that are supportive of their strict liability claim against CPI. CPI is, therefore, entitled to summary judgment as to count three of plaintiffs’ complaint.

Count five of plaintiffs’ amended complaint alleges that CPI “warranted to Plaintiff Linda Moore that the Vaccine would be free from defects and free from unreasonably dangerous or unsafe qualities,” but that CPI breached that warranty. Amended complaint at para. 28–29. Again, however, plaintiffs’ objection to CPI’s motion for summary judgment provides little insight into the precise nature of their claims. Plaintiffs do not, for example, identify whether the “warranties” referenced in count five were express or implied. Nor do they identify any case law supportive of their theory of the case.

*4 In their pre-trial memorandum, plaintiffs do say that their claims are governed by “New Hampshire products liability law and the New Hampshire Uniform Commercial Code.” Plaintiffs’ Pretrial Memorandum (document no. 29) at 6. Importantly, however, New Hampshire’s Uniform Commercial Code imposes warranties (both express and implied) only upon manufacturers, sellers, and suppliers of goods. See N.H.Rev.Stat. Ann. (“RSA”) 382–A:2–318. See also RSA 382–A:2–313, 2–314, and 2–315. Since plaintiffs have failed to point to any evidence suggesting that CPI manufactured, sold, or supplied the vaccine in question, and because plaintiffs have not identified any other legal theory under which CPI might be liable to them for breach of warranty, CPI is entitled to judgment as a matter of law as to plaintiffs’ breach of warranty claim.

Finally, since CPI is entitled to summary judgment on all of Mrs. Moore’s claims against it, it is also entitled to summary judgment on all of the derivative claims for loss of consortium advanced by Mr. Moore (counts two, four, and six).

Conclusion

2004 WL 57084, 2004 DNH 013

For the foregoing reasons, plaintiffs have failed to demonstrate that there are any genuinely disputed material facts. Given the undisputed material facts, Defendant CPI is entitled to judgment as a matter of law. Accordingly, Celltech Pharmaceuticals, Inc.'s motion for summary judgment (document no. 68) is hereby granted.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2004 WL 57084, 2004 DNH 013

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 42

2015 WL 9048979

2015 WL 9048979

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Steven SHEERAN and Kelly Sheeran, Plaintiffs,

v.

BLYTH SHIPHOLDING S.A., et al. Defendants.

Civil No. 14-5482 (JBS/AMD)

|

Signed 12/16/2015

Attorneys and Law Firms

Brian D. Kent, Esq., Laffey Bucci & Kent LLP, 1435 Walnut Street, 7th Floor, Philadelphia, PA 19102 –and– Bruce David Zeidman, Esq., Cosky & Zeidman, Attorneys at Law, 209 Haddon Ave., Haddonfield, NJ 08033, for Plaintiffs.

Patrick M. Northen, Esq., Francis P. Maneri, Esq., Jordan M. Rand, Esq., Dilworth Paxson, LLP, 457 Haddonfield Road, Suite 700, Cherry Hill, NJ 08002, for Defendant Holt Logistics Corp.

OPINION

SIMANDLE, Chief Judge:

I. INTRODUCTION

*1 Plaintiff Steven Sheeran filed this action under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), after he was injured while working aboard the M/V Swan Chacabucco in the Port of Gloucester, New Jersey. His Complaint names a number of different defendants and alleges that all defendants were negligent by collectively breaching two dozen different duties.

Presently before the Court is a motion to dismiss under Fed. R. Civ. P. 12(b)(6) and a motion for sanctions under Fed. R. Civ. P. 11(c) by Holt Logistics Corp. [Docket Items 36 & 53.] Defendant argues that the Complaint must be dismissed because it fails to place Defendant on notice of the particular claims against it, and that sanctions are warranted because the claims against Holt Logistics are entirely groundless. For the reasons set forth below, the Court will grant Defendant's motion to dismiss but will deny Defendant's motion for sanctions.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Complaint (Second Amended Complaint ("SAC") [Docket Item 15]) is short and straightforward.¹ On January 13, 2012, Steven Sheeran was working in the hold of the vessel M/V Swan Chacabucco ("the Swan Chacabucco" or "the Ship"), which was berthed in the Port of Gloucester, when his leg was crushed underneath a crane-controlled tray, causing permanent and severe injuries. (SAC ¶¶ 18-19; 22.) He subsequently brought this action,² which named eight business entities as defendants in the Second Amended Complaint, including Holt Logistics Corp. ("Holt Logistics").³

¹ The facts are taken from Plaintiffs' Second Amended Complaint ("SAC"). For purposes of this motion, the Court must accept Plaintiffs' allegations as true.

² Plaintiffs filed a separate identical complaint under Sheeran v. Blyth Shipholding S.A., Civ. No. 15-272 (Jan. 14, 2015), but both cases have since been consolidated under this action. (Stip. [Docket Item 30] ¶ 1.)

³ The Complaint named the following entities: NYK Container Line, Ltd; NYK Line (North America), Inc.; NYK Cool, a/k/a/ Cool Carriers AB; Cool Carriers Chile SA; Cool Carriers USA Inc.; Chartworld Shipping Corp.; Inchape Shipping Services; and Holt Logistics Corp. (SAC ¶¶ 1-8), along with unnamed entities ABC Companies 1-10 and Def. Companies 1-20. Blyth Shipholding S.A. was later substituted as a named defendant for Chartworld Shipping Corp. (Mar. 11, 2015 Stip. [Docket Item 30] ¶ 2.)

Before Holt Logistics Corp. filed the instant motions, the parties had agreed to dismiss three of the entities from the case. (See Mar. 11, 2015 Stip. [Docket Item 30] ¶ 4). A fourth has since been dismissed (see June 29, 2015 Stip. [Docket Item 46]), leaving only Blyth Shipholding S.A. ("Blyth Shipholding"), Inchape Shipping Services ("Inchape Shipping"), NYK Cool a/k/a Cool Carriers AB ("NYK Cool"), and Holt Logistics as the named defendants.

The Complaint does not allege the specific roles and duties of each Defendant in the action. Rather, it pleads generally that all Defendants "owned, leased, operated, managed, possessed and/or controlled" the Swan Chacabucco. (SAC ¶ 9.) It

2015 WL 9048979

also alleges that “all Defendants owned, leased, operated, occupied, maintained, managed and/or otherwise controlled the Ship and/or the Port and specifically maintained, managed, oversaw, directed, controlled, contracted for and/or participated in the operation of stevedoring and/or longshoring services on the Ship and/or at the Port.” (*Id.* ¶ 11.)

*2 Holt Logistics is identified as a “business entity with a registered place of business” in Gloucester City, New Jersey. The Complaint alleges that Holt Logistics and Inchape Shipping “were responsible for training, screening, certifying, hiring and/or providing crane operators and/or other persons involved in stevedoring and/or longshoring operations at the Port.” (SAC ¶ 10.)

The Complaint contains three causes of action. Count One alleges negligence. Without identifying each individual defendant’s negligent conduct, Count One enumerates 24 duties allegedly violated by all Defendants, including but not limited to: violating OSHA regulations; failing to properly train employees; failing to warn of dangerous and unsafe conditions; failing to “comply with federal and state statutes, local ordinances, and all other rules, enactments, or regulations applicable”; failing to properly supervise; failing to provide adequate safety protection; failing to evaluate the work performed for potential hazards; and negligently controlling the work performed on premises. (*Id.* ¶ 20.)

Count Two is a personal injury claim brought against all Defendants “in their capacity as ‘owner’ or ‘owner pro hac vice’ of the aforementioned Ship” under the Longshore and Harbor Workers’ Compensation Act (“LHWCA”), 33 U.S.C. § 905(b). (*Id.* ¶¶ 18-24.) Section 905(b) provides an injured longshoreman with a cause of action against a ship owner for negligence, and Plaintiffs allege that Defendants “owned, operated, managed, possessed and/or controlled the Ship which it operated in the navigable waters of the United States.” (*Id.* ¶ 24.) Finally, Count Three is an action by Sheeran’s spouse, Kelly Sheeran, for loss of consortium. (*Id.* ¶¶ 29-31.)⁴

⁴ Because Plaintiffs allege that the Swan Chacabucco was berthed in the Port of Gloucester, New Jersey when the injuries occurred (SAC ¶ 22), the Court exercises subject matter jurisdiction over Plaintiffs’ claims under the maritime jurisdiction statute, 28 U.S.C. § 1333. The Court also has diversity jurisdiction under 28 U.S.C. § 1332, because Plaintiffs are citizens of Pennsylvania

and all Defendants have principal places of business outside of Pennsylvania, and the matter in controversy exceeds \$75,000. (SAC ¶¶ 1-9; 15.)

III. DEFENDANT’S MOTION TO DISMISS WILL BE GRANTED

Holt Logistics filed this motion to dismiss, arguing that in lumping all of the defendants together and accusing them all of the same general negligent conduct, the Complaint fails to put Holt Logistics on notice of the claims against them, as required by Fed. R. Civ. P. Rule 8(a). (Mot. to Dismiss [Docket Item 36-1] at 8-10.) Defendant also contends that Count Two must be dismissed because the Complaint does not contain any factual basis for its allegations that Holt Logistics is the “ship owner” or “owner pro hac vice” of the Swan Chacabucco for purposes of an LHWCA claim. (*Id.* at 10-11.)

The Court agrees with Defendant that Plaintiffs’ Complaint fails to plead the liability of Holt Logistics with the requisite specificity and must be dismissed.

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” A to dismiss under Fed. R. Civ. P. 12(b)(6) may be granted if a court concludes that the plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests that make such a claim plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

*3 Although a complaint does not require detailed factual allegations, it must contain enough well-pleaded facts to show that the claim is facially plausible. This “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff must plead enough facts to “raise a reasonable expectation that discovery will reveal evidence of the necessary element,” *Twombly*, 550 U.S. at 556. Although all well-pleaded factual allegations must be accepted as true, the court may disregard any legal conclusions couched as factual allegations. *Id.*; *Iqbal*, 556 U.S. at 678; *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). If the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679.

Plaintiffs’ Complaint fails to separate out the liability for each defendant. Instead, it lumps Defendants together as

a group and asserts general common factual allegations against all of them. Count One, for example, contains 24 different allegations of negligence that vary widely, from violation of OSHA regulations to failure to provide a safe work place to failure to properly train employees to failure to supervise to negligent hiring. Rather than specify which Defendants were responsible for which duties, the Complaint merely states that all Defendants were negligent in the enumerated ways. Without any additional guidance as to the Defendants themselves and what functions they performed, it is impossible to untangle Plaintiffs' specific theory of liability against each individual Defendant.

Courts in this district generally agree that this type of "group pleading" does not satisfy [Rule 8](#), because it does not place Defendants on notice of the claims against each of them. See, e.g., [Ingris v. Borough of Caldwell](#), No. 14-855, 2015 WL 3613499, at *5 (D.N.J. June 9, 2015) ("[T]o the extent Plaintiff seeks to lump several defendants together without setting forth what each particular defendant is alleged to have done, he has engaged in impermissibly vague group pleading."); [Shaw v. Housing Auth. of Camden](#), No. 11-4291, 2012 WL 3283402, at *2 (D.N.J. Aug. 10, 2012) (dismissing complaint because it failed to contain allegations showing how each defendant was liable and noting that "[e]ven under the most liberal notice pleading requirements of [Rule 8\(a\)](#), a plaintiff must differentiate between defendants." (citing [Pietrangelo v. NUI Corp.](#), No. 04-3223, 2005 WL 1703200 (D.N.J. July 20, 2005))); see also [H2O Plus, LLC v. Arch Personal Care Prods., L.P.](#), 2011 WL 2038775, at *2 (D.N.J. May 22, 2011) (holding that complaint did not violate [Rule 8](#) because while plaintiff "did lump the Arch Defendants together in the description of facts, looking to the Complaint and the attached exhibits as a whole clearly shows which claims are made against Arch PCP and which against Arch Chemicals."))

Had the Complaint described the nature of each entity Defendant and precisely what they were responsible for on the Ship, the Court might have been able to infer the theory of liability for each Defendant by comparing the specific role each played on the Swan Chacabucco with the list of duties allegedly breached.⁵ But the Complaint does not do even that. Holt Logistics, like the other named Defendants in the case, is identified only as a "business entity" with a registered place of business; the Complaint describes neither its line of work nor its function on the ship. Instead, eight named Defendants are collectively alleged to have "owned, leased, operated, occupied, maintained,

managed and/or otherwise controlled the Ship and/or the Port" and to have "maintained, managed, oversaw, directed, controlled, contracted for and/or participated in the operation of stevedoring and/or longshoring services on the Ship and/or at the Port." (SAC ¶ 11.) The "and/or" conjunction appears no less than five times in this single sentence, making it impossible to determine Plaintiffs' theory of liability for each Defendant – and for Holt Logistics in particular.

5 For example, had Plaintiffs identified Holt Logistics as the entity responsible for hiring and providing stevedores for work on the Ship, and another Defendant as the entity responsible for the day-to-day supervision of their work, it may have been possible to partially deduce, based on the list of alleged negligent conduct, some of the duties each defendant is alleged to have breached. The only thing that comes close is Plaintiffs' allegation that Holt Logistics and Inchape Shipping "were responsible for training, screening, certifying, hiring and/or providing crane operators and/or other persons involved in stevedoring and/or longshoring operations at the Port." (SAC ¶ 10.) But even this assertion continues to lump Holt Logistics together with an unconnected entity, Inchape Shipping, and asserts seven different duties that either Defendant or Inchape Shipping could have been responsible for. The allegation can hardly be said to narrow down Defendants' liability in this case.

*4 Contrary to Plaintiffs' contention (see Opp'n to Mot. to Dismiss [Docket Item 38] at 3), the mere fact that the Complaint recites the type of negligent conduct at issue does not place the parties sufficiently on notice of the claims against them. Even though the misconduct is alleged with some specificity, [Rule 8](#) is not satisfied because the allegations do not inform each Defendant of the particular claims against it. Moreover, lumping all defendants together for different misconduct fails to demonstrate each defendant's individual liability. Without pleading how, if at all, Holt Logistics was involved with the alleged conduct at issue, the Complaint lacks sufficient facts to draw a reasonable inference that Holt Logistics is actually responsible for any the negligence alleged. See [Phillips v. Cnty. of Allegheny](#), 515 F.3d 224, 232 (3d Cir. 2008) ("We caution that without some factual allegation in the complaint, a claimant cannot satisfy the requirement [under [Rule 8\(a\)\(2\)](#)] that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests." (quoting [Twombly](#), 550 U.S. at 555)).

Nor is the Court persuaded by Plaintiffs' citations to [In re Riddell Concussion Reduction Litig.](#), 77 F.Supp.3d 422 (D.N.J. 2015) (Simandle, J.), and the two unpublished district court opinions, [Capitol Records LLC v. ReDigi Inc.](#), No. 12-95, 2014 WL 4354675 (S.D.N.Y. Sept. 2, 2014), and [Toback v. GNC Holdings, Inc.](#), No. 13-80526, 2013 WL 5206103 (S.D. Fla. Sept. 13, 2013), which have little weight in this Circuit. In [Riddell](#), this Court rejected an argument that the complaint violated [Rule 8](#) by lumping all defendants together without specifying the alleged misconduct of each defendant, because it was "apparent" that the claims were asserted against all defendants "for their concerted conduct under the 'Riddell' brand." 77 F. Supp. 3d at 431. The Court emphasized that group pleading was permissible in that particular case because the defendants did not dispute their collective role in the manufacture, sale, and marketing of the product in question, and they were related entities operating under a single brand, accepting service as a single entity, and represented by the same counsel. [Id.](#) at 432. [Capitol Records](#) and [Toback](#) similarly involve closely related Defendants. See [Capitol Records](#), 2014 WL 4354675, at *3 (noting that the defendants were a small start-up and two corporate officers "who directed and controlled essentially all of its activities"); [Toback](#), 2013 WL 5206103 (holding that complaint satisfied [Rule 8](#) despite referring to defendants – GNC Holdings, Inc., GNC Corp, General Nutrition Corporation, and General Nutrition Centers, Inc. – collectively as "GNC" because defendants were interrelated corporate defendants and demonstrated their understanding of the allegations against them).

[Riddell](#), [Capitol Records](#), and [Toback](#) provide no support that collective-style pleading is permissible in this case, since there are no allegations that Defendants acted jointly or in concert or are closely related corporate entities, such that conduct by one may be ascribed to the others.⁶ See [T.J. McDermott Transp. Co., Inc. v. Cummins, Inc.](#), 2015 WL 1119475, at *7 (D.N.J. Mar. 11, 2015) (holding [Rule 8](#) was satisfied even though complaint failed to distinguish defendants' respective conduct because complaint specifically alleged that defendants formed a partnership).

⁶ The fact that Defendants are all represented by different counsel and that no other defendant has joined Holt Logistics' motion to dismiss is an additional indication that Defendants are independent and concerted action is lacking.

Because Counts One, Two, and Three all suffer from the same infirmity by asserting that the injuries sustained by Plaintiff "were caused by the carelessness and negligence of all Defendants," (SAC ¶ 23), and failing to allege any specific act of misconduct by Holt Logistics, the Complaint as a whole must be dismissed for failing to place Holt Logistics on notice of the claims against it.

*5 Count Two of the Complaint must additionally be dismissed because Plaintiffs have not pleaded sufficient facts to establish a plausible cause of action against Holt Logistics under the Longshore and Harbor Workers' Compensation Act. Specifically, the Complaint does not plead that Holt Logistics qualifies as a "vessel" for purposes of the LHWCA. (Mot. to Dismiss at 10-11; Reply in Supp. of Mot. to Dismiss [Docket Item 40] at 6-7.) Section 905(b) of the LHWCA codifies the exclusive remedy for longshoremen and permits an "action against [a] vessel as a third party" for injuries "caused by the negligence of [such] vessel." 33 U.S.C. § 905(b). The LHWCA, in turn, defines a "vessel" within the meaning of [section 905\(b\)](#) to include the "vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21).

A "vessel owner pro hac vice" is "one who assumes by charter or otherwise exclusive possession, control, command and navigation of the vessel for a specified period of time." [DeArmond v. Southwire Co.](#), 109 Fed. App'x 722, 724 (6th Cir. 2004) (internal quotations and citation omitted); see also [Bossard v. Port Allen Marine Serv., Inc.](#), 624 F. 2d 671, 672-73 (5th Cir. 1980) ("[T]he charterer takes over the ship, lock, stock and barrel, and mans her with his own people. He becomes ... the owner pro hac vice." (internal quotations and citation omitted)); [Irby v. Tokai Lines](#), No. 88-6890, 1990 WL 18880, at *3 (E.D. Pa. Feb. 23, 1990) (noting requirement of "exclusive possession, control, command, and navigation"). The term "vessel," in other words, encompasses "the ship's owner and the owner's agents." [Browning v. Safmarine, Inc.](#), No. 11-2436, 2012 WL 6089481, at 3 n.1 (D.N.J. Dec. 5, 2012).

This Court recently had occasion to explicate the duties of the "vessel" and the "pro hac vice owner" to an offloading stevedore under the LHWCA in [Jones v. Sanko Steamship Co.](#), ___ F. Supp. 3d ___, 2015 WL 8361745 (D.N.J. Dec. 8, 2015). The LHWCA requires that the liability of defendants be separately determined in light of their respective functions relating to the ship and its cargo. [Id.](#) at 7-8. Such an assessment of LHWCA duties for a particular defendant is not

2015 WL 9048979

viable where the plaintiff engages in group pleading against unrelated, disparate parties.

Count Two alleges only that all Defendants, including Holt Logistics, “owned, operated, managed, possessed and/or controlled the Ship which it operated in the navigable waters of the United States.” (*Id.* ¶ 24) (emphasis added). This assertion, however, does not rule out the possibility that Holt Logistics merely “controlled” the Ship. Generally speaking, “those who exercise control over a vessel for a particular purpose such as repairing, cleaning or unloading are not considered to be owners pro hac vice.” *DeArmond*, 109 Fed. App’x at 725. In *DeArmond*, the Sixth Circuit gave the example of a stevedore hired to unload a barge and who exercises control and dominion over the barge in order to do so, and noted that the stevedore was clearly not an owner pro hac vice. The Court explained that this was because even though a party may “control command and navigate the vessel while it is in their possession to accomplish the designated task, the owner of the vessel has not relinquished complete dominion and control of the vessel tantamount to a demise of the vessel.” *Id.* Because the Complaint fails to contain a well-pleaded factual allegation that Holt Logistics was the owner or owner pro hac vice of the Swan Chacabucco, Plaintiffs have not stated a plausible claim for relief under Count Two.

For all the reasons above, Defendant’s motion to dismiss will be granted in its entirety. The Court will, however, dismiss Plaintiffs’ claims against Holt Logistics without prejudice and permit Plaintiffs to file a motion to amend, along with a Proposed Amended Complaint which corrects the multiple deficiencies discussed herein. In so doing, the Court again emphasizes that it is not sufficient to fail to identify each defendant’s role and function or say that each of the defendants is responsible for everything. Plaintiffs must be careful to specify the basis (i.e., the factual grounds) for Defendant’s liability under each Count.

IV. THE COURT WILL DENY DEFENDANT’S MOTION FOR SANCTIONS

*6 Defendant argues that sanctions are warranted because there are no facts to support Plaintiffs’ claim that Holt Logistics was in any way liable for Sheeran’s injury. (Mot. for Sanctions [Docket Item 49-1], at 9-12; Reply in Support of Mot. for Sanctions [Docket Item 53], at 4-9.)

[Federal Rule of Civil Procedure 11](#) requires an attorney to conduct a “reasonable inquiry” into the law and facts before filing a pleading with the court, and to certify that the

legal arguments contained therein are not being presented for any improper purpose and are not frivolous, and the factual contentions have or “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” [Fed. R. Civ. P. 11\(b\)\(1\)-\(3\)](#). By discouraging the filing of frivolous, unsupported, or unreasonable claims, and permitting sanctions to be imposed for violations, [Rule 11](#) “seeks to strike a balance between the need to curtail abuse of the legal system and the need to encourage creativity and vitality in the law.” [Fed. R. Civ. P. 11\(c\)](#); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483–84 (3d Cir. 1987); *see also Lieb v. Topstone Indus. Inc.*, 788 F.2d 151, 157 (3d Cir. 1986); *Leuallen v. Borough of Paulsboro*, 180 F. Supp. 2d 615, 618 (D.N.J. 2002).

When evaluating whether conduct violates [Rule 11](#), the Third Circuit applies a “reasonableness under the circumstances” standard, which is defined as “an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well grounded in law and fact.” *Ford Motor Co. v. Summit Motor Prod., Inc.*, 930 F.2d 277, 289 (3d Cir. 1991). The wisdom of hindsight should be avoided, and the attorney’s conduct must be judged by “what was reasonable to believe at the time the pleading, motion, or other paper was submitted.” [Fed. R. Civ. P. 11](#) advisory committee note; *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir. 1988).⁷

⁷ The Court notes that Defendant has complied with the “safe harbor” provision of [Rule 11](#), which requires a moving party to notify the party against which it seeks sanctions of its intention to move for sanctions, and allows the non-moving party 21 days to take remedial action before the court imposes sanctions. [Fed. R. Civ. P. 11\(c\)\(2\)](#); *see Hockley by Hockley v. Shan Enterp. Ltd.*, 19 F. Supp. 2d 235, 240 (D.N.J. 1998). Defendant sent a “safe harbor” letter together with a copy of the motion on September 18, 2015, 25 days before filing the instant motion with the Court. (See Sept. 18, 2015 Letter, Ex. 1 to Mot. for Sanctions [Docket Item 49-2].)

The Court does not find that the circumstances of this case meets the “high standard for imposing sanctions under [Rule 11](#),” *Oswell v. Morgan Stanley Dean Witter & Co., Inc.*, 507 F. Supp.2d 484, 492 (D.N.J. 2007) (Simandle, J.). Counsel for Plaintiffs had a good-faith basis to believe that Defendant had a hand in controlling stevedoring activities at the site where Steven Sheeran was injured. In particular,

it was reasonable for counsel to believe that the operations of Sheeran's employer, Gloucester Terminals, LLC, at the Port of Gloucester, were being overseen by Holt Logistics. The N.L.R.B. decision, upon which counsel asserts he relied, describes the involvement of the Holt brothers and their various companies (including Holt Logistics) in operations in and around the Port of Gloucester, where the Swan Chacabucco was berthed. (Ex. 1 to Opp'n to Mot. for Sanctions [Docket Item 52-2].) The decision identifies Holt as the CEO of Gloucester Terminals, LLC, and also identifies an individual named Walter Curran who was hired by Holt and who "actively managed" the work of Gloucester Terminals, LLC. (*Id.* at 9.)

*7 Thus, Defendant's argument that Sheeran, who has already settled a claim with Gloucester Terminals, LLC, is barred from asserting a claim against Holt Logistics,⁸ holds no water. Counsel for Plaintiffs had a good-faith basis to believe that Holt Logistics was not Sheeran's employer "via common ownership" with Gloucester Terminals, LLC, but rather an entity that owned and supervised Sheeran's employer and its stevedoring operations. Counsel thus had a reasonable basis to believe that Sheeran's settlement with his direct employer did not extinguish his rights under the LHWCA to file suit against Holt Logistics.

⁸ Specifically, Defendant argues that because a plaintiff who recovers against an employer under LHWCA worker's compensation scheme is barred from suing that employer under the LHWCA for further damages, *see* 33 U.S.C. §§ 904(b), 905(a), counsel lacked a good-faith basis to file suit against Holt Logistics because Sheeran had already settled a claim with Gloucester Terminals, LLC, and Holt Logistics was his co-employer. (Opp'n to Mot. for Sanctions, at 11-12.)

Counsel's belief that Holt Logistics should remain in the action is also not unreasonable under the high [Rule 11](#) standard. Counsel notes that depositions taken after the Complaint continue to raise the possibility that Gloucester Terminals, LLC was managed by Holt Logistics, because certain higher-level employees seemed to be affiliated with both entities. While depositions from individuals employed by Gloucester Terminals, LLC, identified John Florkiewicz and P.J. Inskeep as the stevedore manager and Vice President of Gloucester Terminals, LLC, respectively, both had Holt Logistics-affiliated email addresses. (Quigley Dep., Ex. 3 to Opp'n to Mot. for Sanctions [Docket Item 52-4], at

39:8-41:9; Mountney Dep., *Id.* Ex. 4 [Docket Item 52-5], at 20:8-21:2.) Moreover, an operations representative for Defendant Inchape Shipping identified Florkiewicz and Inskeep as being from Holt Logistics, and additionally testified that he copied several people from Holt Logistics on every email that he sent regarding vessel movements and berthing details. (Hubbard Dep., *Id.* Ex. 2 [Docket Item 52-3], at 53:20-56:7.)

Given the evidence indicating a close relationship between Defendant and Sheeran's employer, it was not palpably unreasonable for Plaintiffs' counsel to believe that Holt Logistics maintained some supervisory role over the stevedoring work of Gloucester Terminals, LLC. Although counsel may not have had a precise understanding of Holt Logistics' responsibilities, it was not unreasonable for counsel to infer that Defendant had a separate duty to ensure the safety of the premises, and that the duty was breached.

"Rule 11 is intended for only exceptional circumstances," [Gaiardo](#), 835 F.2d at 483, and a "district court must exercise discretion and sound judgment in dealing with the myriad methods with which lawyers may abuse the judicial process." [Eavenson, Auchmuty & Greenwald v. Holtzman](#), 775 F.2d 535, 540 (3d Cir. 1985). While it remains to be seen whether Plaintiffs can plead sufficient facts to plausibly establish Holt Logistics' liability in this case, the Court is satisfied that counsel did not drag Holt Logistics into this case based solely upon unsupported, unreasonable, and frivolous allegations. Defendant's motion for sanctions is denied.

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendant's motion to dismiss. The dismissal is without prejudice to Plaintiffs' right to file a motion for leave to file an Amended Complaint within fourteen (14) days of the date of entry of this Order, accompanied by a Proposed Amended Complaint which remedies the deficiencies discussed herein. The Court will deny Defendant's motion for sanctions, but takes this opportunity to remind counsel that any attempt to replead against Holt or any other defendant is governed by the requirements of [Rule 11\(b\)](#), including that the legal claims are warranted by existing law and that the factual contentions have evidentiary support or (if specifically identified) will likely have evidentiary support after a reasonable opportunity for further investigation or discovery, *see* [Rule 11\(b\)\(2\) & \(3\)](#), [Fed. R. Civ. P.](#) An accompanying Order will be entered.

Sheeran v. Blyth Shipholding S.A., Not Reported in Fed. Supp. (2015)

2015 WL 9048979

All Citations

Not Reported in Fed. Supp., 2015 WL 9048979

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 43

2017 WL 4407930

2017 WL 4407930

Only the Westlaw citation is currently available.

United States District Court, D. New Jersey,
Camden Vicinage.

Michael SICH and Ellen

Bitterlich, his wife, Plaintiffs,

v.

PFIZER PHARMACEUTICAL, Pfizer
Incorporated, et al., Defendants.

Civil No. 1:17-cv-02828 (RBK/KMW)

|

Signed 10/04/2017

Attorneys and Law Firms

Mark J. Molz, Hainesport, NJ, for Plaintiffs.

Rahil Darbar, Stephen C. Matthews, Porzio, Bromberg &
Newman P.C., Morristown, NJ, for Defendants.**OPINION**

ROBERT B. KUGLER, United States District Judge

*1 This matter arises upon defendant Pfizer Incorporated's ("Defendant") motion to dismiss plaintiffs Michael Sich and Ellen Bitterlich's ("Plaintiffs") suit for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. For the reasons set forth in the opinion below, this motion is **GRANTED WITHOUT PREJUDICE**, and Plaintiffs are permitted to submit an amended complaint as to only the claims arising under the New Jersey Products Liability Act ("PLA") within 14 days.

I. BACKGROUND

Plaintiffs allege that Defendant's drug, Dep-Medrol, caused Mr. Sich severe physical injuries. *See* Compl. at 1. In February 2015, Mr. Sich visited Reconstructive Orthopedics where a physician's assistant administered an injection of Dep-Medrol in his left knee. *Id.* Later that month, Mr. Sich returned to Reconstructive Orthopedics for an appointment with Dr. Scott Schoifet and received a second injection. *Id.* at 2. Within hours, Mr. Sich began experiencing symptoms including elevated temperature, sensitivity, swelling, rashes, and hives. *Id.* Within a week, Mr. Sich underwent open **debridement**

and two operations, and required seventeen days of inpatient treatment. *Id.* Plaintiffs then sued in New Jersey State Court, but Defendant removed the case on diversity grounds. *See* Notice of Removal (Doc. No. 1). Mr. Sich alleges that the "medication supplied by Defendant [] was defective" and caused his injuries. *Id.*

Plaintiffs seek relief under a number of theories. *See* Compl. First, Plaintiffs allege a design defect, a failure to warn, and manufacturing defects under the PLA. *Id.*; N.J.S.A. § 2A:58C. Second, Plaintiffs allege breach of actual and implied warranties, negligence, and "other causes of action allowed by law." Compl. at 4. Finally, Plaintiffs allege loss of consortium on behalf of Ms. Bitterlich. *Id.* at 5.

II. STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss an action for failure to state a claim upon which relief can be granted. When evaluating a motion to dismiss, "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). In other words, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

To make this determination, a court conducts a three-part analysis. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 131 (quoting *Iqbal*, 556 U.S. at 680). Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* (quoting *Iqbal*, 556 U.S. at 680). This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A complaint cannot survive where a court can only infer that a claim is merely possible rather than plausible. *Id.*

2017 WL 4407930

III. ANALYSIS

**2 Plaintiffs' Strict Products Liability, Negligence, Breach of Implied Warranty, and Loss of Consortium Claims Are Subsumed by the PLA.*

The PLA is “both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products.” *In re Lead Paint Litigation*, 924 A.2d 484, 436-37 (N.J. 2007) (citing N.J.S.A. § 2A:58C-1(b)(3) (defining “product liability action”). The statute's reach includes “any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.” N.J.S.A. § 2A:58C-1(b)(3).

Here, Plaintiffs allege injuries sustained as a result of Mr. Sich's use of *Depo-Medrol*. See Compl. The PLA, as a result, applies—this is a products liability case. But “negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action” by the PLA. *Clements v. Sanofi-Aventis, U.S. Inc.*, 111 F. Supp. 3d 586, 596 (D.N.J. 2015) (“New Jersey law no longer recognizes breach of implied warranty, negligence, and strict liability as viable separate claims for harms deriving from a defective product.”); *Fid. & Guar. Ins. Underwriters, Inc. v. Omega Flex, Inc.*, 936 F. Supp. 2d 441, 446-51 (D.N.J. 2013); *Green v. Gen. Motors Corp.*, 709 A.2d 205, 209 (N.J. Super. 1998). Furthermore, the PLA subsumes loss of consortium claims arising in products liability contexts. *Chester v. Boston Sci. Corp.*, No. CV 16-02421, 2017 WL 751424, at *4 (D.N.J. Feb. 27, 2017). Therefore, Plaintiffs' strict products liability, negligence, breach of implied warranty, and loss of consortium claims are subsumed by the PLA and must be dismissed as a matter of law.

Because the PLA subsumes these claims, it would be futile to include them in the amended complaint.

Plaintiffs PLA and Breach of Express Warranty Claims Fail to Meet The Fed. R. Civ. P. 12(b)(6) Pleading Standard and Must be Dismissed Without Prejudice With Leave to Amend.

A. Design Defect

Under New Jersey law, the plaintiff must show that the “product was defective, that the defect existed when the product left the defendant's control, and that the defect caused injury to a reasonably foreseeable user.” *Feldman v. Lederle*

Labs., 97 N.J. 429, 449 (N.J. 1984); see *Donlon v. Gluck Grp., LLC*, No. 09-5379, 2011 WL 6020574, at *3 (D.N.J. Dec. 2, 2011). The plaintiff must demonstrate that the “product [was] manufactured as intended but the design render[ed] the product unsafe.” *Pollander v. Desimone BMW of Mt. Laurel, Ltd.*, No. A-3204-10T3, 2012 WL 127563, at *3 (N.J. Super. Ct. App. Div. Jan. 18, 2012). Plaintiffs must also provide—pursuant to a risk-utility analysis—an alternative design that is both practical and feasible. *Lewis v. Am. Cyanamid Co.*, 155 N.J. 544, 560-61 (N.J. 1998); *Schraeder v. Demilec (USA) LLC*, No. 12-6074, 2013 WL 5770970, at *2 (D.N.J. Oct. 22, 2013).

Plaintiffs have failed to reach this bar. Plaintiffs have alleged that as a result of a defect in the product, “including its sterility and/or formulation, Plaintiff Michael Sich was injected with toxic substances and injured.” Compl. at 3. That is not enough—Plaintiffs have failed to plead facts that satisfy each of the necessary elements of a design defect claim, they have simply alleged injury.

B. Failure to Warn

**3* A manufacturer is liable for harm caused by a failure to warn if the product does not contain an adequate warning or instruction. N.J.S.A. § 2A:58C-4. A warning is adequate if it is “one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product.” *Id.*; *Banner v. Hoffman-La Roche Inc.*, 891 A.2d 1229, 1236 (N.J. Super. App. Div. 2006) (*cert. denied*, 921 A.2d 447 (N.J. 2007)).

Plaintiffs' allegations fail to meet this standard. Plaintiffs allege that “[a]s a direct and proximate result of” Defendant's failure to warn, “Plaintiff Michael Sich was injected with toxic substances and was injured.” Compl. at 3. Plaintiffs offer nothing further, and thus do not reach the requisite plausibility requirement.¹ *Iqbal*, 556 U.S. at 680.

1

Because Plaintiffs have not alleged or pleaded any facts related to the warning label, this Court does not reach the questions of (1) whether the learned intermediary doctrine applies and if Mr. Sich's healthcare provider was adequately warned of any relevant dangers; and (2) whether the warning label is protected by the rebuttable presumption of adequacy afforded to FDA-approved prescription medication under the PLA. N.J.S.A. § 2A:58C-4.

C. Manufacturing Defect

A manufacturing defect exists if a product “deviated from the design specification, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae.” N.J.S.A. § 2A:58C-2(a). A plaintiff must prove “that the product was defective, that the defect existed when the product left the manufacturer’s control, and that the defect proximately caused injuries to the plaintiff, [who must be] a reasonably foreseeable or intended user.” *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682, 695 (D.N.J. 2013) (citing *Myrlak v. Port Authority of N.Y. and N.J.*, 723 A.2d 45, 52 (N.J. 1999)).

Plaintiffs have alleged that as a “direct and proximate result of ... manufacturing defects including its sterility and/or formulation, Plaintiff Michael Sich was injected with toxic substance and was injured.” Compl. at 3. Plaintiffs have not, however, explained how the drug differed from the requisite standard or how it was allegedly defective. This claim thus lacks the factual support that it needs to reach the *Twombly* / *Iqbal* plausibility standards—conclusory statements are not enough. 550 U.S. at 570; 556 U.S. at 680.

D. Breach of Express Warranty

An express warranty is an “affirmation of fact or promise made by the seller ... which relates to the goods and becomes part of the basis of the bargain.” N.J.S.A. § 12A:2-313(a).

Plaintiffs must allege: (1) that Defendant made an affirmation, promise, or description about the product; (2) that this affirmation, promise, or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description. *Mendez v. Shah*, 28 F. Supp. 3d 282, 294 (D.N.J. 2014); *Fid. & Guar. Ins. Underwriters, Inc.*, 936 F. Supp. 2d at 451.

Plaintiffs have failed to present an affirmation, promise, or description about the product made by Defendant. They have additionally failed to allege how this missing affirmation, promise, or description became a part of the basis of the bargain for the product, nor how the product ultimately did not conform to that affirmation, promise, or description. As such, the breach of express warranty claim constitutes a categorical allegation and nothing more. *Iqbal*, 556 U.S. at 678.

IV. CONCLUSION

*4 Because the complaint as pleaded does not present facts, accepted as true, that give rise to any plausible entitlement to relief, Defendant’s motion to dismiss is **GRANTED WITHOUT PREJUDICE** and Plaintiffs are permitted 14 days to submit an amended complaint correcting the deficiencies noted above.

All Citations

Not Reported in Fed. Supp., 2017 WL 4407930

TAB 44

2008 WL 4936982



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Snyder v. Farnam Companies, Inc.](#), D.N.J., May 26, 2011

2008 WL 4936982

Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.

[Sean SIMMONS](#), Plaintiff,

v.

STRYKER CORPORATION, et al., Defendants.

Civil Action No. 08-3451 (JAP).

|
Nov. 17, 2008.

West KeySummary

1 Sales **Breach and elements thereof in general**

Anesthetics device buyer's breach of warranty claim against device manufacturer was devoid of any factual matter to support the existence of an express warranty. Buyer alleged that manufacturer warranted that their device was a safe and effective ambulatory drug delivery system, and was fit, safe, and effective and proper for the purpose for which it was to be used. However, buyer identified no source whatsoever of any alleged warranty. [N.J.S.A. 12A:2-313](#).

[19 Cases that cite this headnote](#)**Attorneys and Law Firms**

[Alan T. Friedman](#), Bagolie-Friedman, LLC, Jersey City, NJ, for Plaintiff.

[Kim M. Catullo](#), Gibbons P.C., Newark, NJ, for Defendants.

OPINION[JOEL A. PISANO](#), District Judge.

*1 This is a products liability action involving a device referred to as a “pain pump” that delivers controlled infusions

of local anesthetics to a surgical patient. Presently before the Court is a motion by Defendants Stryker Corporation and Stryker Sales Corporation (“Defendants”) to dismiss Counts One and Counts Five through Twelve of Plaintiffs Complaint pursuant to Rule 12(b)(6). Defendants argue that these claims, with the exception of Count Nine, are subsumed by Plaintiff's other claims under New Jersey's Product Liability Act, [N.J.S.A. § 2A:58C-1 et seq.](#) As to Count Nine, breach of express warranty, Defendants argue that Plaintiff has failed to adequately plead such a claim.

Plaintiff does not oppose Defendants' motion as to Counts One, Five, Six, Seven, Eight, Ten, Eleven and Twelve. In fact, Plaintiff “agrees that [all of the challenged Counts except Count Nine] are due to be dismissed.” Pl. Mem. at 4.¹ Consequently, those Counts shall be dismissed with prejudice. With respect to Count Nine, Plaintiff contends that the claim has been sufficiently pled and further argues that, if the Court were to find otherwise, he should be given leave to amend his complaint after the close of discovery. For the reasons below, the Court finds that Count Nine fails to state a claim upon which relief can be granted, and, consequently, Defendants' motion to dismiss that count shall be granted.

¹ Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss does not contain page numbers; therefore, the Court refers to the page number assigned by the electronic filing system that appear in the header.

In the breach of express warranty claim set forth in Count Nine Plaintiff alleges that “[t]he Defendants expressly warranted that their pain pump was [a] safe and effective ambulatory drug delivery system” and also warranted the pain pump to be “fit, safe, and effective and proper” for the purpose for which it was to be used. Compl. ¶ 75, 76. The complaint further alleges that “the pain pump ... did not conform to these express representations because it causes serious injuries to consumers when inserted.” *Id.* at ¶ 76. Plaintiff contends that Defendants should have known that these representations were false, that the medical community as well as Plaintiff relied upon these warranties, and that Defendants breached the express warranties because the pain pump was not safe and fit for its intended use. Defendants assert that these allegations are insufficient to state a claim and Count Nine should be dismissed. Def. Reply at 3.

Referring to the Supreme Court's recent “formulation of the pleading standard” in *Bell Atlantic Corp. v. Twombly*,²

the Third Circuit has noted that stating a claim “requires a complaint with enough factual matter (taken as true) to suggest the required element.” *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir.2008) (internal quotations omitted, alteration in original). The court noted that *Federal Rule of Civil Procedure* 8(a)(2) requires “a showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds on which it rests,” and, therefore, a complaint requires at least some factual allegations to make this “showing.” *Phillips*, 515 F.3d at 232 (alterations in original) (quoting *Twombly*, 127 S.Ct. at 1964). However, this does not mean that a heightened pleading requirement now applies—the *Twombly* decision clearly indicated that the Court was not adopting or applying a “heightened pleading standard,” 127 S.Ct. at 1974 (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face”),—and this Court shall not apply one. Nevertheless, under the liberal pleading standard, the Court finds Count Nine to be insufficient.

² 550 U.S. 554, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

*2 As noted by the Defendants, under New Jersey law, an express warranty can be created by the following:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

N.J.S.A. § 12A:2–313. Defendants contend that Count Nine fails to state a claim because it does not contain sufficient factual allegations about the nature of the express warranty. The Court agrees. Plaintiff’s breach of warranty claim is devoid of any “factual matter” to support the existence of an express warranty. Rather, there is simply a conclusory recitation of the elements of the claim. Plaintiff has alleged no facts to suggest that an express warranty existed.

Other courts have dismissed similar claims under similar circumstances. For example, in *Heisner ex rel. Heisner v.*

Genzyme Corp., 2008 WL 2940811 (N.D.Ill., July 25, 2008), much like the instant case, the plaintiff alleged that the defendant “expressly warranted to Plaintiff by and through statements made ... orally and in publications, package inserts, and other written materials ... that [the product at issue] was safe, effective, fit and proper for its intended use,” and further alleged that he relied on this warranty and that the warranty was false. The court dismissed the plaintiff’s claim, finding that the plaintiff in that case

has offered nothing more than a formulaic recitation of the elements required to prevail on a claim and has alleged no facts at all that suggest an express warranty existed. Plaintiff has not specified any particular affirmation, promise, description, or sample that formed part of the basis of his bargain with Defendant. He thus fails to put the Defendant on notice as to the substance of his claim.

Id. at *8–9 (noting that some courts have “required that plaintiffs at least mention the particular promise or description that allegedly gave rise to an express warranty” and citing *Johnson v. Brown & Williamson Tobacco Corp.*, 122 F.Supp.2d 194, 206 (D.Mass.2000), where the court found that a breach of express warranty claim was insufficient when it stated only that the defendant extended an express warranty through its “advertising, marketing and other efforts.”).

Notably, the breach of warranty claims that were dismissed in both *Heisner* and *Johnson* contained *more* factual detail than the claim in the present case. In each of those cases the plaintiffs generally identified the source of the alleged warranty (e.g., publications, package inserts, advertising), although this general identification was not sufficient to survive a motion to dismiss. Here, Plaintiff identifies no source whatsoever of any alleged warranty. Thus, the Court finds Plaintiff’s breach of express warranty claim in this case to be inadequately pled and Count Nine is dismissed without prejudice. Plaintiff, if he wishes to amend his complaint to allege facts sufficient to support his breach of express warranty claim, shall be permitted 20 days to do so in light of this Opinion.³ An appropriate Order follows.

2008 WL 4936982

3 The Court denies Plaintiff's request to have until after the close of discovery to amend his Complaint. Plaintiff simply has provided no explanation whatsoever as to why this is necessary or appropriate in this case.

All Citations

Not Reported in F.Supp.2d, 2008 WL 4936982

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 45

2020 WL 1237394

2020 WL 1237394

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas, Dallas Division.

Raymon J. SWEZEY, IV

v.

C.R. BARD INCORPORATED et al.

CIVIL ACTION NO. 3:19-CV-2172-S

|

Signed 03/12/2020

Attorneys and Law Firms

Charla G. Aldous, Aldous Walker LLP, Kristi Elizabeth Wood, Ben C. Martin, Laura Jean Baughman, Martin Baughman PLLC, Thomas W. Arbon, Law Offices of Ben C. Martin, Dallas, TX, Julie L. Rhoades, Houston, TX, for Raymon J. Swezey, IV.

Richard B. North, Jr., Pro Hac Vice, Brandee J. Kowalzyk, Pro Hac Vice, Elizabeth C. Helm, Matthew B. Lerner, Pro Hac Vice, Taylor Tapley Daly, Pro Hac Vice, Nelson Mullins Riley & Scarborough LLP, Atlanta, GA, James F. Rogers, Pro Hac Vice, Nelson Mullins Riley and Scarborough LLP, Columbia, SC, Jordan E. Jarreau, Melissa Dorman Matthews, Hartline Barger LLP, Dallas, TX, Matthew E. Brown, Pro Hac Vice, Nelson Mullins Riley & Scarborough LLP, Boston, MA, Philip M. Busman, Pro Hac Vice, Nelson Mullins Riley and Scarborough LLP, Washington, DC, for C.R. Bard Incorporated, Bard Peripheral Vascular Incorporated.

MEMORANDUM OPINION AND ORDERKAREN GREN SCHOLER, UNITED STATES DISTRICT
JUDGE

*1 This Order addresses Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.'s (collectively, "Defendants") Motion for Summary Judgment [ECF No. 95]. For the following reasons, the Court grants in part and denies in part the Motion.

I. BACKGROUND

Plaintiff Raymon Swezey ("Plaintiff") was treated with Defendants' Recovery Inferior Vena Cava Filter ("Filter") on June 28, 2008. Mot. 4. Sometime thereafter, Plaintiff's filter allegedly migrated and perforated his Inferior Vena Cava ("IVC"). *See id.*; *see also* Resp. in Opp. to Mot. for Summ. J. ("Resp.") 6. Plaintiff brings claims for Strict Products Liability – Information Defect (Failure to Warn) (Count II); Strict Products Liability – Design Defect (Count III); Negligence – Design (Count IV); Negligence – Failure to Warn (Count VII); Negligent Misrepresentation (Count VIII); Negligence Per Se (Count IX); Breach of Express Warranty (Count X); Fraudulent Misrepresentation (Count XII); and Fraudulent Concealment (Count XIII).¹ *See* ECF No. 1. Plaintiff also seeks punitive damages. *Id.* at 3.

¹ Plaintiff withdrew his claims for Strict Products Liability – Manufacturing Defect (Count 1) and Negligence – Manufacture (Count V). This Order, therefore, does not address those claims.

Defendants filed the pending Motion on February 17, 2020, seeking summary judgment on all of Plaintiff's claims (including his claim for punitive damages). Mot. 1. For the following reasons, the Court grants the Motion with respect to Plaintiff's Negligence Per Se (Count IX) and Fraudulent Concealment (Count XIII) claims and denies the Motion as to the remaining claims.

II. ANALYSIS***A. Negligence Per Se (Count IX)***

"Negligence per se is a tort theory whereby courts use statutes or regulations to define the standard of reasonably prudent conduct." *Monk v. Wyeth Pharm., Inc.*, Civ. A. No. SA-16-CV-1273-XR, 2017 WL 2063008, at *8 (W.D. Tex. May 11, 2017) (quoting *Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 594 (W.D. Tex. 2002)). " 'Texas courts ... refuse to recognize a cause of action for negligence per se based on violations of the [FDCA] and FDA regulations.' " *Id.* (quoting *Holland v. Hoffman-La Roche, Inc.*, No. 3-06-CV-1298-BD, 2007 WL 4042757, at *3 (N.D. Tex. Nov. 15, 2007)); *see also Jackson v. Tae Jin Kim*, No. 2:02-CV-200, 2004 WL 6040969, at *4 (E.D. Tex. Sept. 27, 2004) (citing *Baker v. Smith & Nephew Richards, Inc.*, No. 95-58737, 1999 WL 811334, at *8 (Tex. Dist. June 7, 1999), *aff'd on other grounds sub. nom.*, *McMahon v. Smith & Nephew Richards, Inc.*, No. 14-99-00616-CV, 2000 WL 991697 (Tex. App.—Houston

[14th Dist.] July 20, 2000, no pet.)). Plaintiff does not dispute that his negligence per se claim is based on Defendants' alleged violations of the FDCA and FDA regulations. See Resp. 50. Accordingly, the Court grants summary judgment as to Plaintiff's negligence per se claim.

B. Fraudulent Concealment (Count XIII)

Under Texas law, "fraudulent concealment is not an independent cause of action, but is rather a tolling provision to prevent the defendant from relying upon a statute of limitations period as an affirmative defense." *Seismic Wells, LLC v. Matthews*, Civ. A. No. 5:15-CV-148-C, 2015 WL 11027778, at *4 (N.D. Tex. Sept. 11, 2015) (citing *Thompson v. Barnard*, 142 S.W.2d 238, 241 (Tex. Civ. App.—Waco 1940), *aff'd*, 158 S.W.2d 486 (Tex. 1942)). The Court, therefore, grants summary judgment as to Plaintiff's fraudulent concealment claim. Plaintiff has, however, preserved his right to assert fraudulent concealment as a defense to limitations at trial. See *Smith v. Palafox*, Civil No. EP-15-CV-00201-DB-RFC, 2016 WL 10515973, at *7 (W.D. Tex. Sept. 28, 2016) (citing *Nichols v. Smith*, 507 S.W.2d 518, 520 (Tex. 1974)).

C. Remaining Claims

*2 With respect to the remaining claims, the Court finds that Plaintiff has established that there is a genuine issue of material fact so that a reasonable jury might return a verdict in his favor. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Therefore, the Court denies the Motion as to those claims.

III. CONCLUSION

For the reasons discussed above, the Court grants the Motion as to Counts IX and XIII and denies the Motion as to all other Counts.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 1237394

TAB 46

2017 WL 2255776



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Quashie v. Olympus America, Inc.](#), N.D.Ga., June 19, 2018

2017 WL 2255776

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia, Atlanta Division.

Emma THORNTON, Plaintiff,

v.

ASTRAZENECA PHARMACEUTICALS
LP; and AstraZeneca LP, Defendants.

CIVIL ACTION NO. 1:17-CV-653-SCJ

|
Signed 05/15/2017**Attorneys and Law Firms**[Roger W. Orlando](#), The Orlando Firm, P.C., Decatur, GA, for Plaintiff.[Amy K. Fisher](#), [Katherine D. Althoff](#), Ice Miller, LLP, Indianapolis, IN, [Christopher B. Freeman](#), Justan Caleaf Bounds, Carlton Fields, PA, Atlanta, GA, [James Joseph Freebery, IV](#), Makenzie Windfelder, McCarter & English, LLP, Wilmington, DE, for Defendants.**ORDER**HONORABLE [STEVE C. JONES](#), UNITED STATES DISTRICT JUDGE

*1 Before the Court in this products liability case is Defendants' Motion to Dismiss plaintiff Emma Thornton's complaint for failure to state a claim. Doc. 18. ¹

¹ All record citations are to the electronic docket unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

I. STANDARD OF REVIEW

Normally the Court narrates the factual background driving a particular case before it explains the review lens to be applied. The centrality of this matter's lens to that narration requires reversing the normal order of things.

[Federal Rule of Civil Procedure 8\(a\)\(2\)](#) “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 555 (2007). On a motion to dismiss, courts must “accept[] the [factual] allegations in the complaint as true and constru[e] them in the light most favorable to the plaintiff.” [Boyd v. Warden, Ala. Dep't of Corrections](#), — F.3d —, 2017 WL 1856071, at *5 (11th Cir. May 9, 2017). Critically, conclusory allegations are not entitled to that assumption of truth—“*legal conclusions must be supported by factual allegations.*” [Bishop v. Ross Earle & Bonan, P.A.](#), 817 F.3d 1268, 1270 (11th Cir. 2016) (emphasis added).

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” [Twombly](#), 550 U.S. at 555. To avoid dismissal, “a complaint,” in other words, “must ‘state a claim to relief that is plausible on its face,’ meaning it must contain ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’ ” [Bishop](#) 817 F.3d at 1270 (quoting [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009)). The following narrative, culled from Thornton's complaint, reflects those review principles.

II. BACKGROUND

“Emma Thornton ingested [Nexium](#),” a drug manufactured by Defendants ² (doc. 7 at 4) that is “used to reduce the production of [stomach] acid,” “as prescribed and/or directed by her physician starting in 2007.” *Id.* at 1-2 (first amended complaint). In doing so, she “read and followed the directions regarding the use of [Nexium](#),” *id.* at 2, and used it “for its intended purposes and for purposes that Defendants expected,” though Thornton never says what those purposes are or what Defendants expected. *Id.* at 25. By 2011, Thornton believes, she developed “[Chronic Kidney Failure](#) ... as a result of her use of ...[Nexium](#).” *Id.* “To date,” and despite much scientific evidence pointing to a link between proton pump inhibitors (PPIs) and kidney damage, “over-the-counter PPIs lack detailed risk information for” a kidney injury named [acute interstitial nephritis](#) (AIN). *Id.* at 11. Over-the-counter and prescription PPIs both meanwhile “lack detailed risk information for” [chronic kidney disease](#). *Id.* At no point does Thornton say what “risk information”

2017 WL 2255776

the [Nexium](#) she actually consumed (which she also never identifies) contained.

2 Defendants argue that Thornton defines [Nexium](#) as “every [stomach acid reducer] that is or ever has been on the market,” and thus that she “fails to identify the allegedly defective product.” Doc. 18-1 at 3. Although it is true that Thornton’s complaint is, quite often, not a model of clarity, it is a stretch to say that she fails to identify the product she claims caused injury.

The entire complaint is about [Nexium](#). The only factual allegations (of which there are precious few) are about [Nexium](#). One loose sentence in a thirty-four page, 154 paragraph, five count complaint defining “[Nexium](#)” (see doc. 7 at 1, ¶ 2) cannot change those overarching, unignorable facts. Whether Thornton identified what version of [Nexium](#) (over-the-counter or prescription, injectable or oral, etc.) she ingested is a different, and relevant, question. But Thornton indubitably claims that [Nexium](#) caused her kidney problems.

*2 The complaint’s next section, titled “Summary of the Case” (all of the facts above reside in the “Introduction”), describes how [Nexium](#)’s active ingredient operates, and how it can cause kidney damage. See, e.g., doc. 7 at 5, ¶¶ 24-30. Thornton then alleges that Defendants hold new drug applications for four versions of [Nexium](#), but, again, never says which type she took. *Id.* at 5-6. She alleges that Defendants “market and sell [Nexium](#)” with certain drug control numbers, speculates that Defendants could, if they wanted to, alter advertisements without FDA approval, asserts legal conclusions, and lists “a multitude of studies ... linking the dangers” of long term use of drugs like [Nexium](#) and kidney damage. *Id.* at 5-7.

The “Factual Allegations” section begins with approximately forty paragraphs of facts like “21 million Americans used one or more prescription PPIs, such as [Nexium](#), in 2009,” and “a study published in the Journal of the American Medical Association found that PPI use was independently associated with a 20 – 50% higher risk of” [chronic kidney disease](#). Doc. 7 at 9, 11. None of those paragraphs include allegations about Thornton, the [Nexium](#) she actually took, the warnings on her [Nexium](#), or anything relating to *her*. The remainder of the “Factual Allegations” section (six paragraphs) contains legal conclusions that play no role in evaluating the complaint’s sufficiency. [Twombly](#), 550 U.S. at 555.

Up next is a “Federal Requirements” section. Doc. 7 at 15. It contains two more conclusions, followed by a single paragraph with thirty-two subparts listing various federal statutes and regulations, none of which contain a single factual allegation. *Id.* at 15-20; see, e.g., *id.* at 16 (“[Nexium](#) is misbranded pursuant to 21 U.S.C. § 352 because, among other things, it’s labeling is false or misleading.”). “Federal Requirements” then gives way to a short section arguing that Defendants should be estopped from pleading a statute of limitations defense and in favor of tolling the applicable limitations period in any case. *Id.* at 20-21. But argument, like legal conclusions, cannot help complaints state claims.

Sandwiched in the middle of all that argument, however, lie two facts: (1) that Thornton “was not aware of the connection between the use of Proton Pump Inhibitors [like [Nexium](#)] and [chronic kidney disease](#) until April of 2016, when [she] saw a television commercial identifying [a] link,” and (2) she had no “access to, [n]or actually receive[d] any studies or information recognizing the increased risk of [chronic kidney disease](#) with [Nexium](#) use or have any discussions with her Doctor that there was an association between her [chronic kidney disease](#) and [Nexium](#) use. Doc. 7 at 21. That, however, is the end of Thornton’s foray into facts.

At paragraph 101, the complaint begins to outline Thornton’s five claims.³ Perhaps unsurprisingly, the beginning of each count contains a paragraph that states “[t]he paragraphs above are incorporated by reference hereto as if set forth at length.” See, e.g., doc. 7 at 21. None of the counts include any additional factual allegations.

3 Those five are: (1) negligence, pled “in the broadest sense available under law to include pleading same pursuant to all substantive law that applies to this case,” whatever that means; (2) strict products liability; (3) breach of express warranty; (4) breach of implied warranty; and (5) fraudulent misrepresentation. Doc. 7 at 21-30. Thornton also seeks punitive damages. *Id.* at 31.

III. ANALYSIS

Defendants ply several dismissal-justifying arguments. First, they contend that Thornton’s claims are barred by Georgia’s two-year statute of limitations for bodily injury tort claims. Doc. 18-1 at 5-6. Diagnosed with [kidney disease](#) in 2011, Thornton, they say, fails to plead adequate facts showing that she reasonably discovered within the last two years that [Nexium](#) caused her half decade-old injury. *Id.* at 6.

2017 WL 2255776

*3 Defendants also point out that the complaint is a shotgun pleading that “fail[s] ... to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.” *Id.* at 8. In particular, Defendants complain about Thornton's reincorporation paragraphs, her all-encompassing definition of Defendants,⁴ and her alleged refusal to “identify what actions [Defendants] took as opposed to the litany of third-parties Plaintiff included in her definition of Defendants.” Doc. 18-1 at 9. In fact, say Defendants, Thornton's complaint is not personalized at all. Instead, it is a “one-size-fits-all-form complaint that Plaintiff's counsel uses against AstraZeneca in other lawsuits.” *Id.* at 10 (citing *Barnes v. AstraZeneca LP*, No. 1:17-cv-142-ODE, doc. 1 (N.D. Ga. Jan. 12, 2017)). “The result,” they say, “is an impersonal account of purported issues with PPIs generally and only sparse references to any injury allegedly sustained by Plaintiff here.” *Id.*

⁴ The term “Defendants,” says Thornton, shall include any and all named or unnamed parent companies, parent corporations, subsidiaries, affiliates, divisions, franchises, partners, joint-venturers, and any organizational units of any kind, their predecessors, successors, successors in interest, assignees, and their officers, directors, employees, agents, representatives and any and all other persons acting on their behalf.

Doc. 7 at 3.

Moving on to Thornton's actual claims, Defendants insist that each fails for lack of supporting facts. Her strict product liability claim perishes because she never alleges how *Nexium* was defectively manufactured, identifies a design defect, or reveals the substance of any inadequate warning. Doc. 18-1 at 16-19. Thornton's negligence claim, say Defendants, fails for the same reason. *Id.* at 19. Meanwhile, her fraud claim fails to plead the circumstance constituting fraud with particularity, and her warranty claims never say what warranties Defendants made. *Id.* at 21-22.

Defendants insist that, at bottom, Thornton, by not identifying “products, conduct, or causality ... fails to plead the most basic facts necessary to support a claim against AstraZeneca.” Doc. 18-1 at 11. They accordingly urge dismissal, with prejudice, for failure to state a claim.

In response, Thornton declines to engage with the substance of Defendants' arguments. To her, she “[c]learly” satisfies Rule 8's pleading requirements and filed within the two year statute of limitations. Doc. 20 at 2. She devotes two pages of her brief (one third of the document) to detailing the standard of review for motions to dismiss (*id.* at 4-5), and ends by adding that “clearly [Thornton] presented facts to identify her prescription use of *Nexium*, the defects in labeling and shortcomings of the Defendants in properly warning Plaintiff of the risks associated with the use of *Nexium*, the causal link between *Nexium* and chronic kidney disease, and the date when her kidney injury was diagnosed.” *Id.* at 5. Thornton never asks for leave to amend in the event the Court agrees with Defendants.

Every pleading-based attack avenue Defendants press has merit. First, Thornton's complaint plainly qualifies as a shotgun pleading. See *Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002) (“The typical shotgun complaint contains several counts, each one incorporating by reference the allegations of its predecessors....”); see also *id.* (127 paragraph, nine count complaint qualified as shotgun pleading). And since Thornton has already amended once and thus had an opportunity to cure her shotgun defect, the Court arguably could dismiss her complaint on those grounds. See *Byrne v. Nezhat*, 261 F.3d 1075, 1133 (11th Cir. 2001) (overturned on other grounds) (“[I]f, in the face of a shotgun complaint, the defendant does not move the district court to require a more definite statement, the court, in the exercise of its inherent power, must intervene *sua sponte* and order a repleader. Implicit in such instruction is the notion that if the plaintiff fails to comply with the court's order—by filing a repleader with the same deficiency—the court should strike his pleading or, depending on the circumstances, dismiss his case and consider the imposition of monetary sanctions.”).

*4 Even if the complaint had no form-based shortcomings, no claim contains sufficient factual allegations to survive. As Defendants note, of 154 paragraphs, fewer than 10 (Defendants say five) “are dedicated to the specific circumstances of” Thornton. Doc. 18-1 at 10. And never does she tether her *Nexium* ingestion to her kidney troubles more securely than by blithely insisting that she suffered the latter “as a result of” the former. Doc. 7 at 2. Even at the pleading stage something more than that must exist in order for the case to survive a 12(b)(6) motion.

2017 WL 2255776

Defendants correctly observe that the complaint in this case mirrors that in Barnes except for six words. Doc. 18-1 at 10. Such extensive overlap raises significant questions about specific causation. Although a plaintiff might plead general causation via non-personalized allegations, it is hard to imagine how someone like Thornton or Barnes could show that a product caused their specific injury based on general allegations of any kind. Put differently, one might be able to show that a drug has the ability to cause heart attacks, but only allegations suggesting that you took the drug and that it in fact underlay your heart attack could suffice to show specific cause. Since causation, both general and specific, is an element of each of Thornton's claims, that inability alone merits dismissal. Were that not the case, each claim pled also contains other essential elements for which Thornton pleads no facts at all.

A. Strict Product Liability

To establish strict liability, the Plaintiff must show that “the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.” O.C.G.A. § 51-1-11(b)(1). “The existence of a defect is crucial, because a manufacturer is not an insurer against all risks of injury associated with its product.” Giordano v. Ford Motor Corp., 165 Ga.App. 644, 645, 299 S.E.2d 897 (1983).

Goodson v. Boston Sci. Corp., No. 1:11-CV-3023-TWT, 2011 WL 6840593, at *4 (N.D. Ga. Dec. 29, 2011). Defects can come in one of three flavors: manufacturing, design, or warning.

At no point does Thornton allege any facts revealing how the Nexium she took deviated from its intended design (manufacturing flaw). Nor does she identify a design defect. Instead, she concludes that “Defendants designed ...Nexium in a defective and unreasonably dangerous condition.” Doc. 7 at 25. But conclusions cannot undergird a plausible claim.

Thornton's attempt to plead a warning claim—Nexium contained “inadequate warnings”—fares no better. Doc. 7 at 25. It is nothing more than a string of legal conclusions unsupported by factual allegations. As such, it too cannot survive.

B. Negligence

Thornton's negligence claim contains similar flaws.

To state a cause of action for negligence in Georgia, the following elements are essential: (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.

Fletcher v. Water Applications Distribution Grp., Inc., 333 Ga. App. 693, 696 (2015).

As discussed above, Thornton never makes the causal connection required and that alone dooms her negligence claim. What's more, she includes no allegations that suggest the conduct of the two defendants in this case breached any of the twenty-seven legal duties she identifies. Instead, she conclusorily alleges that Defendants—which “include[s] any and all named or unnamed parent companies, parent corporations, subsidiaries, affiliates, divisions, franchises, partners, joint-venturers, and any organizational units of any kind, their predecessors, successors, successors in interest, assignees, and their officers, directors, employees, agents, representatives and any and all other persons acting on their behalf”—were “guilty of carelessness, recklessness, negligence, gross negligence and willful, wanton, outrageous and reckless disregard for human life and safety in manufacturing, designing, labeling, marketing, distributing, supplying, selling and/or placing into the stream of commerce their proton pump inhibitor Nexium.” Doc. 7 at 3, 22. “At the risk of repetition (perhaps downright tedium),” Mathis v. United States, 136 S. Ct. 2243, 2251–52 (2016), conclusions cannot state claims. Only facts can. And Thornton includes none relevant to conduct by either defendant that illustrate the breach of a legal duty, much less that that breach caused her kidney injury (whose existence the Court has no reason to doubt). Her negligence claim thus fails.

C. Breach of Warranties (Express and Implied)

2017 WL 2255776

*5 Both of Thornton's warranty claims fare no better because she never identifies the warranties Defendants allegedly made. She vaguely states that Defendants "warranted that their products were safe for use," but that is little more than reciting the elements of the causes of action. Doc. 7 at 28. Her implied warranty claims are even worse. She states that Defendants "intended that [Nexium](#) be used in the manner that ... Thornton used it and Defendants impliedly warranted the product to be of merchantable quality, safe and fit for such use, and was adequately tested." *Id.* at 29. That, once again, is a series of conclusions. Legally, her warranty claims are no different than Thornton declaring defendants "breached a warranty because they breached a warranty." Needless to say such a claim fails.

D. Fraudulent Misrepresentation

Thornton's final claim fails for the same reason—she pleads only conclusions. In the fraud context, that compounds her complaint's problems because [Federal Rule of Civil Procedure 9\(b\)](#) requires that parties "state with particularity the circumstances constituting fraud." But Thornton never even identifies any statements that were misrepresentations. Instead, she pleads that "Defendants fraudulently misrepresented that the daily use of [Nexium](#) was safe and effective," and that "Defendants made representations and failed to disclose material facts with the intent to induce consumers, including Plaintiff, and the medical community to act in reliance by purchasing and using the [Nexium](#) sold by Defendants." Doc. 7 at 31.

But what did Defendants say? When did they say it? What material facts did they fail to disclose? At no point in thirty-four pages and 154 paragraphs (more if you include subparts) does Thornton ever answer those questions, much less distinguish between defendants. Her "allegations of fraud are therefore insufficient under [Rule 9\(b\)](#)." [Brazil v. Janssen](#)

[Research & Dev. LLC](#), No. 4:15-CV-0204-HLM, 2016 WL 4844442, at *11 (N.D. Ga. Mar. 24, 2016).

IV. CONCLUSION

Thornton's first amended complaint (doc. 7) tramples pleading requirements and fails to give Defendants, or the Court, notice of which facts are intended to support which claims for relief. Indeed, it includes practically no relevant facts at all. Instead, it spends 34 pages inveighing against [Nexium](#) without ever identifying which version of the product Thornton ingested, how that version was defective, or what defense conduct caused her injury. In short, it fails to state any viable claim.⁵

⁵ Because it fails to state a claim, the Court need not decide whether the two-year statute of limitations bars Thornton's claims. Given her 2011 kidney damage diagnosis, it well may. But one of the few facts that Thornton pleads—that she learned of the connection between [Nexium](#) and kidney problems in 2016 – casts some doubt on that conclusion. In view of the mountain of pleading deficiencies, and the fact intensive nature of a statute of limitations dispute, the Court declines to decide that issue at this stage.

Accordingly, Defendants' motion to dismiss is **GRANTED**. Doc. 18. This case is **DISMISSED WITH PREJUDICE**. The clerk is **DIRECTED** to enter judgment in accordance with [Fed. R. Civ. P. 58\(a\)](#) and close this case.

SO ORDERED, this 15th day of May 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 2255776

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 47

2008 WL 5381227



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Ontel Products Corporation v. Zuru, LTD](#), D.N.J., August 29, 2018

2008 WL 5381227

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Alberto TORRES–HERNANDEZ, Plaintiff,

v.

CVT PREPAID SOLUTIONS, INC., Defendant.

Civil Action No. 3:08–cv–1057–FLW.

|

Dec. 17, 2008.

Attorneys and Law Firms

[Bruce Heller Nagel](#), [Elliott Louis Pell](#), Nagel Rice, LLP,
Roseland, NJ, for Plaintiff.

[Steven Lawrence Menaker](#), Chasan, Leyner, Bariso &
Lamparello, P.C., Secaucus, NJ, for Defendant.

OPINION[WOLFSON](#), District Judge.

*1 Presently before the Court is a motion filed by Defendant CVT Prepaid Solutions, Inc. (“Defendant”) to dismiss Plaintiff Alberto Torres–Hernandez’s (“Plaintiff”) Complaint, in which Plaintiff, individually and on behalf of all others similarly situated, asserts a claim arising under the New Jersey Consumer Fraud Act, and common law claims for fraud and misrepresentation and unjust enrichment. Alternatively, Defendant argues that jurisdiction over this matter properly lies with the Federal Communications Commission (“FCC”). Generally, Plaintiff alleges that Defendant’s pre-paid calling cards did not provide the minutes advertised and paid for by consumers. For the reasons set forth herein, Defendants’ motion to dismiss for lack of subject matter jurisdiction is denied, and its motion to dismiss for failure to state a cause of action is granted. However, Plaintiff shall be given leave to re-plead and file an Amended Complaint.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Since Defendant moves to dismiss Plaintiff’s Complaint pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#), all facts alleged in the complaint are assumed to be true. Plaintiff is a resident of New Brunswick, New Jersey. Compl. ¶ 6. Defendant is a Delaware Corporation and a nationwide provider of prepaid calling cards that are distributed and sold in New Jersey. *Id.* ¶¶ 5, 8.

Cardholders buy access to allotments of long distance telephone access via an automated computer system commonly referred to as a “platform.” *Id.* ¶ 14. The platform monitors certain data points, namely the stated value of the prepaid calling card, the relevant rate table, the origin and destination of the call. *Id.* A prepaid calling card is generally accompanied by a toll-free telephone number that the cardholder must use to place a long distance call, otherwise known as “plugging into the platform.” *Id.* Once the user has connected with the access number, the user will be prompted to enter his or her personal identification number (“PIN”) found on the front or back of the card. *Id.* After the platform verifies the PIN, the user is then asked to enter the number to which he or she wishes to connect. *Id.* The user, after entering the destination number, is notified via voice prompt as to the amount of minutes he or she has left on that particular calling card. *Id.* The gravamen of Plaintiff’s Complaint is that Defendant’s cards “virtually never provide the minutes advertised to consumers nor do they provide the minutes that the voice prompt indicates are available to the user.” *Id.* ¶ 15.

As a result, Plaintiff filed this action on January 14, 2008, in the New Jersey Superior Court, Middlesex County Vicinage. In his Complaint, Plaintiff alleges that “Defendant researched, developed, designed, tested, manufactured, inspected, labeled, distributed, marketed, promoted, sold and/or otherwise released pre-paid calling cards into the stream of commerce.” Compl. ¶ 25. Pursuant to [28 U.S.C. 1446\(a\)](#), the matter was removed to this Court on February 28, 2008. Defendant asserts that federal jurisdiction is proper pursuant to the Class Action Fairness Act of 2005, [28 U.S.C. 1332\(d\)](#), which provides that this Court has original jurisdiction over any class action (1) involving a plaintiff class of 100 or more members; (2) in which the amount in controversy exceeds \$5,000,000; and (3) where at least one member of the plaintiff class is diverse from defendant. Thereafter, Defendant filed this Motion to Dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) and [12\(b\)\(6\)](#) on March 6, 2008.

II. DISCUSSION

2008 WL 5381227

A. Standard of Review 12(b)(1)

*2 When jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuading the court that subject matter jurisdiction exists. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991). No presumption of truthfulness attaches to the allegations of the complaint insofar as they concern subject matter jurisdiction. *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977). Should factual issues arise regarding subject matter jurisdiction, the court may consider exhibits outside the pleadings. *Id.* Indeed, “the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Id.*

B. Standard of Review 12(b)(6)

When reviewing a motion to dismiss on the pleadings, courts “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008) (citation and quotations omitted). Recently, in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court “retired” the language contained in *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 1968 (quoting *Conley*, 355 U.S. at 45–46). Instead, the factual allegations set forth in a complaint “must be enough to raise a right to relief above the speculative level.” *Id.* at 1965. As the Third Circuit has stated, “[t]he Supreme Court’s *Twombly* formulation of the pleading standard can be summed up thus: ‘stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest’ the required element. This ‘does not impose a probability requirement at the pleading stage,’ but instead ‘simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of’ the necessary element.” *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 127 S.Ct. at 1965).

C. Primary Jurisdiction

Initially, Defendant asserts that this Court should defer to the Federal Communications Commission (“FCC”) and its interstate telecommunication expertise in the present matter

under the doctrine of primary jurisdiction. In response, Plaintiff argues that the case at bar is devoid of technical questions and potential regulatory conflicts, and as such, this Court may exercise jurisdiction.

Defendant’s argument that this Court should defer to the FCC constitutes a challenge to this Court’s subject matter jurisdiction. The Supreme Court, in *Far East Conference v. United States*, 342 U.S. 570, 574–75, 72 S.Ct. 492, 96 L.Ed. 576 (1952), expounded on the doctrine of primary jurisdiction:

*3 [A] principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

The doctrine applies “to claims properly cognizable in court that contain some issue within the special competence of an administrative agency.” *Global Naps, Inc. v. Bell Atlantic–New Jersey, Inc.*, 287 F.Supp.2d 532, 548 (D.N.J.2003). Thus, cases involving specific technical or policy considerations within an agency’s area of expertise should be referred to the appropriate administrative agency. *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 496 F.2d 214, 220 (3d Cir.1974). The doctrine ensures a “workable

2008 WL 5381227

relationship between the courts and administrative agencies wherein ... the court can have the benefit of an agency's views on issues within the agency's competence." *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1105 (3d Cir.1995).

Additionally, the possibility that a conflict may arise if a court were to decide a matter inextricably intertwined with an intensive regulatory scheme requires judicial abstention in such cases. *Cheney State College Faculty v. Hufstедler*, 703 F.2d 732, 736 (3d Cir.1983); *American Telephone*, 496 F.2d at 220 (finding that the doctrine was created to "avoid conflict between the court and an administrative agency arising from either the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court."). However, a court need not defer review in every cause of action that requires a court to deal with regulatory rules. *The Business Edge Group, Inc. v. Champion Mortgage Company, Inc.*, 519 F.3d 150, 154 (3d Cir.2007). Such cases may be handled by a district court if the issues before it can be resolved "using the plain language of the [regulations] and ordinary rules of construction." *Id.* (quoting *Advance United Expressways, Inc. v. Eastman Kodak Co.*, 965 F.2d 1347, 1353 (5th Cir.1992)).

Even though the Third Circuit has visited the issue of primary jurisdiction on several occasions, there remains "no fixed formula for determining whether the doctrine of primary jurisdiction applies." *Global Naps*, 287 F.Supp.2d at 549. It is more appropriate for a court to evaluate issues of primary jurisdiction on a case-by-case basis. Nonetheless, the *Global Naps* court adopted four factors that can guide a court's analysis in such inquiries:

*4 (1) Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) Whether the question at issue is particularly within the agency's discretion; (3) Whether there exists a substantial danger of inconsistent rulings; and (4) Whether a prior application to the agency has been made.

Id. (citing *Oh v. AT & T Corp.*, 76 F.Supp.2d 551, 557 (D.N.J.1999)). This Court also turns to the resolution of other disputes over primary jurisdiction in the Third Circuit. For instance, in *American Telephone*, a group of communication carriers brought suit to compel telephone companies to provide interconnection services. 496 F.2d at 220. The Third Circuit found that the district court should have deferred to the FCC for two reasons: (1) the FCC had issued two separate rulings around the time of the dispute dealing with interconnection services; and (2) proceedings before the FCC had recently been initiated that dealt with the same issues raised by the plaintiffs. *Id.*

In the instant matter, Defendant directs the Court's attention to the FCC's broad, sweeping regulation of interstate communications, namely pre-paid calling cards. Specifically, Defendant cites to recent regulatory decisions rendered by the FCC concerning the pre-paid calling card industry. Def.'s Br. Pg. 6 (citing 21 FCC Rcd 7290 (2006) and 20 FCC Rcd 4826 (2005)). The crux of Defendant's argument is simple: this Court's adjudication of this matter could conflict and upset the FCC's expansive regulatory scheme over pre-paid calling cards. Although there is no pending hearing before the FCC concerning this specific issue, Defendant argue that pursuant to Section 201(b) of the Communications Act of 1934, the FCC provides Plaintiff with a more appropriate forum to adjudicate his claims. In response, Plaintiff charges "[t]here is no appreciable danger of inconsistent rulings; either consumers received the appropriate minutes on prepaid calling cards, or the converse is true." This Court agrees.

Applying the *Global Naps* factors, the Court finds that Plaintiff's Complaint is properly before this Court. Simply put, the case at bar requires this Court to determine whether Plaintiff and those similarly situated received what they bargained for. In arguing that this Court should defer to the FCC, Defendant does not list any pending hearings involving issues that if they were to be decided before this Court would give rise to a conflict with the current FCC regulatory scheme. Unlike *American Telephone*, where the FCC had made two previous rulings directly on point and another hearing was scheduled to deal with the contested issues in that case, no previous FCC ruling has been cited by Defendant that governs the specific issue in this case, namely the regulation of allegedly fraudulently advertised pre-paid calling cards and recourse for the average consumer. See 496 F.2d at 220. Instead, Defendant relies on broad FCC regulations that promulgate general administrative rules that have no bearing on the discrete issues in the case at bar. For example, *In re*

2008 WL 5381227

Vista Services Corp., 15 FCC Red 20646 (Oct. 18, 2000), an FCC ruling cited by Defendant, does not confer sole jurisdiction on the FCC with respect to the marketing of telecommunication providers, rather it states that the FCC may adjudicate claims under 201(b) of the Communications Act of 1934. The case at bar deals with issues arising from Defendant's supposed violation of the NJCFA, not 201(b).

*5 Moreover, Defendant's position on primary jurisdiction is untenable. Taken to its logical extreme, Defendant's proposed application of the doctrine would permit a pharmaceutical company to avoid negligence claims in federal court by invoking the Food and Drug Administration's authority (putting aside any preemption issues), or force a state court to defer consumer fraud actions against a commercial bank due to Federal Reserve oversight. Primary jurisdiction is an exceptional doctrine reserved for those technical cases that *would* conflict with specific federal regulations or pending agency hearings. It is not an alternate route for federally regulated businesses to take as a way to avoid civil litigation with consumer plaintiffs. Accordingly, Defendant's Motion to Dismiss for lack of subject matter jurisdiction is denied.

D. Plaintiff's NJCFA Claim

Defendant also challenges Plaintiff's Complaint on the ground that it fails to sufficiently state a cause of action under the NJCFA.¹ The Act is intended to protect consumers who purchase "goods or services generally sold to the public at large." *Marascio v. Campanella*, 298 N.J.Super. 491, 689 A.2d 852 (App.Div.1997). To state a claim under the NJCFA, a plaintiff must allege:

¹ In his Amended Complaint, Plaintiff needs to clarify whether this action is on behalf of consumers nationwide or only applies to New Jersey consumers. Such clarification is necessary to determine the applicability of the NJCFA to other plaintiffs as well as other choice of law issues.

"(1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." [*Frederico v. Home Depot*, 507 F.3d 188, 202 (3d Cir.2007) (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454 (1994))]. The NJCFA defines unlawful practice broadly, as including but not limited to unconscionable commercial practice, deception, fraud, false promise, false pretense

misrepresentation, or knowing concealment. N.J.S.A. 65:8-2.

Kalow & Springnut, LLP v. Commence Corp., No. 07-3442, 2008 U.S. Dist. LEXIS 48036, at *9-10, 2008 WL 2557506 (D.N.J. June 23, 2008) (citation omitted).

Because Plaintiff alleges violation² of the NJCFA, Plaintiff's Complaint must meet the heightened pleading requirements of Fed.R.Civ.P. 9(b). *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F.Supp.2d 494, 510 (D.N.J.2000) (finding that the plaintiff's NJCFA claim was subject to 9(b)'s heightened pleading standard); *Slim CD, Inc. v. Heartland Payment Sys.*, No. 06-2256, 2007 U.S. Dist. Lexis 62536, at *32, 2007 WL 2459349 (D.N.J. Aug. 22 2007) ("The pleading requirements of Rule 9(b) apply to ... NJCFA claims as well as ... common law fraud claims."). Recently, this Court reiterated what must be alleged to satisfy the heightened pleading standard:

² Plaintiff does not state whether he purchased one card or multiple cards. Thus, this Court cannot determine whether Plaintiff alleges more than one violation of the NJCFA.

Pursuant to Rule 9(b), a plaintiff alleging fraud must state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the precise misconduct with which [it is] charged." *Lum v. Bank of America*, 361 F.3d 217, 223-24 (3d Cir.2004). To satisfy this standard the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation. See *id.* at 224.

*6 *Kalow*, 2008 U.S. Dist. LEXIS 48036 at *10-11, 2008 WL 2557506 (quoting *Federico*, 507 F.3d at 200). This heightened pleading standard applies to all three prongs of an NJCFA claim. *Kalow*, 2008 U.S. Dist. LEXIS 48036 at *10, 2008 WL 2557506.

A properly plead NJCFA claim requires a plaintiff to allege "unlawful conduct by the defendants." Unlawful conduct or practices, as defined by the Act, consist of:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission

2008 WL 5381227

of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale or advertise of any merchandise.

N.J.S.A. 56:8–2. In other words, unlawful practices fall into one of three general categories: (1) affirmative acts; (2) knowing omissions; and (3) regulation violations. *Federico*, 507 F.3d at 202 (citation omitted). When the alleged consumer fraud consists of an affirmative act, it is unnecessary for the plaintiff to prove that the defendant intended to commit an unlawful act. *Slim CD*, 2007 U.S. Dist. LEXIS 62536, at *32, 2007 WL 2459349. Under the NJCFA, an affirmative representation is “one which is material to the transaction and which is a statement of fact, found to be false, made to induce the buyer to make the purchase.” *Mango v. Pierce–Coombs*, 370 N.J.Super. 239, 851 A.2d 62 (App.Div.2004). By contrast, when the alleged consumer fraud is an omission, intent is an essential element of the charge. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350 (1997). In *Kalow*, this Court found these allegations plead under the NJCFA as insufficient to withstand a motion to dismiss: “Defendant engaged in unfair, false, deceptive, and misleading practices, representations, and omissions in representing that it produced good quality software that business should rely upon and that it would stand behind software.” *Kalow*, 2008 U.S. Dist. LEXIS 48036 at * 11, 2008 WL 2557506. The *Kalow* complaint merely restated the language that defined an unlawful practice contained in the NJCFA's statutory language and made fleeting reference to an alleged misrepresentation on the part of the defendant. *Id.*

Here, Plaintiff's Complaint suffers from a similar defect as the allegations in *Kalow*, alleging, without specificity, that “Defendant concealed, that the amount of minutes advertised are in excess of the actual amount of minutes a user of their cards can actually utilize” and a recitation of the NJCFA's statutory language.” Compl. ¶¶ 30–31. After reviewing Plaintiff's Complaint, the Court finds no specific factual allegations, the what, where, and when of Defendant's alleged misrepresentations, necessary to sustain a cause of action under the NJCFA. Hypothetically, Plaintiff's allegations would need to indicate specific misrepresentations, such as Defendant selling calling cards that specifically advertised that they contained 120 minutes when in fact Defendant knew the card would only provide 100 minutes worth of calling time for the cardholder. With respect to the marketing

allegations, general allegations of concealment on the part of a defendant are insufficient to sustain an NJCFA claim. *Cooper v. Samsung Electronics America, Inc.*, No. 07–3853, 2008 WL 4513924, at *8 (D.N.J. Sept.30, 2008). Plaintiff fails to supply any details as to the character of the marketing and advertising materials. *See id.* (finding that a plaintiff's consumer fraud claim was deficient when he failed to specify which marketing or advertising materials allegedly mislead him in his purchase of the defendant's product).

*7 Moreover, Plaintiff's Complaint is devoid of any allegations that would be sufficient to set forth the causal relationship between Defendant's unlawful conduct and Plaintiff's ascertainable loss.³ To properly plead a causal nexus, a plaintiff cannot rely on legal conclusions that fail to allege “when statements were made or when the plaintiffs were exposed to the statements.” In *Dewey v. Volkswagen*, the court provided an example of a sufficiently plead causal nexus:

3 Additionally, Plaintiff must plead a specific ascertainable loss. A sufficiently plead ascertainable loss is one with enough specificity as to give the defendant notice of possible damages. Thus, in *Seville Industry Machine Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir.1984), a plaintiff satisfied the ascertainable loss pleading requirements “by incorporating into the complaint a list identifying with great specificity the pieces of machinery that were the subject of the alleged fraud.” Further, in *Kalow*, this Court found sufficient an alleged dollar amount lost by the plaintiff when it was forced to purchase a different product upgrade provided by the defendant. 2008 U.S. Dist. LEXIS 48036, at *10, 2008 WL 2557506. Here, Plaintiff “incur[red] monetary expense and has suffered an ascertainable economic loss that includes the purchase price of the pre-paid calling cards and the difference in price between the purchase price of the pre-paid cards and the fair market value for the actual minutes plaintiff received for which Defendants are liable to Plaintiff for treble Plaintiff's actual damages.” Compl. ¶ 35. Although there is no specific dollar amount alleged in Plaintiff's Complaint, that level of specificity is not required by the case law and Rule 9(b). However, the fact that Plaintiff fails to allege which calling card denominations he purchased, e.g.. a

120 minute calling card, precludes Plaintiff from sufficiently pleading ascertainable loss. Thus, if Plaintiff properly pleads the other two elements of the NJCFA, Plaintiff will also be able to plead ascertainable loss.

For example, in order to demonstrate the required causal nexus, Plaintiffs might be expected to plead facts stating whether the allegedly fraudulent statements on the website were on the website at the time that any of the individual Plaintiffs were deciding whether to purchase a Volkswagen, and whether any of the Plaintiffs saw those statements on Volkswagen's website.

558 F.Supp.2d 505 (D.N.J.2008). Thus, allegations set forth in “broad-brush fashion” will not suffice. *Kalow*, 2008 U.S. Dist. LEXIS 48036, at *17, 2008 WL 2557506. Here, Plaintiff alleges in conclusory fashion that “[a]s a direct and proximate result of the acts of consumer fraud set forth above, Plaintiff has purchased and used prepaid calling cards which caused him to incur monetary expense and has suffered an ascertainable economic loss.” Compl. ¶ 35. At its most basic level, Plaintiff has failed to allege when he purchased his calling card(s), what he relied upon regarding the minutes he purchased and how many calling minutes he actually received. These allegations as to a causal nexus between Defendant's alleged unlawful practices and Plaintiff's ascertainable loss do not withstand a motion to dismiss. Accordingly, Plaintiff's NJCFA claim is dismissed without prejudice.

E. Plaintiff's Fraud and Misrepresentation Claim

Additionally, Defendant seeks the dismissal of Count Two for failure to comply with Fed.R.Civ.P. 9(b). Rule 9(b) requires “[i]n all averments of fraud ..., the circumstances constituting fraud ... shall be stated with particularity.” Fed.R.Civ.P. 9(b). In *Lum v. Bank of America*, 361 F.3d 217, 223–24 (3d Cir.2004), the Third Circuit expounded on the heightened pleading standard imposed on allegations of fraud:

In order to satisfy Rule 9(b), plaintiffs must plead with particularity “the ‘circumstances’ of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.” *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.1984). Plaintiffs may satisfy this requirement by pleading the “date, place or time” of the fraud, or through “alternative means of injecting precision and some measure of substantiation into their allegations of fraud.”

Id. (holding that a plaintiff satisfied Rule 9(b) by pleading which machines were the subject of alleged fraudulent transactions and the nature and subject of the alleged misrepresentations). Plaintiffs also must allege who made a misrepresentation to whom and the general content of the misrepresentation. See [*Saporito v. Combustion Eng'g*, 843 F.2d 666, 675 (3d Cir.1988)]; *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 658–59 (3d Cir.1998); *Klein v. General Nutrition Cos.*, 186 F.3d 338, 345 (3d Cir.1999).

*8 Thus, the nature or subject of the fraud, or an indication of who made the alleged representations and to whom, must be set forth in the plaintiff's pleadings. *A–Valey Engineers, Inc. v. Board of Freeholders of Camden*, 106 F.Supp.2d 711, 716 (D.N.J.2000). The Rule's heightened pleading requirements “gives defendants notice of the claims against them, provides an increased measure of protection for their reputations, and reduces the number of frivolous suits brought solely to extract settlements.” *Naporano Iron & Metal Co. v. American Crane Corp.*, 79 F.Supp.2d, 494, 511 (D.N.J.2000). With respect to a class action claim, “less specificity is required when the complaint presents the claims of a class and individual identification of the circumstances of the fraud as to each class member would require voluminous pleadings.” *Szczubelek v. Cendant Mortgage Corp.*, No. 00–1858, 2001 WL 34875217, at *3 (D.N.J. Jun.15, 2001). However, this less stringent standard does not obviate the need for a lead plaintiff to set forth specific factual misrepresentations as to his particular allegations. *Id.*

As to Count Two, Plaintiff merely alleges in his Complaint that “Defendant made these misrepresentations and actively concealed adverse information” and “Defendant omitted, suppressed or concealed material facts in order to increase the sales of the product.” Compl. ¶¶ 39–40. Although Rule 9(b)'s strictures are less exacting for class action complaints, Plaintiff's vague, conclusory allegations as to Defendant's alleged fraudulent acts are insufficient. The Complaint contains no factual substantiation of alleged fraudulent acts taken on the part of Defendant, presumably the specific misrepresentation of actual minutes on Defendant's pre-paid calling cards that Plaintiff purchased. Moreover, no general time period in which the alleged misrepresentations took place is set forth anywhere in Plaintiff's Complaint. In sum, Plaintiff's allegations “suffers from the precise problems that Rule 9(b) aims to prevent,” that is failing to give the defendant the appropriate notice of the claims alleged against him and the specific fraudulent acts underlying the plaintiff's pleadings. *Naporano*, 79 F.Supp.2d at 512. Accordingly,

2008 WL 5381227

Count Two of Plaintiff's Complaint is dismissed without prejudice.

F. Plaintiff's Unjust Enrichment Claim

Finally, Defendant moves to dismiss Plaintiff's unjust enrichment claim. Defendant contends that Plaintiff's unjust enrichment claim is simply derivative of the fraud claims set forth in Counts I and II, and as such, should be dismissed. In his Complaint, Plaintiff alleges that "[i]n accepting payment for prepaid phone cards which virtually never provide the minutes advertised to consumers, Defendant has been unjustly enriched."

With respect to Defendant's assertion that Count Three is nothing more than a derivative claim of Counts One and Two, this Court disagrees. An unjust enrichment claim may be sustained independently as an alternative theory of recovery. *In re K-Dur Antitrust Litigation*, 338 F.Supp.2d 517, 544 (D.N.J.2004) (finding defendant's motion to dismiss plaintiff's unjust enrichment claim as premature even where other remedies at law were available to plaintiff); see also *United States v. Kensington Hosp.*, 760 F.Supp. 1120, 1135 (E.D.Pa.1991) (allowing plaintiff to assert an unjust enrichment claim as an alternative theory of recovery when plaintiff had asserted a cognizable contract claim in the same complaint). Thus, this Court must determine whether Plaintiff's allegations give rise to an unjust enrichment claim.

*9 At the onset, the Court notes that an unjust enrichment claim need not be pled with the same specificity as a claim sounding in fraud. Rather, the more liberal notice pleading standard of Fed. R. Civ. 8(a) applies. An unjust enrichment claim requires plaintiff to allege "(1) at plaintiff's expense (2) defendant received benefit (3) under circumstances that would make it unjust for defendant to retain benefit without paying for it." *In re K-Dur Antitrust Litigation*, 338 F.Supp.2d 517, 544 (D.N.J.2004) (quoting RESTATEMENT OF RESTITUTION 1 (1937)). Further, "[t]he unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519 (1994). However, New Jersey

law does not recognize unjust enrichment as an independent tort cause of action. *Cafaro v. HMC*, No. 07-2793, 2008 WL 4224801, at *12 (D.N.J. Sept.8, 2008) (finding that the plaintiffs' unjust enrichment claim should be dismissed because the allegations sounded in tort and not in quasi-contract). Rather, "unjust enrichment ... requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant." *VRG*, 135 N.J. at 554, 641 A.2d 519. Thus, where a plaintiff asserts an unjust enrichment cause of action along with tort claims and there appear to be no allegations that the plaintiff expected or anticipated remuneration from the defendant, the unjust enrichment claim should be dismissed. See *Cafaro*, 2008 WL 4224801, at *12.

Here, the Court is unable to discern whether Plaintiff's unjust enrichment claim is based on a quasi-contractual or implied contractual relationship with the expectation of remuneration or is alleged as an independent tort cause of action. Plaintiff's Complaint contains two counts arising from fraudulent misrepresentations and an unjust enrichment claim that simply relies on the allegations set forth in Counts One and Two. Accordingly, this Court dismisses Count Three of Plaintiff's Complaint without prejudice.

G. Plaintiff's Request for Leave to File Amended Complaint

Plaintiff requests leave to amend his Complaint should the Court grant Defendant's motion to dismiss. Since Plaintiff may have sufficient information to properly allege an NJCFA, fraud and misrepresentation, and unjust enrichment claim, this Court will give Plaintiff leave to amend his Complaint.

III. CONCLUSION

For the foregoing, Defendant's Motion to Dismiss for lack of subject matter jurisdiction is denied. However, Plaintiff's Complaint is dismissed without prejudice and Plaintiff shall be given leave to re-plead and file an Amended Complaint within 30 days.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5381227

TAB 48

2012 WL 6595732

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Michael WALTERS, Plaintiff,

v.

Richard J. CARSON, Matthew J. Ernades, Jr., North
Hanover Township Board of Education, Johnson
& Johnson, and McNeil–PPC, Inc., Defendants.

Civil No. 11–6545 (RBK/AMD).

|

Dec. 17, 2012.

Attorneys and Law Firms

George R. Szymanski, Law Offices of George R. Szymanski,
Laurel Springs, NJ, for Plaintiff.

Eric L. Harrison, Methfessel & Werbel, PC, Edison, NJ,
David F. Abernethy, Drinker Biddle & Reath, Princeton, NJ,
Meredith Reinhardt, Melissa A. Graff, Drinker Biddle &
Reath LLP, Philadelphia, PA, for Defendants.

OPINION

KUGLER, District Judge.

*1 This matter comes before the Court upon Plaintiff Michael Walters's ("Plaintiff") Amended Complaint against Defendant McNeil–PPC, Inc. ("Defendant") asserting claims of negligence, breach of implied and express warranties, and strict liability arising out of Plaintiff's use of certain over the counter medication manufactured and distributed by Defendant. Currently before the Court is Defendant's motion to dismiss Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted (Doc. No. 28). See Fed.R.Civ.P. 12(b)(6). For the reasons stated below, Defendant's motion will be granted.

I. BACKGROUND¹

¹ When considering the sufficiency of the factual allegations in a plaintiff's complaint, the Court, for purposes of deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), assumes such allegations to

be true. See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir.2009).

Plaintiff was formerly a custodian employed by the North Hanover Township Board of Education ("the Board"). Amended Compl. ¶ 7. In October 2009, Plaintiff began taking *Tylenol Arthritis*, a medication manufactured, marketed, distributed, and sold by Defendant. Amended Compl. ¶ 1; Def.'s Br. in Support of Mot. to Dismiss 1. Later that month, Plaintiff began experiencing stomach problems which caused him to miss work. Amended Compl. ¶ 11.

On November 6, 2009, Plaintiff received a letter from the business administrator of North Hanover Township Schools, Matthew J. Ernades, Jr. ("Ernades"). *Id.* at ¶ 12. The letter recommended to the Board and to Richard Carson ("Carson"), superintendent of the North Hanover Township School District ("the District"), that Plaintiff's contract with the District be terminated because Plaintiff had used ten of his twelve allotted sick days since July 1, 2009. *Id.* at ¶¶ 12, 13. The Board followed the recommendation and terminated Plaintiff's employment as of December 1, 2009. *Id.* at ¶ 14.

At some point in 2009 following his termination, Plaintiff learned that *Tylenol Arthritis* had been known to cause stomach problems in individuals taking the medication and that the manufacturer had ordered a recall. *Id.* at ¶ 15. Plaintiff alleges that the *Tylenol Arthritis* products he had purchased and used were part of the recall. *Id.*

Plaintiff's Amended Complaint states various federal and state law claims against Carson, Ernades, and the District arising out of his termination. In addition, and the focus of the instant motion to the dismiss, the Amended Complaint asserts three causes of action against Defendant²: (1) negligence in the manufacture of *Tylenol Arthritis*; (2) breach of express and implied warranties in selling the "inherently defective" *Tylenol Arthritis*"; and (3) strict liability for placing the allegedly defective product into the stream of commerce. Amended Compl. ¶¶ 22–31.³

² The Amended Complaint also names Johnson and Johnson in the claims concerning *Tylenol Arthritis*. Defendant explains that it is responsible for the "manufacture, marketing, distribution and sale of the product." Def.'s Br. in Support of Mot. to Dismiss 1. Defendant is a wholly owned subsidiary of Johnson & Johnson. McNeil Corp. Disclosure Statement 2 (Doc. No. 29).

3 The Court exercises supplemental jurisdiction over Plaintiff's state law claims as they form part of the same transaction or occurrence giving rise to Plaintiff's federal claims against the North Hanover Township School Board Defendants. *See* 28 U.S.C. § 1367(b) (2006).

In its instant motion to dismiss under Fed.R.Civ.P. 12(b)(6), Defendant argues that Plaintiff's negligence, implied warranty, and strict liability claims are subsumed by the New Jersey Products Liability Act ("the PLA") and that Plaintiff has failed to state a claim under the Act. Def.'s Br. in Support of Mot. to Dismiss 2. Defendant further asserts that Plaintiff fails to state a claim under New Jersey law for breach of express warranty. Def.'s Br. in Support of Mot. to Dismiss 7.

II. DISCUSSION AND ANALYSIS

A. Legal Standard

*2 Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss an action for failure to state a claim upon which relief can be granted. When evaluating a motion to dismiss, "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir.2009) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008)). In other words, a complaint survives a motion to dismiss if it contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

To make this determination, a court conducts a three-part analysis. *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir.2010). First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." *Id.* (quoting *Iqbal*, 556 U.S. at 675). Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 131 (quoting *Iqbal*, 556 U.S. at 680). Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* (quoting *Iqbal*, 556 U.S. at 680). This plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. A complaint

cannot survive where a court can only infer that a claim is merely possible rather than plausible. *Id.*

B. Negligence, Breach of Implied Warranty, and Strict Liability Claims

It is well established in this Circuit that the PLA creates an "exclusive statutory cause of action" for products liability claims asserted under New Jersey law. *See Kury v. Abbott Laboratories, Inc.*, No. 11-803, 2012 WL 124026 at *3 (D.N.J. Jan.17, 2012) (quoting *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir.1991)). That is, after the enactment of the PLA, "only a single product liability action remains" under New Jersey law and it is the sole method by which to bring such a claim. *Id.* (quoting *Tirrell v. Navistar Int'l, Inc.*, 248 N.J.Super. 390, 591 A.2d 643, 647 (N.J.Super.App.Div.1991), *cert. denied*, 126 N.J. 390, 599 A.2d 166 (1991)); *see also id.* at —3-4, 599 A.2d 166 (quoting *In re Lead Paint Litig.*, 191 N.J. 405, 924 A.2d 484, 503, 504 (N.J.2007)) ("[The PLA] generally subsumes common law product liability claims ... [and] ... encompass[es] virtually all possible causes of action relating to harms caused by consumer and other products.").

In this case, although he brings suit against the manufacturer and distributor of a consumer product like *Tylenol Arthritis* for alleged injuries caused by that product, Plaintiff has stated common law claims of negligence, breach of implied warranty, and strict liability. However, these common law causes of action are subsumed by the PLA. *See Kury*, 2012 WL 124026 at *3. Thus, Plaintiff's failure to assert his claim under the PLA is a fatal pleading deficiency. Accordingly, the Court will grant Defendant's motion to dismiss Plaintiff's negligence, breach of implied warranty, and strict liability claims as improperly pled.

C. Breach of Express Warranty Claim

*3 By its own terms, the PLA does not extend to claims for breach of an express warranty. N.J.S.A. § 2A:58C-1(3) (2011).⁴ Instead, under New Jersey law, "in order to state a claim for breach of express warranty, [a plaintiff] must properly allege: (1) that [the defendant] made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description." *Arlandson v. Hartz Mountain Corp.*, 792 F.Supp.2d 691, 706 (D.N.J.2011). When a plaintiff's express warranty claims relies merely on bald assertions "that fail to identify specific

2012 WL 6595732

affirmations or promises,” the claims cannot survive a motion to dismiss. *Id.* at 707. Similarly, a claim “devoid of factual matter” that simply states “a conclusory recitation of the elements of the claim” will be dismissed. *Simmons v. Stryker Corp.*, No. 08–3451, 2008 WL 4936982 at *2 (D.N.J. Nov.17, 2008).

4 That provision reads, in relevant part, “[p]roduct liability action means any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.”

In support of his breach of express warranty claim, Plaintiff alleges only the following: “[Defendant] expressly and impliedly warranted that Tylenol Arthritis was merchantable, free from any defects, and reasonably fit for the foreseeable use and intended purposes for which it was sold” and that “[Defendant] breached [its] express and implied warranties in that the Tylenol Arthritis was inherently defective, hazardous, unsafe, not properly and reasonably merchantable, and unfit for its intended, ordinary and foreseeable use.” Amend. Compl. ¶¶ 23–24.

Simply stated, Plaintiff's Amended Complaint does not contain sufficient factual allegations to support a claim for breach of an express warranty. Even if the Court accepts Plaintiff's allegation that Defendant *expressly* warranted that Tylenol Arthritis was “merchantable,” “free from any defects,” and “reasonably fit for the foreseeable use and intended purposes for which it was sold,” nowhere does Plaintiff allege how that alleged warranty formed any part of the basis of his decision to purchase the product. Instead, Plaintiff's claims are best characterized as “a conclusory recitation of the elements of the claim.” See *Simmons*, 2008 WL 4936982 at *2. Thus, because Plaintiff failed to allege adequately the elements of a breach of express warranty cause of action under New Jersey law, the Court must grant Defendant's motion to dismiss.

III. CONCLUSION

For the reasons stated above, Defendant's motion is **GRANTED**. An appropriate order shall issue today.

All Citations

Not Reported in F.Supp.2d, 2012 WL 6595732

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

**COMPENDIUM OF UNREPORTED OR UNPUBLISHED
AUTHORITIES CITED IN MANUFACTURER DEFENDANTS'
COMPENDIUM OF CHARTS**

TABLE OF CONTENTS

Cases	Tab
<i>Am. Fed’n of State Cnty. & Mun. Emps. v. Ortho-McNeilJanssen Pharm., Inc.</i> , No. 2:08-cv-5904, 2010 WL 891150 (E.D. Pa. Mar. 11, 2010)	1
<i>Archer v. Holmes</i> , No. 1:17-cv-2051, 2018 WL 534475 (N.D. Ga. Jan. 23, 2018), <i>reconsideration denied</i> , No. 1:17-cv-2051, 2018 WL 3454899 (N.D. Ga. Apr. 9, 2018)	2
<i>Avila v. CNH Am., LLC</i> , No. 4:04-cv-3384, 2012 WL 13187721 (D. Neb. Aug. 30, 2012).....	3
<i>Baker v. Chevron U.S.A. Inc.</i> , 533 F. App’x 509 (6th Cir. 2013)	4
<i>Banh v. Am. Honda Motor Co., Inc.</i> , No. 2:19-cv-5984, 2019 WL 8683361 (C.D. Cal. Dec. 17, 2019)	5
<i>Banks v. Nationwide Mut. Fire Ins. Co.</i> , No. 99AP-1413, 2000 WL 1742064 (Ohio Ct. App. Nov. 28, 2000)	6
<i>Benton v. Phillips Edison & Co., Ltd.</i> , No. 3:17-cv-630, 2017 WL 6273361 (E.D. Va. Dec. 8, 2017)	7
<i>Bostick v. St. Jude Med., Inc.</i> , No. 2:03-cv-2636, 2004 WL 3313614 (W.D. Tenn. Aug. 17, 2004)	8
<i>Bowerman v. United Illuminating</i> , No. X04Cv 940115436S, 1998 WL 910271 (Conn. Super. Ct. Dec. 15, 1998)	9
<i>Brochu v. Foote Enters., Inc.</i> , 381 P.3d 596, 2012 WL 5991571 (Nev. 2012)	10
<i>Brown v. Saint-Gobain Performance Plastics Corp.</i> , No. 1:16-cv-242, 2018 WL 10638396 (D.N.H. Dec. 6, 2018)	11
<i>Bunn v. Navistar, Inc.</i> , 797 F. App’x 247 (6th Cir. 2020).....	12
<i>Callegari v. Blendtec, Inc.</i> , No. 2:18-cv-308, 2018 WL 5808805 (D. Utah Nov. 6, 2018)	13

<i>Cnty. Spirit Bank v. Fid. Nat'l Title Ins. Co. of New York</i> , No. 3:09-cv-430, 2009 WL 10688141 (N.D. Ala. June 22, 2009)	14
<i>Daniele Int'l, Inc. v. Sabra Dipping Co., LLC</i> , No. 1:17-cv-499, 2018 WL 2744976 (D.R.I. June 7, 2018)	15
<i>Easler v. Hoechst Celanese Corp.</i> , No. 7:14-cv-48, 2014 WL 3868022 (D.S.C. Aug. 5, 2014)	16
<i>Ehlers v. Ben & Jerry's Homemade Inc.</i> , No. 2:19-cv-194, 2020 WL 2218858 (D. Vt. May 7, 2020)	17
<i>Estes v. Lanx, Inc.</i> , No. 1:14-cv-52, 2015 WL 9462964 (N.D. Miss. Dec. 23, 2015)	18
<i>Figueroa v. Ethicon, Inc.</i> , No. 2:19-cv-1188, 2020 WL 1434249 (D.N.M. Mar. 24, 2020)	19
<i>In re Ford Tailgate Litig.</i> , No. 3:11-cv-2953, 2014 WL 1007066 (N.D. Cal. Mar. 12, 2014), <i>order corrected on denial of reconsideration</i> , No. 3:11-cv-2953, 2014 WL 12649204 (N.D. Cal. Apr. 15, 2014)	20
<i>In re Gen. Motors LLC Ignition Switch Litig.</i> , 257 F. Supp. 3d 372 (S.D.N.Y. 2017), <i>modified on reconsideration</i> , No. 1:14-mc-2543, 2017 WL 3443623 (S.D.N.Y. Aug. 9, 2017)	21
<i>Genito L.P. v. Nat. Housing Bldg. Corp.</i> 50 Va. Cir. 71, 1999 WL 33722382 (Va. Cir. Ct. 1999)	22
<i>Henderson v. Freightliner, LLC</i> , No. 1:02-cv-1301, 2005 WL 775929 (S.D. Ind. Mar. 24, 2005)	23
<i>Hunt v. Am. Wood Preservers Inst.</i> , No. IP 02-0389, 2002 WL 34447541 (S.D. Ind. July 31, 2002)	24
<i>Hydronic Enters. v. Danal Jewelry Co.</i> , No. 81-4011, 1986 WL 213409 (R.I. Super. Ct. Dec. 22, 1986)	25
<i>Javens v. G.E. Healthcare Inc.</i> , No. 1:18-cv-1030, 2020 WL 2783581 (D. Del. May 29, 2020)	26

<i>Johnson v. Eli Lilly & Co.</i> , No. 1:14-cv-453, 2015 WL 1120009 (S.D. Ohio Mar. 12, 2015)	27
<i>Kodger v. Zimmer Biomet Holdings, Inc.</i> , No. 1:17-cv-1350, 2017 WL 4348997 (N.D. Ohio Sept. 29, 2017).....	28
<i>Kury v. Abbott Labs., Inc.</i> , No. 3:11-cv-803, 2012 WL 124026 (D.N.J. Jan. 17, 2012).....	29
<i>Lamb v. Graco Children’s Prods., Inc.</i> , No. 4:11-cv-477, 2012 WL 12871963 (N.D. Fla. Jan. 24, 2012)	30
<i>Lugones v. Pete & Gerry’s Organic, LLC</i> , --- F. Supp. 3d ---, 2020 WL 871521 (S.D.N.Y. Feb. 21, 2020).....	31
<i>Mercantile Bank of Mich. v. CLMIA, LLC</i> , No. 316777, 2015 WL 630259 (Mich. Ct. App. Feb. 12, 2015).....	32
<i>Naylor Farms, Inc. v. Anadarko OGC Co.</i> , No. 5:08-cv-668, 2011 WL 7267851 (W.D. Okla. June 15, 2011).....	33
<i>Palmer v. CVS Health</i> , No. 1:17-cv-938, 2019 WL 6529163 (D. Md. Dec. 4, 2019).....	34
<i>Peace Software, Inc. v. Hawaiian Elec. Co., Inc.</i> , No. 1:09-cv-408, 2009 WL 3923350 (D. Haw. Nov. 17, 2009).....	35
<i>Philips v. Ford Motor Co.</i> , No. 5:14-cv-2989, 2015 WL 4111448 (N.D. Cal. July 7, 2015).....	36
<i>Pixler v. Huff</i> , No. 3:11-cv-207, 2011 WL 5597327 (W.D. Ky. Nov. 17, 2011)	37
<i>R.M. Harrison Mech. Corp. v. Decker Indus., Inc.</i> , No. CL08–193, 2008 WL 10669311 (Va. Cir. Ct. Aug. 28, 2008).....	38
<i>Regent at Town Ctr. Homeowners’ Ass’n v. Oxbow Constr., LLC</i> , 419 P.3d 702, 2018 WL 2431690 (Nev. May 24, 2018).....	39
<i>Rosmer v. Pfizer, Inc.</i> , No. 9:99-cv-228018, 2001 WL 34010613 (D.S.C. Mar. 30, 2001)	40

<i>Salley v. Heartland-Charleston of Hanahan, SC, LLC</i> , No. 2:10-cv-791, 2011 WL 2728051 (D.S.C. July 12, 2011).....	41
<i>Sanford v. Ektelon/Prince Sports Grp., Inc.</i> , No. 8:97-cv-368, 1999 WL 33537914 (D. Neb. Nov. 5, 1999).....	42
<i>Sani-Pure Food Labs, LLC v. bioMerieux, Inc.</i> , No. 13-cv-6643, 2014 WL 6386803 (D.N.J. Nov. 13, 2014)	43
<i>Savett v. Whirlpool Corp.</i> , No. 1:12-cv-310, 2012 WL 3780451 (N.D. Ohio Aug. 31, 2012)	44
<i>Schumacher v. Tyson Fresh Meats, Inc.</i> , No. 1:02-cv-1027, 2006 WL 7124778 (D.S.D. Apr. 10, 2006)	45
<i>Scott v. Durham</i> , No. 1:09-cv-348, 2011 WL 8969 (N.D. Ind. Jan. 3, 2011)	46
<i>Sergeants Benevolent Ass’n Health & Welfare Fund v. Actavis, PLC</i> , No. 1:15-cv-6549, 2018 WL 7197233 (S.D.N.Y. Dec. 26, 2018)	47
<i>Small v. Univ. Med. Ctr. of S. Nevada</i> , No. 2:13-cv-298, 2016 WL 4157309 (D. Nev. Aug. 3, 2016)	48
<i>Smith v. Merial Ltd.</i> , No. 2:10-cv-439, 2011 WL 2119100 (D.N.J. May 26, 2011).....	49
<i>Stroderd v. Yamaha Motor Corp., U.S.A</i> , No. 04-cv-3040, 2011 WL 2119100 (E.D. La. Aug. 4, 2011)	50
<i>Sweezy v. C.R. Bard Inc.</i> , No. 3:19-cv-2172, 2020 WL 1237394 (N.D. Tex. Mar. 12, 2020)	51
<i>Total Care Physicians, P.A. v. O’Hara</i> , No. 99c-11-201, 2002 WL 31667901 (Del. Super. Ctr. Oct. 29, 2002).....	52
<i>United Golf, LLC v. Westlake Chem. Corp.</i> , No. 4:05-cv-495, 2006 WL 2807342 (N.D. Okla. 2006)	53
<i>Vind v. McGuire</i> , No. A13-0591, 2013 WL 6152312 (Minn. Ct. App. Nov. 25, 2013)	54

<i>Ybarra v. Ameripro Funding, Inc.</i> , No. 1:17-cv-224, 2018 WL 2976126 (Tex. App. June 14, 2018), <i>review denied</i> (Nov. 9, 2018)	55

TAB 1

2010 WL 891150



KeyCite Yellow Flag - Negative Treatment

Distinguished by *In re McNeil Consumer Healthcare, Marketing and Sales Practices Litigation*, E.D.Pa., July 15, 2011

2010 WL 891150

Only the Westlaw citation is currently available.
 United States District Court,
 E.D. Pennsylvania.

AMERICAN FEDERATION OF STATE COUNTY
 AND MUNICIPAL EMPLOYEES, District Council
 47 Health Andwelfare Fund, et al., Plaintiffs,

v.

ORTHO-McNEIL-JANSSEN
 PHARMACEUTICALS, INC., et al., Defendants.

Civil Action No. 08-cv-5904.

|
 March 11, 2010.

West KeySummary

1 Sales Parties entitled to notice

Buyer of pain medication patch failed to notify seller of the alleged breach of warranty, as required to support buyer's claim for breach of implied and express warranty under the Pennsylvania Uniform Commercial Code (UCC). Although seller may have had notice that its product was defective since it issued a recall notice, the buyer did not notify the seller that the transaction was claimed to involve a breach of warranty. 13 Pa.C.S.A. § 2607(c)(1).

14 Cases that cite this headnote

Attorneys and Law Firms

William D. Marvin, Cohen Placitella & Roth, Philadelphia, PA, for Plaintiffs.

Kathryn E. Deal, David J. Antczak, Edward M. Posner, Drinker Biddle & Reath LLP, Philadelphia, PA, for Defendants.

MEMORANDUM OPINION AND ORDER

RUFE, District Judge.

*1 Plaintiff American Federation of State, County and Municipal Employees, District Council 47 Health and Welfare Funds, and Philadelphia Firefighters Union Local No. 22 Health and Welfare Fund bring this action against Defendants Ortho-McNeil-Janssen Pharmaceuticals, Inc. ("OMJ"), Sandoz, Inc., and ALZA Corporation ("ALZA"), alleging violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), breach of express and implied warranties, and unjust enrichment. Before the Court is Defendants' Motion to Dismiss Plaintiffs' Complaint.¹ For the reasons set forth below, the Motion will be granted in part and denied in part.

¹ Document No. 14.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendants OMJ and Sandoz, Inc. market and distribute the *fantanyl transdermal system* patch ("fantanyl patch"), which is a Schedule II narcotic, available only through a doctor's prescription, designed to deliver a steady, controlled dosage of a powerful medication that provides relief for severe and chronic pain.² ALZA, an affiliate of OMJ, contracted with OMJ and Sandoz to manufacture and supply *fantanyl* patches throughout the United States.³ OMJ distributes the patches under the brand name *Duragesic* and Sandoz distributes the patches under a generic equivalent.⁴ The *fantanyl* patches are available in a variety of dosage delivery rates (e.g., 12.5, 25, 50, 75 and 100 micrograms per hour ("mcg/hour")).⁵

² Compl. [Document No. 1] ¶¶ 6–7, 16.

³ *Id.* ¶ 8.

⁴ *Id.*

⁵ *Id.*

On February 12, 2008, OMJ announced a recall of all 25 mcg/hour *Duragesic* patches (and its generic equivalent) stamped with expiration dates on or before December 2009.⁶ The official press release stated, in pertinent part, that:

⁶ *Id.* ¶ 19.

[The 25mcg/hr fentanyl transdermal system patches] being recalled may have a cut along one side of the drug reservoir within the patch. The result is possible release of fentanyl gel from the gel reservoir into the pouch in which the patch is packaged, exposing patients or caregivers directly to fentanyl gel. Fentanyl patches that are cut or damaged in any way should not be used. Exposure to fentanyl gel may lead to serious adverse events, including respiratory depression and possible overdose, which may be fatal....Anyone who has 25 mcg/hr ... fentanyl patches should check the box or foil pouch for the expiration date ... The recalled patches all have expiration dates on or before December 2009. The cut edge in affected patches can be seen upon opening the sealed foil pouch that holds the patch. Affected patches should not be handled directly.⁷

⁷ Defs.' Mot. to Dismiss, Ex. A; *see also* Compl. ¶ 20.

Plaintiffs are health and welfare trust funds that provide medical coverage, including prescription drug coverage, to their members and their members' dependents.⁸ Plaintiffs and other similarly situated third-party payors have paid for supplies of 25 mcg/hour fentanyl patches, which were later recalled by Defendants, on behalf of their qualified members.⁹ As a result of the recall, Plaintiffs allege that they, and similarly situated third-party payors, paid or will pay expenses related to the purchase and reimbursement of 25 mcg/hour fentanyl patches that had to be discarded.¹⁰

⁸ Compl. ¶¶ 1–2.

⁹ *Id.* ¶ 21.

¹⁰ *Id.* ¶ 23.

*2 On December 19, 2008, Plaintiffs filed the underlying class-action Complaint, alleging the following: COUNT I: Violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTCPL"); COUNT II: Breach of an Express Warranty under the Pennsylvania Uniform Commercial Code ("UCC"); COUNT III: Breach of an Implied Warranty; and COUNT IV: Rescission / Unjust Enrichment. On March 25, 2009, Defendants filed the instant Motion to Dismiss, asserting several grounds for dismissal of Plaintiffs' Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Court has carefully reviewed Defendants' Motion, Plaintiffs' Response,¹¹ Defendants'

Reply,¹² and all accompanying materials, and this matter is now ready for disposition.

¹¹ Document No. 15.

¹² Document No. 19.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) allows a party to move for dismissal of any claim wherein the district court lacks subject matter jurisdiction.¹³ When considering a 12(b)(1) motion, the court "review [s] only whether the allegations on the face of the complaint, taken as true, allege sufficient facts to invoke the jurisdiction of the district court."¹⁴ When subject matter jurisdiction is challenged under 12(b)(1), the plaintiff must bear the burden of persuasion.¹⁵

¹³ FED. R. CIV. P. 12(b)(1) (West 2009 Revised).

¹⁴ *Licata v. U.S. Postal Serv.*, 33 F.3d 259, 260 (3d Cir.1994).

¹⁵ *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991).

In order for a plaintiff to have standing in federal court, the case or controversy presented by the plaintiff must be justiciable and establish an injury-in-fact.¹⁶ To establish an injury-in-fact, a plaintiff must allege that: (1) defendant violated a legally protected interest that is concrete and particularized, and actual or imminent—not merely an injury that is "conjectural" or "hypothetical," (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is redressable by a remedy that federal courts are permitted to give.¹⁷ If the complaint fails to satisfy these requirements, "a federal court does not have subject matter jurisdiction ... [and] the claim[s] must be dismissed."¹⁸

¹⁶ *See Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

¹⁷ *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

¹⁸ *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir.2006).

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal for failure to state a claim upon

which relief can be granted.¹⁹ Under 12(b)(6), the moving party “bears the burden of showing no claim has been stated.”²⁰ The court must “accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in a light most favorable to the non-moving party.”²¹ The United States Supreme Court clarified this standard in *Bell Atlantic Corporation v. Twombly*, explaining that “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”²² Instead, a plaintiff must allege facts that “raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact).”²³

¹⁹ FED. R. CIV. P. 12(b)(6) (West 2009 Revised).

²⁰ *Kehr Packages*, 926 F.2d at 1409.

²¹ *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir.1989).

²² 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted).

²³ *Id.* (citations omitted).

III. DISCUSSION

A. FRCP 12(b)(1)

*3 Relying upon FRCP12(b)(1), Defendants assert that the Court lacks subject matter jurisdiction because Plaintiffs allegedly (1) failed to plead an injury-in-fact sufficient to satisfy Article III standing; (2) lack standing as a “person” under the UTPCPL; and (3) do not fall within the class of buyers or end-users that may recover for a breach of warranty under the Pennsylvania UCC. The Court will address each argument separately below.

(i) Injury-In-Fact

Defendants argue that Plaintiffs’ Complaint failed to allege that any of their members actually purchased defective fentanyl patches. Defendants assert that unless Plaintiffs pled that their members received patches that were actually defective, Plaintiffs’ alleged injury is merely conjectural and hypothetical. Defendants further assert that “[p]ayment for a product that is recalled as a precautionary measure because it might have a defect is not the legal equivalent of payment for

a product that actually is defective.”²⁴ In effect, Defendants’ arguments attempt to distinguish between patches that were actually defective (*e.g.*, patches that contained a cut on the gel reservoir) and patches that were subject to Defendants’ product recall. The Court finds, however, that Defendants’ recall notice made no such distinction. The recall notice warned that “[f]entanyl patches that are cut or damaged in any way should not be used,” and that “[e]xposure to fentanyl gel may lead to serious adverse events, including respiratory depression and possible overdose, which may be fatal.”²⁵ Plaintiffs pled that as a result of this warning and product recall, they “have paid or will pay expenses related to the purchase of and reimbursement for supplies of 25 mcg/hour fentanyl patches [previously purchased for their members, bearing the relevant expiration dates] that were unusable, worthless, and had to be discarded.”²⁶ These facts, if accepted as true, plead an economic loss that is concrete, particular, and traceable to a defect resulting from Defendants’ manufacturing and distribution process, and would permit a remedy if Plaintiffs are successful on the merits.

²⁴ Defs.’ Mot. at 8.

²⁵ Defs.’ Mot., Ex. A; *see also* Compl. ¶ 20.

²⁶ Compl. ¶¶ 21, 23.

Additionally, Plaintiffs’ claim, as pled, seeks monetary damages for the purchase price of the recalled fentanyl patches, an injury that directly impacts Plaintiffs, not just the consequential damages that their members may incur from exposure to the defective patches.²⁷ Claims for monetary damages generally satisfy the injury-in-fact threshold.²⁸ Based on the allegations pled in the Complaint, the Court finds that Plaintiffs have satisfied the injury-in-fact requirements necessary to establish Article III standing.

²⁷ Compl. at 13–14; *see also* Pls.’ Answer to Defs.’ Mot. to Dismiss at 5.

²⁸ *See Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir.2005).

(ii) Standing Under the UTPCPL

Defendants argue, in the alternative, that Plaintiffs are not “persons” under the UTPCPL, and therefore do not have standing to sue, because “[t]hey do not themselves obtain or consume the fentanyl patches in question” nor were their purchases made for primarily “personal, family,

or household purposes.”²⁹ Pennsylvania courts, however, have long recognized the ability of third-party trusts and associations to assert UTPCPL claims on behalf of their constituent members based on the statute's broad definition of “person.”³⁰ Section 201–9.2(a) of the UTPCPL permits a private action for the recovery of damages for “[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money ... as a result of ... [any] act or practice declared unlawful by this act”³¹ The UTPCPL defines “person” as “natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities.”³² In addition, the “purpose” requirement of § 201–9.2(a) focuses on whether the final consumer uses the product for personal, family or household use, not whether the third-party entity personally uses the product or merely purchases it.³³

²⁹ Defs.' Mot. at 10–11.

³⁰ See *Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1142–1143 (Pa.Comm.2005) (definition of “person” under § 9.2(a) includes third-party medical benefit payors); See also *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.*, 393 Pa.Super. 339, 574 A.2d 641, 644–645 (Pa.Super.1990) (“associations” were explicitly included within the definition of “person” under § 202–2(2) and that even though the breach of warranty claim for defective roofing membranes affected the individual unit owners the association represented, the condominium association could assert a claim as a “person” under § 9.2(a)).

³¹ 73 PA. STAT. § 201–9.2(a) (2010 Electronic Update).

³² *Id.* § 201–2(2).

³³ See *TAP Pharm. Prods.*, 885 A.2d at 1142–1143; See also *Valley Forge Towers*, 574 A.2d at 649.

*4 Defendants, nonetheless, rely on *Balderston v. Medtronic Sofamor Danek, Inc.* to support their position.³⁴ In *Balderston*, the plaintiff-physician filed suit against a manufacturer of surgical screws, which were used on his patients during spinal fusion operations, claiming that the defendant misrepresented the FDA's approval status of the

screws. The plaintiff claimed that he had been misled as to the FDA's approval status, and was subsequently exposed to lawsuits. The district court, however, determined that the plaintiff's patients, not the plaintiff, had actually purchased the screws and therefore concluded that the plaintiff lacked standing. The district court further concluded that plaintiff could not qualify as a purchaser because any purchase he would have made was for business purposes, not for “personal, family, or household” use.³⁵ On appeal, the Third Circuit affirmed the district court's findings and noted that plaintiff unequivocally acknowledged that “purchase [of the surgical screw was] by the consumer, the patient ... [and that] neither plaintiff nor his practice [were] ever billed for the screw and [did] not pay for it.”³⁶

³⁴ 285 F.3d 238 (3d Cir.2002) (a surgeon filed a UTPCPL claim against the manufacturer of pedicle screws, which were used on his patients during various surgical procedures. The Third Circuit held the surgeon did not qualify as a “person” under the UTPCPL because his patients actually purchased the screws, and even if he had directly purchased the screws, the court reasoned that he purchased them primarily for business purposes).

³⁵ *Id.* at 240.

³⁶ *Id.* at 241.

The distinctions between the facts in *Balderston* and the facts as pled before this Court are clear. Whereas in *Balderston*, the plaintiff could in no way be considered a purchaser or even consumer of the goods at issue, Plaintiffs here actually paid for the fentanyl patches *on behalf* of their members for their members' personal, family or household use.³⁷ This places Plaintiffs in a far different relationship with Defendants than the distant or tangential relationship between the plaintiff and the defendant in *Balderston*. The facts here compel the conclusion that Plaintiffs' allegations, as pled in the Complaint, strongly support the position that they have standing as purchasers under the UTPCPL. The Court finds that since Plaintiffs purchased the fentanyl patches on behalf of their members in their representative capacity, and those patches were purchased for the personal, family and household use of their members, Plaintiffs have properly asserted a claim under the UTPCPL.³⁸

³⁷ See Compl. ¶¶ 26, 35.

³⁸ See *TAP Pharm. Products*, 885 A.2d at 1142–1143 (distinguishing *Balderston* from the Commonwealth's third-party payor programs); See also *Valley Forge Towers*, 574 A.2d at 649.

(iii) Buyers Under Pennsylvania's UCC

As a third alternative argument for dismissal under FRCP 12(b) (1), Defendants assert that because “plaintiffs merely pay or reimburse some or all of the purchase price of the covered prescription medicines that their members buy and use,” Plaintiffs, as third-party payors, do not qualify as “buyers” under Pennsylvania's UCC.³⁹ Defendants' argument, however, essentially takes a section of the UCC that *extends* warranty protections to relatives and persons in the same household as the buyer, and incorrectly suggests to this section somehow *limits* buyers to only “natural persons.”

³⁹ Defs. Mot. at 14–15.

Section 2103(a) of the UCC defines “buyer” as a “person who buys or contracts to buy goods.”⁴⁰ Section 1201(b) (27) of the UCC defines “person” as “[a]ny individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency or instrumentality, public corporation or other legal or commercial entity.”⁴¹ Contrary to Defendants' arguments, the definition of “person” under the UCC is not limited to a “natural person;” rather, the UCC uses a very broad definition, which includes corporations, trusts and business trusts. Therefore, the Court finds that Plaintiffs are in fact considered both “persons” and “buyers” under the UCC. Accordingly, each of Defendants' arguments offered to support its motion to dismiss the Complaint for a lack of subject matter jurisdiction are denied.

⁴⁰ 13 PA. CONS.STAT. § 2103(a) (2010 Electronic Update).

⁴¹ *Id.* § 1201(b)(27).

B. FRCP 12(b)(6)

*5 Relying upon FRCP 12(b)(6), Defendants assert that the Court should dismiss Plaintiffs' Complaint because Plaintiffs failed to state a claim for which relief can be granted by not pleading that: (1) Defendants committed unfair or deceptive acts or practices under the UTPCPL; (2) Plaintiffs provided Defendants reasonable notification of the alleged breach of warranty as required by Title 13 of the Pennsylvania

Consolidated Statutes, Section 2607(c)(1); (3) a warranty was actually breached; (4) an express warranty extended to them as third-party medical benefit payors; and (5) Defendants actually received a benefit as required for a claim of unjust enrichment. The Court will address each argument separately below.

(i) The UTPCPL

Defendants argue that Plaintiffs' UTPCPL claims should be dismissed for failure to state a claim upon which relief can be granted because Plaintiffs failed to: (1) identify, with particularity, a false or deceptive representation made by Defendants that was material to Plaintiffs' coverage decisions and (2) plead justifiable reliance on Defendants' alleged representations. In support of their first point, Defendants assert that in order for Plaintiffs to plead an unfair or deceptive act or practice under the UTPCPL, Plaintiffs must allege that the “defendants made a representation that their patches would invariably be free from defects.”⁴² The UTPCPL, however, defines unfair or deceptive acts or practices to include representations that “goods ... have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have,” or representations “that goods ... are of a particular standard, quality, or grade ..., if they are of another.”⁴³ Under both definitions, Plaintiffs' allegations in the complaint, if taken as true, sufficiently plead an unfair or deceptive act committed by Defendants. The “unfair and deceptive” act alleged in Plaintiffs' Complaint is Defendants' representation that the recalled fentanyl patches would release the drug at a safe dosage rate. However, due to the defect and subsequent recall, the fentanyl patches could actually release the drug at a significantly higher and more dangerous dosage rate, which rendered the patches useless to Plaintiffs.

⁴² Defs.' Mot. at 12.

⁴³ 73 PA. STAT. § 201–2(4)(v), (vii).

As to their second point, Defendants assert that any alleged reliance by Plaintiffs that the fentanyl patches would be completely free from cuts or damage is not “justifiable,” especially given that the fentanyl patches packaging included an insert disclaimer, which warned that broken or cut patches could lead to overdose or death.⁴⁴ Plaintiffs argue in opposition that the Complaint sufficiently pleads “the type of representations that fall into the traditional scope of consumer protection statutes—where a product seller

promises one thing but delivers another.”⁴⁵ Plaintiffs assert in the Complaint that Defendants represented to end-users, physicians and third-party payors that the fentanyl patches were designed to safely release the prescription drug at a rate of 25 mcg/hour. However, because of the manufacturing defect, the patches potentially released the drug at an excessive, possibly fatal, rate. Accordingly, the Court finds that Plaintiffs sufficiently alleged that Defendants committed unfair or deceptive acts or practices under the UTPCPL and Plaintiffs sufficiently pled justifiable reliance on the alleged unfair or deceptive acts in their Complaint.

⁴⁴ Defs.' Mot. at 13.

⁴⁵ Pls.' Answer at 11.

(ii) Breach of Implied and Express Warranty Under Pennsylvania UCC

*6 Defendants argue that Plaintiffs' breach of express and implied warranty claims should be dismissed for failure to state a claim upon which relief can be granted because Plaintiffs failed to allege in their Complaint that they notified Defendants of the breach of warranty. Under § 2607(c)(1) of the UCC, a buyer must “within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.”⁴⁶ Defendants argue that “[t]he purpose of the notice requirement is to afford the seller a reasonable time within which to cure the breach or settle the claim.”⁴⁷ Plaintiffs argue in opposition that Defendants cannot complain of a lack of notice for the breach of warranty, as it was Defendants themselves who first gave notice to the purchasers that the fentanyl patches were defective through the recall notice. According to Plaintiffs, “Defendants were already well aware of the breach and had an opportunity to make good.”⁴⁸

⁴⁶ 13 PA. CONS.STAT. § 2607(c)(1).

⁴⁷ Defs.' Mot. at 16.

⁴⁸ Pls.' Answer at 14.

Plaintiffs' argument, however, that notification under § 2607(c) is unnecessary because Defendants had actual or constructive knowledge of the breach, is not supported by the language of the UCC, its statutory purpose, or existing case law interpreting § 2607. Plaintiffs appear to confuse the term “notice” with “notify”—which the UCC explicitly distinguishes. Under UCC § 1202(a), a person has *notice* of a

fact when the person has actual knowledge of it, has received notification of it, or, from all of the facts and circumstances known to that person at the time in question, has reason to know it exists.⁴⁹ On the other hand, § 1202(d) defines *notify* to mean “give a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.”⁵⁰

⁴⁹ 13 PA. CONS.STAT. § 1202(a).

⁵⁰ *Id.* § 1202(d).

The purpose of notification under § 2607(c)(1) is not intended to merely make the seller aware of the breach; rather, the notification must “inform [] the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.”⁵¹ Thus, the purpose of notification under § 2607(c) is to allow the seller an opportunity to resolve the dispute regarding an alleged breach before the buyer initiates a lawsuit. Therefore, even assuming that Defendants were aware that the fentanyl patches were defective, Defendants may not have been aware of Plaintiffs' intent to file a class action lawsuit, and were denied the opportunity to negotiate or settle this claim without judicial involvement. To “notify” under the UCC requires the affirmative act of notification, and Section 2607(c) (1) explicitly requires the buyer to “notify the seller of breach or be barred from any remedy.”⁵² Plaintiffs' “constructive notice” argument does not address whether Plaintiffs ever actually and affirmatively notified Defendants of the breach, as required by § 2607(c)(1), prior to initiating this litigation.

⁵¹ *Id.* § 2607 cmt. 4; *see also Beneficial Comm. Corp. v. Brueck*, 23 Pa. D. & C.3d 34, 37 (Pa.Ct.Comm.Pl.1982) (“Section 2607(c)'s requirement that the buyer notify the seller of the breach within a reasonable time after he discovers or should have discovered the breach gives the manufacturer the opportunity to cure the defect, settle the claim through negotiation, and gather information that may assist in defending the claim.”).

⁵² *Id.* § 2607(c)(1).

*7 Additionally, the Third Circuit recently analyzed § 2607(c) of the UCC in *Vanalt Electrical Construction, Inc. v. Selco Manufacturing Corporation*, and concluded that

a “review of Pennsylvania precedent and other authorities interpreting the UCC indicates that the Pennsylvania Supreme Court would agree that a buyer must prove compliance with [Section 2607](#) before recovering for a breach of contract or warranty involving nonconforming goods....”⁵³ Here, the Court must also treat the [§ 2607\(c\)](#) reasonable notification requirement as a condition precedent to recovery, with Plaintiffs bearing the burden to prove that reasonable notification was given. As reasonable notification is a material element necessary to sustain recovery of a UCC breach of warranty claim, Plaintiffs were required to affirmatively allege that they reasonably notified Defendants.⁵⁴ Inasmuch as [§ 2607\(c\)](#) bars a buyer's recovery absent the buyer providing reasonable notification of the breach, it follows that a buyer must also plead, at a minimum, in its Complaint, that it provided reasonable notification in order to state a viable claim for recovery.⁵⁵ Plaintiffs were not required to allege in the Complaint that the notification occurred in any substantial form (such as a letter or a formal demand), as the “reasonableness” of the notice is a factual matter left for the jury to resolve. However, Plaintiffs needed to allege, at a minimum, that they notified Defendants in some manner “or be barred from any remedy.”⁵⁶ The Court finds that Plaintiffs failed to allege that they provided Defendants with notification as required by [§ 2607\(c\)\(1\)](#) of the UCC. As such, the Court further finds that Plaintiffs' breach of express and implied warranty claims should be dismissed under [FRCP 12\(b\)\(6\)](#).

⁵³ [233 Fed. Appx. 105, 111 \(3d Cir.2007\)](#) (held in a dispute over the sale of goods, the buyer must prove compliance with the notice requirement of [Section 2607](#)” and that “reasonable notification is a precondition to the buyer's recovery for breach”, with the buyer bearing the burden to prove its requirements).

⁵⁴ *See Vanalt*, 233 Fed. Appx. at 111; *See also Twombly*, 550 U.S. at 562 (quoting *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984) (a complaint “ ‘must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory’ ”).

⁵⁵ [Section 2607\(c\)\(1\)](#) requires the buyer to “within a reasonable time after he discovers or should have discovered any breach notify the seller of the

breach or be barred from any recovery.” 13 PA. CONS.STAT. [§ 2607\(c\)\(1\)](#).

⁵⁶ *See Id.*; *see also Vanalt*, 233 Fed. Appx. at 112.

(iii) Unjust Enrichment

Defendants also argue that Plaintiffs' unjust enrichment claim should be dismissed for failure to state a claim upon which relief can be granted. To satisfy the pleading requirements of unjust enrichment, the plaintiff must allege the following elements in its complaint: (1) a benefit conferred upon one party by another, (2) appreciation of the benefit by the recipient, and (3) acceptance and retention of the benefit under circumstances that would make it inequitable or unjust for the recipient to retain the benefit without payment of value.⁵⁷

⁵⁷ *Allegheny Gen. Hosp. v. Phillip Morris, Inc.*, 228 F.3d 429, 447 (3d Cir.2000).

Defendants offer two distinct arguments to defeat Plaintiffs' unjust enrichment claim. First Defendants assert that when an unjust enrichment claim is based upon tortious conduct, and the court dismisses the tort claims based upon the same conduct, the court must also dismiss the unjust enrichment claim as it “is essentially another way of stating a traditional tort claim.”⁵⁸ The Court finds, however, that this argument is inconsequential and cannot constitute a basis for dismissal in this instance because the Court does not dismiss Plaintiffs' UTPCPL claim.

⁵⁸ Defs.' Mot. at 19.

Second, Defendants assert that Plaintiffs, as third-party payors obligated to reimburse their members' prescription drug expenses, did not confer a “benefit” to Defendants in any way recognized under the law and that “any ‘benefit’ inured to [D]efendants was merely ‘incidental’ to [P]laintiffs' performance of their independent contractual obligations.”⁵⁹ To support this argument, Defendants rely on *Allegheny General Hospital v. Phillip Morris, Inc.*⁶⁰ The facts of *Allegheny General*, however, are distinguishable: *Allegheny General* involved a hospital's expenses to treat tobacco-related illnesses caused by the patient's prolonged tobacco use. The hospital and tobacco companies had no preexisting relationship, and the hospital did not directly pay the tobacco companies for any products or services. Under such circumstances, the Third Circuit found that the benefit conferred to the tobacco companies was too incidental or

2010 WL 891150

remote to establish a claim of unjust enrichment.⁶¹ Here, however, as pled in the Complaint, Plaintiffs directly paid for or reimbursed the purchase costs of fentanyl patches on behalf their members. The benefit in this case is not remote or incidental; rather, the benefit (the amount paid by Plaintiffs to Defendants for defective fentanyl patches) is direct and measurable.

⁵⁹ *Id.* at 20.

⁶⁰ 228 F.3d at 434, 446–448. (held a hospital's claim of unjust enrichment filed against certain tobacco companies was based on remote and indirect injuries, consequently the tobacco companies had no legal obligation to pay the non-paying patients' medical expenses, and whatever “incidental benefit” the tobacco companies received was insufficient to establish a claim of unjust enrichment).

⁶¹ *Id.*

*8 Plaintiffs' Complaint alleges that Defendants “reaped substantial profits from the sale of defective fentanyl patches,” and that “Defendants' profits would have been reduced, but for their wrongful and unlawful conduct.”⁶² Otherwise stated, Plaintiffs pled that they conferred a monetary benefit to Defendants, that Defendants appreciated the benefit, and that the Defendants retained the benefit under inequitable circumstances. The Court finds that these factual allegations, if taken as true, sufficiently plead a claim of unjust enrichment. Accordingly, Defendants' arguments offered to support its motion to dismiss the Complaint for failure to state a claim upon which relief can be granted are denied as to Plaintiffs' unjust enrichment and UTPCPL claims

and granted as to Plaintiffs' breach of express and implied warranty claims.

⁶² Compl. ¶ 49.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Counts II and III for Plaintiffs' failure to plead reasonable notification as required by 13 Pa. Cons.Stat. § 2607(c) is hereby granted. Defendants' remaining general and specific grounds for dismissal under FRCP 12(b)(1) and 12(b)(6), particularly as to Counts I and IV, are hereby denied.

An appropriate order follows.

ORDER

AND NOW, this 11th day of March 2010, upon consideration of Defendants' Motion to Dismiss [docket entry No. 14]; Plaintiffs' Answer to Defendants' Motion to Dismiss [docket entry Nos. 15 and 16]; and Defendants' Reply [docket entry No. 19], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART**. Defendants' Motion to Dismiss Plaintiffs' **COUNTS I** and **IV** is **DENIED**. Defendants' Motion to Dismiss Plaintiffs' **COUNTS II** and **III** is **GRANTED**. **Counts II** and **III** are hereby **DISMISSED**.

It is so **ORDERED**.

All Citations

Not Reported in F.Supp.2d, 2010 WL 891150

TAB 2

2018 WL 534475

2018 WL 534475

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia, Atlanta Division.

Arsenio ARCHER, Plaintiff,

v.

London HOLMES p/k/a We Got
London on da Track, et al., Defendants.

CIVIL ACTION FILE NO. 1:17-CV-2051-TWT

Signed 01/23/2018

Attorneys and Law Firms

Lauren R. McAlpin, Thomas E. Reynolds, Jr., Reynolds Law
Group, LLC, Atlanta, GA, for Plaintiff.

Brian Caplan, Reitler Kailas & Rosenblatt LLC, New York,
NY, Alan Stuckey Clarke, Harry Donival Dixon, III, Taylor
English Duma LLP, Eileen Elizabeth Hintz Rumfelt, Miller &
Martin, PLLC, Derek Mikal Wright, Derek M. Wright, LLC
Attorney at Law, Jordan Fishman, Hayden R. Pace, Stokes
Wagner, ALC, Atlanta, GA, Namisha D. Patel, Roy Hyrum
Maughan, Jr., The Maughan Law Firm, LLC, Baton Rouge,
LA, for Defendants.

OPINION AND ORDER

THOMAS W. THRASH, JR., United States District Judge

*1 This is a copyright infringement case. It is before the Court on the Defendant London Holmes' Motion to Dismiss [Doc. 20], and the Defendant Songs of YSL Music Publishing's Motion to Dismiss [Doc. 24], to which other Corporate Defendants have joined [Docs. 58, 65].¹ For the following reasons, Holmes' Motion to Dismiss [20] is GRANTED in part and DENIED in part, and the Corporate Defendants' Motions to Dismiss [Docs. 24, 58, 65] are GRANTED.

¹ The Corporate Defendant TIG7 Publishing filed a motion [Doc. 65] to join in Holmes' and YSL's Motions to Dismiss. Meanwhile, the following Corporate Defendants filed a separate Motion to Dismiss [Doc. 58] that consists only of a statement adopting Holmes' and YSL's

Motions to Dismiss in their entirety: Theory Entertainment, LLC d/b/a 300 Entertainment, BMG Rights Management (US) LLC d/b/a Gold Songs, WEA International Inc., Warner-Tamerlane Publishing Corp., Warner Music Group Corp., Atlantic Recording Corporation, Sony/ATV Music Publishing LLC, EMI Blackwood Music Inc., Songs of Universal Inc., Universal Music Group, Inc., and Grand Hustle, LLC.

I. Background

This dispute stems from the Defendant Holmes' alleged refusal to give credit to or share profits with the Plaintiff stemming from the Plaintiff's alleged co-authorship or sole-authorship of twenty-nine different sound recordings.² According to the Complaint, the Plaintiff, Arsenio Archer, and Holmes began a professional relationship in June of 2014 as music producers, the goal of which was to co-author and co-produce songs for music artists.³ Archer agreed to the relationship in reliance on Holmes' representation that he would receive an equal share of any income generated from sound recordings which he helped to produce.⁴ During the course of their working relationship, Archer exercised "complete creative freedom" to alter the sound recordings and produced "essential elements to complete each project."⁵

² Compl. ¶ 6. The songs are: "Section" by 2 Chainz feat. Lil Wayne; "Retaliation" by Boosie Badazz; "Street Shit", "Don't You Change", "Kodak", "Ride", "Black Lives Matter", "How You Feel", and "Bullshit" by Dae Dae; "Good Girls" by Verse Simmonds; "I Don't Belong to You" by KeKe Palmer; "About the Money" by T.I. feat. Young Thug; "Peanut Butter Jelly" by T.I.; "730", "Tell em", "Keep it Going", "Lifestyle", "Sho Me Love", and "Take Kare" by Rich Gang; "Gold Bottles", and "Hell you talkin bout" by Young Jeezy; "Check", "Numbers", "Memo", "Digits", "Worth It", "Tattoos", and "Again" by Young Thug; and "Sneakin" by Drake feat. 21 Savage. Archer claims that "How You Feel" and "Bullshit" were authored solely by him. *Id.* at ¶¶ 56, 62. The remainder were joint works between Archer and Holmes. *See, e.g., id.* at ¶ 60.

³ *Id.* at ¶ 33.

2018 WL 534475

⁴ *Id.* at ¶ 37.⁵ *Id.* at ¶¶ 34-35.

At some point, Holmes began to claim sole production credits for both the works he created jointly with Archer and the works Archer claims he authored himself.⁶ Holmes also began to make various licensing agreements with publishers, distributors, and record labels without obtaining Archer's consent to do so.⁷ Meanwhile, Archer claims he has not been compensated or credited as an author or producer of the recordings.⁸

⁶ *Id.* at ¶ 39.⁷ *Id.* at ¶¶ 40-41. Many of these third parties are joined as Defendants.⁸ *Id.* at ¶ 44.

*2 Archer filed this action on June 5, 2017, against Holmes and the Corporate Defendants. In his original Complaint, Archer alleged eight counts in all. In Count I, he sought a declaratory judgment against all Defendants establishing his ownership rights in the sound recordings. In Count II, he sought an accounting of all income generated from the sound recordings. In Counts III and IV, Archer claimed copyright infringement against Holmes and the Corporate Defendants, respectively. In Count V, Archer claimed vicarious copyright infringement against the Corporate Defendants. In Count VI, he alleged violations of the Lanham Act. Lastly, Archer included a claim for fraud against Holmes in Count VII, and claims for unjust enrichment against all of the Defendants in Count VIII.

Since filing the Complaint, Archer has voluntarily dismissed Counts IV-VI against all Defendants, and partially dismissed Count III against Holmes. All that remains, therefore, are claims for declaratory judgment and accounting against all Defendants (Counts I-II), a claim for copyright infringement against Holmes for the two songs Archer claims he solely authored (Count III), one claim for fraud against Holmes (Count VII), and claims for unjust enrichment against all Defendants (Count VIII). Holmes now moves to dismiss the fraud and unjust enrichment claims against him. The Corporate Defendants,⁹ meanwhile, move to dismiss Archer's unjust enrichment claims. The Court will address the claims against Holmes and the Corporate Defendants separately.

⁹ As mentioned above in note 1, a number of Defendants have joined YSL's motion to dismiss. Collectively, the Court refers to these as the "Corporate Defendants." Lest there be any confusion, however, it should be pointed out that there are a number of other corporate Defendants who have not moved to dismiss Archer's claims against them. This Order does not address those claims.

II. Legal Standard

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible" claim for relief.¹⁰ A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely "remote and unlikely."¹¹ In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff.¹² Generally, notice pleading is all that is required for a valid complaint.¹³ Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests.¹⁴

¹⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); Fed. R. Civ. P. 12(b)(6).

¹¹ *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007).

¹² *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983); *see also Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (noting that at the pleading stage, the plaintiff "receives the benefit of imagination").

¹³ *See Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985), cert. denied, 474 U.S. 1082 (1986).

¹⁴ *See Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555).

III. Discussion

A. Claims against Holmes

Section 301(a) of the Copyright Act expressly preempts all legal or equitable rights that “are equivalent to any of the exclusive rights within the scope of copyright...”¹⁵ The parties agree that the sound recordings at issue are governed by the Copyright Act. The only question is whether Archer’s claims for fraud and unjust enrichment are “equivalent to” Archer’s potential copyright claims.

¹⁵ 17 U.S.C. § 301(a).

*3 Courts in this Circuit have said that state laws are not preempted if they require plaintiffs to prove additional elements over and above those necessary for copyright claims.¹⁶ As the Eleventh Circuit has made clear, however, not just any extra element will do. Rather, only that extra element which “changes the nature of the action so that it is qualitatively different from a copyright infringement claim” will serve to prevent preemption.¹⁷ Put another way, state law claims are equivalent to, and thus preempted by, copyright infringement claims unless they are substantively different from one another.

¹⁶ See, e.g., *Howard v. Sterchi*, 725 F. Supp. 1572, 1578 (N.D. Ga. 1989).

¹⁷ *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1549 (11th Cir. 1996) (quotations omitted) (emphasis in original).

Turning to the case at hand, though the fraud and copyright claims are based on similar facts—Holmes’ licensing of the recordings without Archer’s permission—the fraud claim requires proof that Holmes intentionally misled Archer via a false representation.¹⁸ This false representation, similar to breach of duty in trade secrets cases, is an essential element of a fraud claim that is not present in a copyright claim.¹⁹ Because the false representation of a material fact is not only a required element, but in truth the “gravamen” of a fraud claim, it adds the extra element that qualitatively distinguishes Archer’s fraud claim from copyright infringement.²⁰ The fraud claim, therefore, is not preempted by the Copyright Act.

¹⁸ O.C.G.A. § 51-6-2(a).

¹⁹ See *Bateman*, 79 F.3d at 1549 (“[t]he defendant’s breach of duty is the gravamen of such trade secret claims, and supplies the ‘extra element’ that qualitatively distinguishes such trade secret causes of action from claims for copyright infringement that are based solely upon copying.”) (quoting *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 717 (2d Cir. 1992)).

²⁰ *Altai*, 982 F.2d at 717. See also *Maxient, LLC v. Symplicity Corp.*, 63 F. Supp. 3d 592, 598 (E.D. Va. 2014) (finding computer fraud claim not preempted for similar reasons).

But the same cannot be said for Archer’s unjust enrichment claim. Under Georgia law, unjust enrichment applies where “there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated.”²¹ These claims are generally regarded as equivalent to copyright claims and, therefore, preempted.²² This is because, “under these quasi-contractual theories, the plaintiff need only prove that the defendant was unjustly enriched through the use of her idea or work.”²³ The heart and soul of such a claim is the violation of the copyright.

²¹ *Clark v. Aaron’s, Inc.*, 914 F. Supp. 2d 1301, 1309 (N.D. Ga. 2012) (quotation omitted).

²² See 1 Nimmer on Copyright § 1.01[B][1][g] (2017) (“a state law cause of action for unjust enrichment or quasi contract should be regarded as an ‘equivalent right’ and hence, pre-empted insofar as it applies to copyright subject matter.”).

²³ *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 432 (2d Cir. 2012).

Using the facts of this case as an example, the gist of Archer’s claim for unjust enrichment is that Holmes failed to pay him money he was owed as a co-owner in the works, and that Holmes should not be allowed to be unjustly enriched by his unauthorized use of the sound recordings. No other elements—like a breach of fiduciary duty, a false representation, or a breach of a promise in a contract—need to be proven other than Holmes’ violation of Archer’s rights as the owner of the copyright. This is no different from a copyright claim.

*4 The Plaintiff counters that while quasi-contract claims (e.g., unjust enrichment) may be preempted, contracts implied-in-fact are not necessarily preempted. Because he

alleged Holmes promised to pay him for his work in one paragraph of the Complaint,²⁴ the Plaintiff contends that Holmes breached a contractual promise and that because this is an element not present in a copyright claim, his claim should survive as a result. The Plaintiff is correct that there is a crucial distinction between quasi-contract claims and implied-in-fact contract claims. Whereas a quasi-contract is a “fictitious contract” created by courts to prevent injustice, a contract implied-in-fact is “a true contract that arises from the tacit agreement of the parties.”²⁵ Claims based on quasi-contract are equitable claims, while claims based on contracts implied-in-fact are regular breach of contract claims. As discussed in the previous paragraph, quasi-contract claims—like unjust enrichment—are almost always preempted. Breach of contract claims, on the other hand, are not necessarily so if a plaintiff can show that rights separate from those he held as a copyright owner were violated.²⁶

²⁴ See Compl. ¶ 37.

²⁵ 1-1 Corbin on Contracts § 1.20 (2017).

²⁶ See, e.g., *Forest Park Pictures*, 683 F.3d at 432 (finding breach of contract claim not preempted where there was a promise to pay for the use of the plaintiff’s ideas); 5 Nimmer on Copyright § 19D.03[C][2] (arguing that implied-in-fact contract claims should not be preempted per se).

But while the Plaintiff certainly deserves credit for articulating this somewhat knotty distinction, the Court does not see how it is relevant here as the Plaintiff’s Complaint never asserts a claim for breach of contract. The Plaintiff may not successfully argue in a response brief to a motion to dismiss that one throwaway allegation buried deep in the Complaint suddenly serves as the basis for an entirely new cause of action. But even if he could, this novel contract claim would still fail. While courts have found promises to pay contained in implied contracts sufficient to overcome preemption,²⁷ contract claims “which seek[] to enforce only rights that copyright law itself accords plaintiff” are preempted because a promise to do that which copyright law already requires does not contain the “extra element” required to prevent preemption.²⁸

²⁷ See, e.g., *Forest Park Pictures*, 683 F.3d at 432.

²⁸ 5 Nimmer on Copyright § 19D.03[C][2][b] (2017)

In this case, Holmes allegedly promised to “split the income generated from the sound recordings....”²⁹ He did not promise to pay Archer for his labor, to give Archer an interest in some unrelated asset, or to assign credit in any particular way. The only promise Holmes made was to pay Archer a co-owner’s share of any income generated from works of which he was to be a co-owner. This “promise” is merely an acknowledgment of that which Archer would already enjoy as a co-owner or sole owner of the copyrights.³⁰ Any breach of this “promise” would also be a violation of the copyright, and vice-versa. The two claims are effectively the same. Thus, even if this Court read the Complaint broadly and graciously, any purported breach of contract claim on the facts contained in the Complaint would be preempted.

²⁹ Compl. ¶ 37.

³⁰ *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998) (“Joint authorship entitles the co-authors to equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.”)

In addition to his preemption arguments, Holmes also argues that the fraud claim has not been sufficiently pleaded under Rule 9(b).³¹ In particular, citing *Brazil v. Janssen Research & Development, LLC*, 2016 WL 4844442 at *1 (N.D. Ga. Mar. 24, 2016) (Murphy, J.), Holmes argues that the Complaint does not allege specific statements by the Defendant on which the Plaintiff relied. But the Complaint in this case is very different from the complaint at issue in *Brazil*. In that case, which had multiple defendants, the plaintiff merely stated that there were misrepresentations without specifying what those misrepresentations were or who said them. But here, the Complaint states that Holmes made representations, before their working relationship began, that Archer would receive an equal share of any royalties earned from any sound recordings they produced together.³² The Plaintiff has provided the who, what, where, when, and how of the alleged fraud.³³ As such, the Defendant has received the requisite notice as to which of his actions were allegedly fraudulent. This satisfies the pleading requirements of Rule 9(b).³⁴ For these reasons, Holmes’ motion to dismiss is granted as to the unjust enrichment claim, but denied regarding the fraud claim.

31 Fed. R. Civ. P. 9(b).

32 Compl. ¶ 37.

33 *Brazil*, 249 F. Supp. 3d at 1339 (“This means that to state an actionable claim for fraud, the plaintiff must state the who, what, when[,] where, and how.”) (quoting *Jenkins v. BAC Loan Servicing LP*, 822 F.Supp.2d 1369, 1380 (M.D. Ga. 2011)).

34 See *Ackerman v. Nat'l Prop. Analysts, Inc.*, 887 F.Supp. 494, 505 (S.D.N.Y. 1992) (“Generally, to survive a Rule 9(b) motion, a plaintiff claiming fraud must apprise each defendant of the scope of his or her participation in the alleged fraud.”).

B. Unjust Enrichment Claims Against the Corporate Defendants

*5 The Plaintiff’s unjust enrichment claims against the Corporate Defendants also fail, albeit for different reasons. The Plaintiff alleges that when the Corporate Defendants signed licensing agreements with Holmes, they were unjustly enriched because they never paid the Plaintiff as a co-owner.³⁵ The Plaintiff never alleges, however, that the Corporate Defendants negotiated with the Plaintiff or that they even knew he existed. In other words, there is no alleged relationship at all between the Corporate Defendants and the Plaintiff. Any benefits the Corporate Defendants received from the Plaintiff, therefore, were received indirectly through Holmes. But in Georgia, unjust enrichment claims

lie only in those situations where a defendant has received a direct benefit from a plaintiff.³⁶ Indeed, any other result would lead to widespread liability for record companies who deal in good faith with those who they believe are the true owners of copyrights. The unjust enrichment claim against the Corporate Defendants is inappropriate under Georgia law and is dismissed.

35 Compl. ¶ 161.

36 See *Peterson v. Aaron's, Inc.*, No. 1:14-CV-1919-TWT, 2015 WL 5479877, at *2 (N.D. Ga. Sept. 16, 2015) (holding that indirect benefits are insufficient to sustain a claim for unjust enrichment); *In re White*, 559 B.R. 787, 807 (Bankr. N.D. Ga. 2016) (“... Georgia law does not support claims of unjust enrichment that arise from indirect benefits.”).

IV. Conclusion

For the reasons stated above, the Defendant Holmes' Motion to Dismiss [Doc. 20] is GRANTED in part and DENIED in part. Songs of YSL Music Publishing, et al.'s Motions to Dismiss [Doc. 24, 58, 65] are GRANTED.

SO ORDERED, this 23 day of January, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 534475

2018 WL 3454899

2018 WL 3454899

Only the Westlaw citation is currently available.

United States District Court,
N.D. Georgia, Atlanta Division.

Arsenio ARCHER, Plaintiff,

v.

London HOLMES p/k/a We Got
London on da Track, et al., Defendants.

CIVIL ACTION FILE NO. 1:17-CV-2051-TWT

Signed 04/09/2018

Attorneys and Law Firms

Lauren R. McAlpin, Thomas E. Reynolds, Jr., Reynolds Law Group, LLC, Atlanta, GA, for Plaintiff.

Brian Caplan, Reitler Kailas & Rosenblatt LLC, New York, NY, Alan Stuckey Clarke, Harry Donival Dixon, III, Taylor English Duma LLP, Derek Mikal Wright, Derek M. Wright, LLC Attorney at Law, Von A. DuBose, DuBose Miller, LLC, Atlanta, GA, Namisha D. Patel, Roy Hyrum Maughan, Jr., The Maughan Law Firm, LLC, Baton Rouge, LA, for Defendants.

ORDER

THOMAS W. THRASH, JR., United States District Judge

*1 This is a copyright action. It is before the Court on the Plaintiff's Motion for Reconsideration [Doc. 82]. Rule 59(e) of the Federal Rules of Civil Procedure authorizes district courts upon motion to alter or amend a judgment. See Fed. R. Civ. Proc. 59(e). "The decision to alter or amend judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion." American Home Assurance Co. v. Glenn Estess & Assocs., 763 F.2d 1237, 1238-39 (11th Cir. 1985)

(citing *Commodity Futures Trading Comm'n v. American Commodity Group Corp.*, 753 F.2d 862, 866 (11th Cir. 1984)). The Federal Rules of Civil Procedure do not specifically authorize motions for reconsideration. Nevertheless, such motions are common in practice.

Local Rule 7.2 provides that motions for reconsideration are not to be filed "as a matter of routine practice," but only when "absolutely necessary." L.R. 7.2E. A party may move for reconsideration only when one of the following has occurred: "an intervening change in controlling law, the availability of new evidence, [or] the need to correct clear error or prevent manifest injustice." *Godby v. Electrolux Corp.*, No. 1:93-CV-0353-ODE, 1994 WL 470220, at *1 (N.D. Ga. May 25, 1994). Further, a party "may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." *Brogdon v. National Healthcare Corp.*, 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000); see also *Godby*, 1994 WL 470220, at *1 ("A motion for reconsideration should not be used to reiterate arguments that have previously been made ... '[I]t is an improper use of] the motion to reconsider to ask the Court to rethink what the Court [has] already thought through-rightly or wrongly.'") (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)) (alterations in original); *In re Hollowell*, 242 B.R. 541, 542-43 (Bankr. N.D. Ga. 1999) ("Motions for reconsideration should not be used to relitigate issues already decided or as a substitute for appeal ... Such motions also should not be used to raise arguments which were or could have been raised before judgment was issued."). The Motion for Reconsideration [Doc. 82] raises nothing new and is DENIED.

SO ORDERED, this 9 day of April, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 3454899

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 3

2012 WL 13187721

2012 WL 13187721

Only the Westlaw citation is currently available.
United States District Court, D. Nebraska.

Cindy AVILA, Individually and as
Personal Representative of the Estate
of Steven Avila, et al., Plaintiffs,

v.

CNH AMERICA, LLC, Individually and as
Successor-In-Interest to New Holland North
America, Inc., p/k/a Ford New Holland, Inc.;
Fiatallis North America, Inc.; Fiatallis North
America, LLC, p/k/a Fiatallis North America, Inc.;
Case New Holland, Inc., p/k/a CaseNewHolland
Inc., p/k/a Case International Corporation; CNH
Global, N.V., Individually and as Successor-
In-Interest to New Holland N.V., p/k/a N.H.
Geotech; and Unisys Corporation, Successor-In-
Interest to Sperry Rand Corporation, Successor-
In-Interest to Sperry Corporation, Defendants.

4:04CV3384

|
Signed 08/30/2012

Attorneys and Law Firms

Curt D. Marshall, Pro Hac Vice, Weitz, Luxenberg Law Firm, New York, NY, James W. Vititoe, Masry, Vititoe Law Firm, Westlake Village, CA, L. William Kelly, III, Kelly, Schroeder Law Firm, Grand Island, NE, for Plaintiffs Cindy Avila, Rose Bergholz, Frank Elliott, Virginia Elliott, Robert Eversoll, Denny Fitzgerald, Julia Foote, Donald Jenkins, Donnette Jenkins, Michelle Kohlhof, Anthony Martinez, Kris Mlecenko, Michael Nelson, Jody Roepke, Kerry Ressler-Martinez, Patrick Ryan, Barbara Schorle, Cheri Schwieger, Gordan Svoboda, William Tolle, Sherri Tolle, Roxana Webb, Jack Wiese, Bruce Schorle, Charmaine Arp, Rocke Beason, Thomas Brown, Lorinda Krance, Warren Edghill, Jeanette Edghill, Joanie Guerrero, Robert Guerrero, Carol Heying, Robert E. Lee, Byron M. Levinson, Suzanne Dowd, David R. Bergholz, Jeffrey L. Bergholz, Jason P. Ressler, Ted Rookstool, Donald A. Schwieger, Richard E. Willis, Keely Nelson.

Curt D. Marshall, Pro Hac Vice, Weitz, Luxenberg Law Firm, New York, NY, James W. Vititoe, Masry, Vititoe Law Firm, Westlake Village, CA, for Plaintiffs Patricia Ann Pirnie,

Marlene Beason, Carol Marie Castleberry, Sandra Lawrey, William Lawrey, Cecil Sonnenfelt, Letha Sonnenfelt, Jerrold Tjaden, Linda Tjaden, Aaron Wobig.

Thomas J. Culhane, Erickson, Sederstrom Law Firm, Omaha, NE, Thomas E. Dutton, Greenberg, Traurig Law Firm, Chicago, IL, for Defendants CNH America, Case New Holland, CNH Global.

Daniel W. Nelson, Pro Hac Vice, Melanie L. Katsur, Pro Hac Vice, Gibson, Dunn Law Firm, Washington, DC, Michaela A. Smith, Patrick E. Brookhouser, Jr., McGrath, North Law Firm, Omaha, NE, for Defendant Unisys Corporation.

MEMORANDUM AND ORDER

Richard G. Kopf, Senior United States District Judge

*1 Five defendants¹ have filed a motion for partial summary judgment (filing 431) that raises the issue of whether Nebraska law will permit the recovery of damages for future medical monitoring costs in connection with a cause of action for private nuisance or trespass.² I have previously held, in granting the defendants' motion for partial judgment on the pleadings (filing 237) and dismissing "[a]ll personal injury claims alleging negligence, negligent failure to warn, and negligent infliction of emotional distress (counts one, two, and three of the fourth amended complaint) brought by ... eighteen plaintiffs, who claim only a need for future medical monitoring [on behalf of twenty-one individuals]," that "damages are an essential element of any negligence cause of action brought under Nebraska law" and "Nebraska law does not recognize a claim for medical monitoring when no present physical injury is alleged." Memorandum and Order entered on September 10, 2007 (filing 249) at 2.³ Consistent with this holding, I will now grant the defendants' motion for partial summary judgment and dismiss additional personal injury claims alleged in counts four and five of the fifth amended complaint brought by the same eighteen plaintiffs on behalf of the same twenty-one individuals who do not have a present physical injury.⁴

¹ Fiatallis North America, Inc., is the only remaining defendant not to join in the motion. However, its successor, Fiatallis North America, LLC, is a movant.

2 The plaintiffs claim the defendants contaminated groundwater by improperly disposing of chemical wastes at an industrial facility in Grand Island, Nebraska.

3 All proceedings in this matter were stayed after the plaintiffs appealed from a January 2009 judgment that dismissed all claims against Cargill, Incorporated. The appeal was voluntarily dismissed in May 2012, and Cargill is no longer a defendant.

4 Six of these individuals do not claim any property damage either. As to these individuals, I will dismiss all claims alleged.

I. Background

In accordance with the requirements of our local rules, the defendants have included a statement of material facts in their supporting brief. *See* NECivR 56.1(a). Because the statement is not controverted by the plaintiffs, the facts are deemed admitted. *See* NECivR 56.1(b)(1). The uncontroverted facts are these:

1. The Appendix to the Fifth Amended Complaint lists each Plaintiff's "currently manifested illness or other adverse physical effects, if any, as a result of their exposure." (Filing No. 207-2 ¶ 3 (emphasis added).)

2. The Appendix includes such alleged medical effects as: eye irritation, dry skin, throat irritation, insomnia and irritability. (Ex. 1 at 1-4.)

3. Eighteen Plaintiffs, asserting claims on behalf of 21 individuals [(the "Medical Monitoring Plaintiffs")], allege no physical effects, but instead assert only "the need for future medical monitoring." (*Id.*)

4. Of the 21 individuals who assert only the need for future medical monitoring, six do not assert a claim for property damage. (*Id.*)

*2 5. Cindy Avila, in her individual capacity, alleges no medical effects and claims only the need for future medical monitoring. She asserts no property damage claim. (*Id.* at 1)

6. Cindy Avila denies any claim of property damage in her supplemental damages disclosure. (Ex. 2 at 3.)

7. David Bergholz alleges no medical effects and claims only the need for future medical monitoring. He asserts no property damage claim. (Ex. 1 at 1.)

8. David Bergholz asserts no property damage claims in his supplemental damages disclosure. (Ex. 3 at 3.)

9. Jeffrey Bergholz, individually and as next friend of S.L.B. and S.R.B., minors, alleges no medical effects and claims only the need for future medical monitoring. He asserts no property damage claim, either individually or as next friend of S.L.B. and S.R.B. (Ex. 1 at 1.)

10. Jeffrey Bergholz, individually and as next friend of S.L.B. and S.R.B., asserts no property damage claims in his supplemental damages disclosure. (Ex. 4 at 2.)

11. Roxanna Webb alleges no medical effects and claims only the need for future medical monitoring. She asserts no property damage claim. (Ex. 1 at 3.)

12. Roxanna Webb asserts no property damage claims in her supplemental damages disclosure. (Ex. 5 at 2.)

13. Rose Bergholz alleges no medical effects and claims only the need for future medical monitoring. She asserts a property damage claim. (Ex. 1 at 1; Ex. 6 at 2-3.)

14. Warren Edghill alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 2; Ex. 7 at 4-5.)

15. Julia Foote alleges no medical effects and claims only the need for future medical monitoring. She asserts a property damage claim. (Ex. 1 at 2; Ex. 8 at 3-5.)

16. Joanie Guerrero, as next friend of B.C.G. and B.C.G., minors, alleges no medical effects and claims only the need for future medical monitoring. She asserts property damage claims on behalf of both minors. (Ex. 1 at 2; Ex. 9 at 3-5.)

17. Robert Guerrero alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 2; Ex. 9 at 3-5.)

18. Donald Jenkins alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 2; Ex. 10 at 4-5.)

19. Anthony Martinez alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 2; Ex. 11 at 4-5.)

20. Kris Mleczko alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 2; Ex. 8 at 3-5.)

21. Jason Ressler alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 3; Ex. 12 at 2.)

22. Barbara Schorle alleges no medical effects and claims only the need for future medical monitoring. She asserts a property damage claim. (Ex. 1 at 3; Ex. 13 at 3.)

23. Bruce Schorle alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 3; Ex. 13 at 3.)

24. Cheri Schwieger alleges no medical effects and claims only the need for future medical monitoring. She asserts a property damage claim. (Ex. 1 at 3; Ex. 14 at 3-4.)

*3 25. Gordon Svoboda alleges no medical effects and claims only the need for future medical monitoring. He asserts a property damage claim. (Ex. 1 at 3; Ex. 15 at 3-4.)

26. Sherri Tolle alleges no medical effects and claims only the need for future medical monitoring. She asserts a property damage claim. (Ex. 1 at 3; Ex. 16 at 3-5.)

27. The Medical Monitoring Plaintiffs have resisted discovery of their medical records on the ground that, as of January 30, 2009, they do not allege any personal injury. (Ex. 17.)

28. The Medical Monitoring Plaintiffs have no present physical injury. (Exs. 1-17.)

29. The Medical Monitoring Plaintiffs have no personal injury damages. (Exs. 1-17.)

(Filing 432 at 4-7)

II. Discussion

“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(a\)](#). There being no dispute that the twenty-one

Medical Monitoring Plaintiffs have not manifested any health problems as a result of their alleged exposure to toxins, the only question to be answered is whether, as a matter of law, they might be able to recover damages for the cost of medical monitoring to detect future health problems.⁵

⁵ The same question was presented by the defendants’ motion for partial judgment on the pleadings (filing 237), but “[t]he defendants restricted the scope of the motion in their reply brief by arguing only that “the three negligence counts should be dismissed with prejudice.” (Filing 246, at 13, 14.) Thus, I [did] not consider[] whether these plaintiffs might be entitled to recover future medical monitoring costs by alleging claims for private nuisance (count four) and trespass (count five).” Memorandum and Order entered on September 10, 2007 (filing 249) at 3, n. 4.

In *Trimble v. ASARCO, Inc.*, 83 F. Supp. 2d 1034 (D. Neb. 1999), *aff’d*, 232 F.3d 946 (8th Cir. 2000), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), property owners sought to bring a class action against an alleged polluter under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and also asserted state-law tort claims for trespass, nuisance, negligence, strict liability, unjust enrichment, and medical monitoring. District Judge Thomas M. Shanahan dismissed the case after finding that the plaintiffs did not have a private cause of action under CERCLA and did not meet the jurisdictional amount-in-controversy requirement for bringing state-law tort claims in federal court under [28 U.S.C. § 1332](#). As damages, the plaintiffs claimed property remediation costs plus future medical monitoring costs, but Judge Shanahan stated that “the plaintiffs have cited no authority, and the court has found none, which would suggest that Nebraska law recognizes either a cause of action for medical monitoring or a remedy involving the creation of a medical monitoring fund.” *Id.*, [83 F.Supp.2d at 1041](#). He found it “improbable that the Nebraska courts would judicially fashion such a right or remedy.” *Id.* On appeal, the Eight Circuit agreed, stating:

*4 Plaintiffs still have not cited any Nebraska authority for the proposition that damages may be awarded for future medical monitoring costs in the absence of a present physical injury.

Thus, our recognition of such a cause of action would, in effect, expand substantive liability under Nebraska law. Under the circumstances, it would be both imprudent and improper for us to allow plaintiffs to pursue their medical monitoring claim.

Id., 232 F.3d at 963.

The plaintiffs attempt to distinguish *Trimble* because they are not asserting a separate “medical monitoring claim” but instead are contending that “the reasonable cost of future medical monitoring medically necessary as a result of the defendants’ tortious conduct is properly characterized as an item of damages[.]” (Filing 465 at 8) They then argue, relying on Restatement (Second) of Torts, that private nuisance and trespass claims do not require proof of a present physical injury before future medical monitoring costs may be recovered as damages.

The Nebraska Supreme Court has adopted the law of nuisance as articulated in the Restatement. See *Bargmann v. Soll Oil Co.*, 574 N.W.2d 478, 486 (Neb. 1998). Under the Restatement, “[i]f one is entitled to a judgment for harm to land resulting from a past invasion ..., the damages include compensation for ... discomfort and annoyance to him as an occupant.” Rest. 2d Torts § 929 (1979). The commentary states that an occupant “is also allowed to recover for his own serious sickness or other substantial bodily harm,” *id.* (comment e), but there is no suggestion in § 929 that future medical monitoring costs may be recovered in the absence of a present physical injury. Cases cited by the plaintiffs also fail to support this proposition.⁶

⁶ The plaintiffs contend that § 929 “has been routinely applied to allow ‘injury’ from a nuisance to include bodily harm or the threat thereof. *Ayers v. Township of Jackson*, 106 N.J. 557, 525 A.2d 287 (1987) (citing Restatement (Second) of Torts § 929 to conclude that quality of life damages represent compensation for losses associated with damage to property); *Rust v. Guinn*, 429 N.E.2d 299, 303-04 (Ind. Ct. App. 1981) (citing Restatement (Second) of Torts § 929 to find that jury may consider ‘injury to health’ in assessing the damages from nuisance); *Miller v. Carnation Company*, 39

Colo. App. 1, 564 P.2d 127 (1977) (distinguishing between plaintiff’s proprietary loss, i.e., loss of use and enjoyment of land, and personal losses, i.e., annoyance, discomfort, and inconvenience, to hold that an occupant-owner may recover both under the Restatement (Second) of Torts § 29, comment e).” (Filing 465 at 10-11) In *Ayers*, the New Jersey Supreme Court referred to § 929 to explain that the inconvenience of having no running water on the plaintiffs’ properties was the sort of “quality of life damage” that is compensable under nuisance law. 525 A.2d at 293-94. In *Rust*, an Indiana appellate court upheld an award of damages to plaintiffs who complained of vomiting, gagging, nausea and a burning sensation in their eyes, holding that these were actual injuries. 429 N.E.2d at 304-05. In *Miller*, a Colorado appellate court upheld a jury award for the annoyance and discomfort associated with harassment by flies and rodents. 564 P.2d at 129.

The Nebraska Supreme Court also follows the Restatement (Second) of Torts with regard to trespass law. See *Lambert v. Holmberg*, 712 N.W.2d 268, 273 (Neb. 2006). Under the Restatement, “[a] trespass on land subjects the trespasser to liability for physical harm⁷ to the possessor of the land at the time of the trespass” Rest. 2d Torts § 162 (1965). Again, this language merely authorizes recovery of damages for existing bodily harm.

⁷ “The words ‘physical harm’ are used to denote physical impairment of the human body, or of tangible property, which is to say land or chattels. Where the harm is impairment of the body, it is called ‘bodily harm,’ as to which see § 15.” Rest. 2d Torts § 7, comment e (1965). “Bodily harm is any physical impairment of the condition of another’s body, or physical pain or illness.” Rest. 2d Torts § 15 (1965).

*5 The personal injury claims alleged by or on behalf of the twenty-one Medical Monitoring Plaintiffs in count four (private nuisance) and count five (trespass) of the fifth amended complaint, as against the moving defendants, will be dismissed with prejudice because it is undisputed they have “no present physical injury ... [and] no personal injury damages.” See paragraphs 28 and 29 of the defendants’ statement of material facts (filing 432 at 7). Six of these Medical Monitoring Plaintiffs (Cindy Avila, in her individual capacity; David Bergholz; Jeffrey Bergholz, individually and

as next friend of S.L.B. and S.R.B.; and Roxanna Webb) also do not claim any property damage. *See* paragraphs 4-12 of the defendants' statement of material facts (filing 432 at 5-6). Thus, all claims alleged by or on behalf of these six individuals, as against the moving defendants, will be dismissed with prejudice.⁸ However, no final judgment will be entered at this time. *See Clark v. Baka*, 593 F.3d 712, 715 (8th Cir. 2010) (interlocutory appeals under Rule 54(b) are "generally disfavored").

⁸ In the previous memorandum and order, I indicated that "[p]roperty damage negligence claims also alleged by thirteen of these plaintiffs are not subject to the defendant's [Rule 12(c)] motion and will not be dismissed." Memorandum and Order entered on September 10, 2007 (filing 249 at 2, n. 3). Because it is now undisputed that six of the Medical Monitoring Plaintiffs do not claim any property damage, their negligence claims will be dismissed entirely.

III. Conclusion

As before, I conclude that Nebraska tort law does not permit the cost of future medical monitoring to be recovered as damages by an individual who has no present physical injury. Accordingly,

IT IS ORDERED that:

1. The defendants' motion for partial summary judgment (filing 431) is granted, as follows:

a. All claims brought by the following four plaintiffs on behalf of six individuals who claim only a need for future medical monitoring and no property damage, as alleged in counts one through five of the fifth amended complaint (filing 282) against the defendants Unisys Corporation, CNH America LLC, Case New Holland, Inc., CNH Global N.V., and Fiatallis North America LLC f/k/a Fiatallis North America, Inc., are dismissed with prejudice:

- (1) Cindy Avila;
- (2) David R. Bergholz;
- (3) Jeffrey L. Bergholz, individually and as next friend of S.L.B. and S.R.B., minors; and

(4) Roxana Webb.

b. All personal injury claims alleging private nuisance and trespass (counts four and five of the fifth amended complaint (filing 282)) brought by the following fourteen plaintiffs, on behalf of fifteen individuals who claim only a need for future medical monitoring, are dismissed with prejudice as against the defendants Unisys Corporation, CNH America LLC, Case New Holland, Inc., CNH Global N.V., and Fiatallis North America LLC f/k/a Fiatallis North America, Inc.:

- (1) Rose Bergholz;
- (2) Warren Edghill;
- (3) Julia Foote;
- (4) Joanie Guerrero, as next friend of B.C.G. and B.C.G., minors, but not in her individual capacity;
- (5) Robert Guerrero;
- (6) Donald Jenkins;
- (7) Anthony Martinez;
- (8) Kris Mleczeko;
- (9) Jason P. Ressler;
- (10) Barbara Schorle;
- (11) Bruce Schorle;
- (12) Cheri Schwieger;
- (13) Gordon Svoboda; and
- (14) Sherri Tolle.

Any property damage claims alleged by these fourteen plaintiffs are not dismissed.

c. No claims are dismissed as against the defendant Fiatallis North America, Inc.

2. This order does not constitute a final judgment under [Federal Rule of Civil Procedure 54\(b\)](#).

All Citations

Slip Copy, 2012 WL 13187721

2012 WL 13187721

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 4



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Penn, LLC v. Prosper Business Development Corp.](#),
6th Cir.(Ohio), December 12, 2014

533 Fed.Appx. 509

This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.

United States Court of Appeals,
Sixth Circuit.

Carolyn BAKER; Daniel Brockman,
et al., Plaintiffs–Appellants,

v.

CHEVRON U.S.A. INC.; [Chevron Texaco
Corporation](#); Chevron Pipeline, Inc.; Chevron
Energy Solutions LP; Chevron Energy Solutions
Management LLC; Chevron Environmental
Management Company; Chevron Environmental
Services Company, Defendants–Appellees.

Nos. 11–4369, 12–3995.

|

Aug. 2, 2013.

Synopsis

Background: Residents living near crude oil refinery that leaked toxic chemical plume allegedly contaminating their property brought action against refinery operator for property damages and medical monitoring damages. Operator moved for summary judgment. The United States District Court for the Southern District of Ohio, [2011 WL 3652249](#), [Sandra S. Beckwith](#), J., granted the motion. Residents appealed.

Holdings: The Court of Appeals, [Griffin](#), Circuit Judge, held that:

[1] expert testimony regarding causation of disease was unreliable;

[2] residents did not have a property interest in the water;

[3] there was no evidence that soil vapors were harmful to humans;

[4] medical monitoring of residents was not warranted; and

[5] sanctions against residents' counsel were warranted.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (10)

[1] **Federal Civil Procedure** 🔑 Failure to respond; sanctions

Expert witness report that was an untimely disclosed report intended to supplement a deficient expert opinion and reopen *Daubert* testimony was inadmissible.

3 Cases that cite this headnote

[2] **Evidence** 🔑 Medical testimony

Evidence 🔑 Experiments and results thereof

Under the *Daubert* test for determining admissibility of expert testimony, expert witness's opinion that cumulative benzene exposure caused blood diseases in residents living over ground water allegedly contaminated by plume of toxic chemicals leaked from crude oil refinery was unreliable, where expert relied on studies with much higher levels of benzene exposure than residents were exposed to, studies offered no consistent support of exposure causing increased risk of blood disease, and expert did not attempt to eliminate alternative competing causes.

7 Cases that cite this headnote

[3] **Water Law** 🔑 Pollution

Under Ohio law, residents living near crude oil refinery who were not using the groundwater beneath their land when it was allegedly contaminated by a plume of toxic chemicals leaked from the refinery that allegedly made the water undrinkable for approximately 500 years

did not have a property interest in that water such that toxic plume was not an unreasonable interference with their property rights.

[4] **Trespass** 🔑 Injury to property

Water Law 🔑 Pollution

Under Ohio law, mere detection of toxic soil vapors did not constitute damage to property that would give rise to a claim for indirect trespass into the subsurface of properties of residents living near a crude oil refinery that leaked a plume of toxic chemicals that allegedly contaminated the soil and groundwater beneath the residents' homes.

5 Cases that cite this headnote

[5] **Water Law** 🔑 Evidence

Under Ohio law, evidence of two completed subsurface pathways for two hydrocarbons at two monitoring wells was insufficient to establish actual damages to all 61 residences near crude oil refinery, as required to give rise to a claim for indirect interference with owners' subsurface property rights by presence of toxic chemical plume that allegedly leaked from the refinery; owners were required to offer evidence of contamination on each of their 61 properties since actual damages were required to prove indirect interference, and residents did not bring class action against refinery that would allow for common proof of damages.

2 Cases that cite this headnote

[6] **Evidence** 🔑 Cause and effect

Under *Daubert* test for determining admissibility of expert testimony, expert's testimony that presence of toxic chemicals in soil vapors could only have originated from plume of toxic chemicals leaked from crude oil refinery into local groundwater supply was unreliable, where expert's field was not soil vapor, and expert failed to conduct a soil vapor pathway analysis.

11 Cases that cite this headnote

[7] **Water Law** 🔑 Pollution

Under Ohio law, allegations by some residents living near crude oil refinery of interference with the use and enjoyment of their properties due to a chemical plume that leaked from the refinery and allegedly contaminated the groundwater and soil under their homes, causing them to be unable to enter their basements or forcing them to abandon home improvement plans, were either de minimis or irrational such that they were not substantial, as required to be compensable under a theory of indirect interference with subsurface rights.

[8] **Water Law** 🔑 Pollution

There was no evidence that soil vapors that were allegedly contaminated from toxic chemical plume that leaked from crude oil refinery into groundwater supply were harmful to humans such that residents living near the refinery experienced substantial physical damage that would give rise under Ohio law to a claim for invasion of subsurface property rights under a theory of indirect trespass.

4 Cases that cite this headnote

[9] **Damages** 🔑 Medical treatment and care of person injured

Medical monitoring of residents living near crude oil refinery that leaked a plume of toxic chemicals that allegedly contaminated the groundwater and soil under residents' properties was not warranted, where residents did not identify the diseases the chemicals in the plume allegedly caused, there was no individualized proof that each of the 118 residents were exposed to chemicals from the plume in sufficient quantities to cause an increased risk of disease, and community-wide cancer study did not conclude that the higher than expected number of cases was due to the plume.

[10] **Federal Civil Procedure** 🔑 Particular types of cases in general

Rule 11 sanctions were warranted against counsel for residents who lived near crude oil refinery alleging that a plume of leaked toxic chemicals from the refinery contaminated their groundwater and soil, where counsel asked for the medical monitoring of all 118 residents knowing that they did not have individualized exposure data, or a present, rather than merely potential, increased risk in certain diseases, and continued to litigate the medical monitoring claim while knowing that it was meritless. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

2 Cases that cite this headnote

***510** On Appeal from the United States District Court for the Southern District of Ohio.

***511** BEFORE: [GRIFFIN](#) and [KETHLEDGE](#), Circuit Judges; and ZATKOFF, District Judge. *

* The Honorable [Lawrence P. Zatkoff](#), Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Opinion

[GRIFFIN](#), Circuit Judge.

This case arises from defendant Chevron's activities at its crude oil refinery near the Village of Hooven in Hamilton County, Ohio.¹ Chevron acknowledges that from 1931 to 1986, the refinery was the source of considerable environmental contamination, including hazardous air emissions and a cumulative release of approximately eight million gallons of gasoline that gravitated through the soil and formed a plume atop the groundwater under the refinery. By 1996, the plume had migrated under a portion of the Village of Hooven.

¹ Although plaintiffs named seven different Chevron entities as defendants, there appears to be no reason to distinguish between each of the separate entities because the parties collectively refer to all defendants throughout their briefs simply as “Chevron.” We follow suit.

Plaintiffs are approximately 200 former and current neighbors of the refinery who allege claims for damages arising out of the refinery's air emissions, the groundwater plume, and the “soil vapors” arising from the plume that escape to the surface. Plaintiffs fall into three distinct categories: (1) individuals who claim personal injury because of the air emissions; (2) individuals who seek medical monitoring damages because their exposure to the plume and its soil vapors has given them an increased risk of contracting a serious disease; and (3) individuals who claim property damage because of the plume and its soil vapors.

The district court bifurcated the personal injury plaintiffs from the property damage plaintiffs and selected bellwether plaintiffs from each group to determine the viability of each category of claims. After excluding two of plaintiffs' experts opinions as unreliable, the district court granted summary judgment to Chevron on all claims. The district court also granted Chevron's motion for [Rule 11](#) sanctions, ordering plaintiffs' counsel to pay Chevron \$250,000 in defense costs because their positions regarding the legal and evidentiary basis for medical monitoring damages were objectively unreasonable. Plaintiffs appealed the orders excluding their experts and granting summary judgment to Chevron; plaintiffs' counsel appealed the order granting [Rule 11](#) sanctions to Chevron. For the reasons that follow, we affirm.

I.

A.

The Village of Hooven lies in the western part of Hamilton County, Ohio. State Route 128 demarcates Hooven's eastern boundary. From approximately 1930 to 1985, Gulf Oil Company (“Gulf”) operated a petroleum refinery next to Hooven, just across State Route 128. The refinery produced gasoline, diesel fuel, jet fuel, heating oil, sulphur, and asphalt. The southwestern corner of the refinery's property line abuts the northeastern corner of Hooven. The refinery sits in the flood plain of the Great Miami River, which establishes the eastern boundary of the refinery. Chevron purchased the refinery from Gulf in 1985 and closed it in 1986. Chevron acknowledges that while the refinery was operational, various hydrocarbon compounds escaped from refinery equipment into the air as “fugitive emissions.”

In 1985, gasoline appeared to be seeping from the riverbank inside the refinery *512 property line into the Great Miami River. It was later determined that gasoline and diesel fuel, which had been leaked or spilled at the refinery over the years, had gravitated through the soil and entered the groundwater under the refinery. In total, about eight million gallons of fuel leaked into the groundwater. The fuel settled on top of the groundwater, creating a light, non-aqueous phase liquid (“LNAPL”) plume. Over time, the plume migrated from the refinery’s boundaries and entered at least the eastern subterranean area of Hooven. The plume under the eastern portion of Hooven is at a depth of anywhere from fifty to seventy feet below the surface. The principal chemical of concern in the plume is benzene, which is a known carcinogen in sufficient doses. Benzene also originates from vehicle exhaust, cigarette smoke, and is present in common household products, such as glue and paint.

As the level of the groundwater rises, so does the LNAPL plume floating atop the water. When the groundwater falls, a “smear zone” of LNAPL-saturated soil is left behind. When the water table does not encompass the smear zone, constituents from the plume remaining in the soil may volatilize into “soil vapors” which could potentially reach the surface, depending on, among other things, the chemical properties of the particular constituent, the depth of the smear zone, and the porosity of the soil. Under the right conditions, however, the soil vapors may biodegrade naturally.

Soon after Chevron discovered the seeping gasoline in 1985, it notified the Ohio Environmental Protection Agency and began the process of installing groundwater monitoring and recovery wells throughout the refinery to capture the contamination. Later, in 1993, Chevron and the United States Environmental Protection Agency (“U.S. EPA”) entered into a consent order which governs the remediation of the refinery site. Pursuant to the order, a number of monitoring wells were installed to assist in determining the footprint of the plume, as well as provide a means to conduct soil vapor testing. These efforts led Chevron to discover that the plume had migrated under Hooven in 1997.

In 1999, to mitigate the risk of soil vapor intrusion from the plume, Chevron installed a horizontal soil vapor extraction (“HSVE”) system in Hooven. The HSVE is a vacuum-type system comprised of three horizontal extraction pipes located underneath Hooven’s main roadways that intercepts soil vapors from the plume and sends them to a thermal oxidation unit for incineration.

In 2006, the U.S. EPA reviewed Chevron’s monitoring well sampling data and concluded that “there are no exposure pathways from Chevron’s contamination to the community residents, and that Chevron’s contamination does not pose any current human health risks to the residents or workers in the community.” An “exposure pathway” or “completed pathway” is a pathway by which soil vapors from the plume can reach the surface and enter a building. The existence of a completed pathway generally requires: (1) the observation that a particular chemical is present at all soil depths and in the subject building’s indoor air; (2) confirmation that the specific chemical is present at concentrations above background levels; and (3) confirmation that the measured concentrations did not come from nonplume sources.

Also in 2006, using the same Chevron sampling data as did the U.S. EPA, the Ohio Department of Health (“ODH”) prepared its own health risk analysis. The ODH found an “indeterminate public health hazard” and requested additional sampling under a “wors[t] case scenario.” *513 To accommodate the ODH’s request, the U.S. EPA went into Hooven in 2008 and 2009 and collected several quarters of sub-slab and indoor vapor samples under what it deemed a “worst case scenario,” that is, when the HSVE was turned off and when Chevron was engaged in high-grade groundwater pumping which would lower the water table and expand the smear zone.

The ODH drew two conclusions from its “worst case scenario” study. First, “[t]he levels of vapor-phase petroleum hydrocarbons detected in the indoor air of area residences and the Hooven Elementary School during the [U.S. EPA] quarterly sampling did not pose a public health hazard to residents, students or staff.” Second, a completed pathway for isopentane and trimethylpentane at concentrations above screening levels could be found in the subsurface near two monitoring wells in the eastern portion of Hooven. Regarding this second conclusion, however, the ODH noted that, although those hydrocarbons were detected in the *subsurface*, there was no health risk because the *indoor air* concentrations of those chemicals “did not increase to above levels of concern,” even under “worst case scenario” conditions. The ODH also observed that when Chevron reactivated the HSVE, the vapor levels quickly and significantly decreased.

The ODH also released an ecological study titled “[Cancer Incidence Among Residents of Hooven, Hamilton County, Ohio, 1996–2003](#).” The ODH designed the study to compare

the incidence of cancer among Hooven's 164 residents with national background rates. The study found “significantly higher than expected numbers of cancer cases for the 25 observed cancers combined and cancers of the female breast; lung and bronchus; and bladder.” The study concluded, however, that the “types of cancer diagnosed among Hooven residents differ with respect to risk factors, latency, course of disease and probability of survival. For this reason, it is not likely a specific point source of exposure or single risk factor is playing a role in the increased cancer burden.” The ODH later supplemented its study with data from 2004 to 2007, reporting seven additional cancer cases. In this update, the ODH reaffirmed its earlier conclusion that “it is not likely that a common risk factor is contributing to the development of these cancers.”

The 200 plus individual plaintiffs in this case, former and current neighbors of the refinery, assert a litany of personal injury and property damage claims against Chevron under Ohio state law. For case management purposes, the matter was bifurcated between personal injury plaintiffs and property damage plaintiffs. The district court also allowed the parties to select bellwether plaintiffs for each trial group. The parties vigorously litigated whether the refinery damaged each category of plaintiffs. In four separate opinions, the district court rejected all claims. A summary of each of these rulings is necessary for the issues raised on appeal. We start with the bellwether property damage plaintiffs.

B.

Of the sixty-one individual plaintiffs advancing property damage claims, there are fifteen bellwether plaintiffs. These plaintiffs, whose properties were directly above the plume, alleged property damage resulting from the plume's contamination of the subsurface and groundwater, and the soil vapors emanating from the plume that reach the surface. In support of these claims, plaintiffs offered, inter alia, the expert opinion of Philip Bedient, Ph.D. Dr. Bedient broadly opined that the “[p]roperties *514 and residents of Hooven have been adversely impacted” by the plume. He also stated that soil vapors from the plume were “the only way to explain” the presence of benzene, toluene, xylene, and ethyl benzene in the shallow subsurface soils in and around Hooven.

Chevron filed a motion to exclude Dr. Bedient's opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and a

motion for summary judgment. The district court granted Chevron's motions, holding that “the record fails to show that the hydrocarbon plume caused any damage to Plaintiffs' property or interfered with their property rights or with the use and enjoyment of their properties.” The court first determined that:

[N]one of the bellwether Plaintiffs have demonstrated that the plume actually interferes with their use of the subsurface. Plaintiffs do not use the groundwater for any purpose. Plaintiffs' water supply does not come from ground wells; rather, they have a municipal water source. Plaintiffs have not indicated that the plume has caused them to abandon any particularized and non-speculative plans which require drilling or excavation on their properties.

(Footnote omitted.)

The court next excluded Dr. Bedient's opinions because he admitted he was not a soil vapor expert and, even if he was, his opinions were unreliable, vague, and conclusory because he did not perform any analysis to determine whether there is a completed soil vapor pathway from the plume to the surface. The court went on to conclude that plaintiffs' remaining evidence of soil vapor intrusion—Chevron's *theoretical* model of completed soil vapor pathways and plaintiffs' deposition testimony of gasoline odors in their homes and around their properties—was insufficient to create a genuine issue of material fact on whether soil vapors from the plume caused compensable property damage. All bellwether property damage plaintiffs appealed.

C.

The district court next addressed the bellwether claims of the personal injury plaintiffs. Of the 200 plus plaintiffs in this case, only seven claimed personal injury from being exposed to benzene contained in the refinery's “fugitive emissions.” Of those seven, the parties selected four as bellwether plaintiffs. These plaintiffs, and their respective injuries, are as follows: Mary Etta Greener–Brown, *Hodgkin's*

disease and breast cancer; Carol Lipscomb, monoclonal gammopathy/multiple myeloma; Jean Runck, monoclonal gammopathy/multiple myeloma; and Michelle Schrader, acute myelogenous leukemia (“AML”).

Plaintiffs offered three expert witnesses to prove that the refinery's airborne benzene emissions caused their injuries. First, Dr. Cheremisinoff, a chemical engineer, calculated a total gross amount of benzene released from the refinery through emissions. Second, Dr. Rosenfeld, using Dr. Cheremisinoff's calculations, created an air flow model to calculate the cumulative dose of benzene to which each plaintiff was exposed, a number expressed in micrograms. Dr. Garabrant, Chevron's expert, converted Dr. Rosenfeld's microgram figures into the more conventional expression of parts per million per years (“ppm-years”). Finally, Dr. Dahlgren, using Dr. Rosenfeld's dose estimates, opined in his First Report and untimely Second Report (filed in response to Chevron's motion to strike the First Report) that each plaintiff's dose of benzene was sufficient to cause her specific illness.

*515 Chevron filed a motion to exclude Dr. Dahlgren's causation opinions under *Daubert* and a motion for summary judgment. Chevron based its motion for summary judgment on the asserted inadmissibility of Dr. Dahlgren's opinion. Plaintiffs responded by submitting Dr. Dahlgren's Third Report, a forty-nine page affidavit which purportedly clarified his first two reports. The district court held a hearing at which Dr. Dahlgren testified. After the hearing, as a result of additional motion practice, plaintiffs obtained discovery of some 270 documents that Chevron wrongly identified as privileged. With leave of court, Dr. Dahlgren prepared a Fourth Report limited to the issues raised in the newly discovered evidence, and the parties filed supplemental memoranda on Dr. Dahlgren's new opinion.

In a forty-seven page order, the district court held that Dr. Dahlgren's causation opinions were not reliable under *Daubert* and therefore inadmissible. The court first determined that Dr. Dahlgren's First Report failed to comply with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure because it did not provide the “how and why” of his opinion that each plaintiff's cumulative benzene exposure caused her specific illness. The court explained:

Dr. Dahlgren's [First Report] on these Plaintiffs consists almost entirely

of a recitation of their family and medical histories. Each report concludes with a brief “discussion” which apparently sets forth Dr. Dahlgren's opinion that the Plaintiff's illness was caused by her exposure to benzene. Then, attached to each report is an “Appendix on benzene toxicity,” which is essentially a bibliography and summary of a number of articles and medical studies on illnesses purportedly caused by benzene. With one exception, however, Dr. Dahlgren never explains in his report how the bibliography supports his conclusion that a Plaintiff's cumulative benzene exposure was sufficient to cause her disease.

The “one exception” noted by the district court was Dr. Dahlgren's opinion regarding plaintiff Michelle Schrader, where he cited a 1948 report issued by the American Petroleum Institute which states that there is no safe level of exposure to benzene. The court concluded, however, that Dr. Dahlgren's “no safe level” opinion was not a reliable causation theory under *Daubert*, noting that “the one-hit theory could not be established because it would be just as likely that ambient benzene was the cause of Plaintiffs' illnesses.”

The court next determined that the Second Report—submitted nearly two months after the expert report deadline and without leave of court—contained the same fatal flaw as the First Report: Dr. Dahlgren made no effort to tether his causation theory to the medical literature attached to his report.

As for the Third Report, the district court observed that it “is arguably the only report from Dr. Dahlgren which complies with the requirements of Rule 26(a)(2)(B) [(B)] and yet Plaintiffs provided no justification for providing this report five months late.” The court concluded that there was nothing in the Third Report that could not have been included in the First Report and, therefore, the Third Report must be excluded as an improper attempt to correct the weaknesses of Dr. Dahlgren's opinions that Chevron identified in its *Daubert* motion. The court further determined that submitting the specifics of the expert's opinion on the dispositive issue in the case more

than five months late was not harmless error. Because of these defects, the district court *516 did not consider Dr. Dahlgren's Third Report.

The district court then addressed Dr. Dahlgren's Fourth Report. Interestingly, the additional discovery that plaintiffs obtained on the documents that Chevron had wrongly claimed as privileged showed that the refinery's benzene emissions were actually thirty percent *lower* than initially believed. Nevertheless, Dr. Dahlgren maintained his original causation opinion and raised for the first time the issue of short-term exposure. On this new issue, he opined that plaintiffs' peak exposures to benzene in excess of regulatory levels were worse than lower levels of exposure for a longer period of time. Dr. Dahlgren also stated that in 1977, plaintiffs, and all Hooven residents, should have been wearing air respirators when benzene emissions exceeded regulatory levels near the refinery's fence line with Hooven. Additionally, Dr. Dahlgren cited nine medical studies in support of his Fourth Report.

The district court rejected the Fourth Report as unreliable. The court found that Dr. Dahlgren's opinions were inadmissible to the extent he was relying on regulations on short-term benzene exposures. Citing *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 252–53 (6th Cir.2001), the court explained that the mere fact that plaintiffs were exposed to benzene in excess of regulatory limits was insufficient to establish causation in a tort case. The court also found the discussion of short-term benzene exposures in 1977 wholly irrelevant because Dr. Dahlgren failed to account for the fact that “not only did none of the Plaintiffs live near the refinery fence line in 1977, none of the Plaintiffs even lived in Hooven in 1977.” The court then exhaustively analyzed the medical studies Dr. Dahlgren offered in support of his opinion, ultimately concluding that “none of these studies supports an opinion that benzene can cause the illnesses from which Plaintiffs suffer at the extremely low doses or exposures experienced in this case.” Having excluded Dr. Dahlgren's opinions—plaintiffs' only evidence of causation—the district court granted Chevron's motion for summary judgment. Greener–Brown, Schrader, and Lipscomb appealed; Runck did not.

D.

The remaining property damage plaintiffs attempted to meet the district court's criticism of the bellwether claims with new expert opinions from Matthew Hagemann, a former U.S. EPA geologist, Dr. Cheremisinoff, and Dr. Bedient. Although Mr.

Hagemann agreed with Chevron's assessment of the size of the smear zone, he broadly concluded that the plume and its soil vapors could be found “in Hooven.” Dr. Cheremisinoff similarly opined, in nonspecific fashion, that soil vapors intruded into basements and crawl spaces of the buildings “in Hooven.” Dr. Bedient disagreed with Mr. Hagemann over the size of the smear zone, stating that the smear zone boundaries had been “misrepresented” and that further sampling was necessary “to determine the full extent of the hydrocarbon contamination.”

Chevron moved for summary judgment; the district court granted the motion. Adopting Mr. Hagemann's opinion on the size of the smear zone, the court held that all property owners who were not above the smear zone, or within 100 feet of its edges,² had no property damage claims as a matter of law. As for the claims involving *517 the remaining properties, the court summarized its reasons for rejecting those claims as follows:

- 2 The district court adopted the 100–foot limit based on U.S. EPA guidance regarding the methodology of detecting soil vapors.

Plaintiff[s] claims fail because none of them pointed the [c]ourt to specific evidence that his or her property had experienced [soil] vapor intrusion. Instead, as alluded to earlier, Plaintiffs have approached this case as if the Village of Hooven is the real party-in-interest in this case. But Hooven is not a plaintiff in this case and proof that there was a completed pathway for vapor intrusion “in Hooven” does not suffice—to take one example—to prove that there was or is a completed pathway at 113 Ohio Avenue. Plaintiffs' proof of vapor intrusion is simply at too general a level to create a triable issue of fact on this issue. (Emphasis removed.) All property damage plaintiffs appealed.

E.

One hundred eighteen plaintiffs requested medical monitoring damages because their alleged exposure to the plume and its soil vapors put them at an “increased risk” of contracting a number of serious diseases. Plaintiffs submitted a medical monitoring plan from Dr. Lockey designed to “balance increased health risks of contracting injuries or diseases associated with the involuntary environmental contamination of the soil and ground water of Hooven

by Chevron hazardous chemicals and help mitigate individual and community distress related to health outcome uncertainties.” After reviewing Dr. Lockey’s plan, the district court ordered plaintiffs to show cause why their claims should not be dismissed in light of *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359 (6th Cir.2011), a case in which this court addressed the evidentiary requirements for medical monitoring damages under Ohio law.

After considering the parties’ briefing, the district court dismissed all claims for medical monitoring damages with prejudice. The court offered three reasons for its ruling. First, plaintiffs failed to specifically identify any disease or illness that they might have an increased risk of contracting because of the plume and its soil vapors. Second, plaintiffs failed to show “not only that he or she was exposed to a specific chemical, but also to quantify the exposure, i.e., provide a dose, in some way that it can be reliably determined that he or she has a significantly increased risk of contracting some disease or medical condition.” And third, Dr. Lockey’s plan was not designed to address any disease that might be caused by the chemicals in the plume; rather, it was a general wellness plan that supposedly would offset the deleterious health effects that may or may not have been caused by the plume. The district court also commented that “[a]s was the case with the property damage Plaintiffs, the medical monitoring Plaintiffs have apparently treated this lawsuit as a class action. It is not, however.” All medical monitoring plaintiffs appealed.

F.

After all property damage claims and bellwether personal injury claims were adjudicated, but while the claims for medical monitoring damages were pending, Chevron filed a motion for Rule 11 sanctions against plaintiffs’ counsel. Chevron argued that it was entitled to defense costs and attorney’s fees relating to those pending claims because plaintiffs’ counsel continued to prosecute these claims after conceding at a discovery conference that they had no causation evidence under the standards set by the district court.

The district court granted Chevron’s Rule 11 motion about two months after it *518 dismissed the claims for medical monitoring damages, holding that:

Plaintiffs’ counsel took objectively unreasonable positions with respect to both the facts and the law and persisted in maintaining the medical monitoring claims despite the absence of legal and factual support for the claims. These two problems are intertwined in this case. It may be that counsel’s unreasonable view of the law influenced the manner in which they attempted to develop evidentiary support for these claims. Counsel’s conduct, nevertheless, was unreasonable.

The court identified the “most serious” problem with counsel’s conduct in further detail: “Because it was so well-established ... that a toxic tort claimant needed proof of specification causation, i.e., dose, counsel’s complete failure to adduce proof of dose had to be the product of a deliberate decision and cannot be blamed on inadvertence or on a reasonable misinterpretation of the case law.” The court subsequently awarded Chevron \$250,000. Plaintiffs’ counsel appealed.

II.

It is undisputed that the LNAPL plume under a portion of Hooven originates from Chevron’s refinery and that fugitive emissions escaped from the refinery while it was operational. It is fiercely disputed whether these environmental hazards have caused any cognizable personal injury or property damage. On appeal, the parties have abandoned the bellwether distinctions used below and have organized their arguments around the three categories of plaintiffs: (1) those claiming personal injury damages from airborne benzene emissions; (2) those claiming property damage; and (3) those claiming medical monitoring damages. We address each category in the order presented after reciting the applicable standards of review.

We review a district court’s decision on a motion for summary judgment de novo. *Savage v. Gee*, 665 F.3d 732, 737 (6th Cir.2012). “The question on summary judgment is whether the moving party has demonstrated that the evidence available

to the court establishes no genuine issue of material fact such that it is entitled to a judgment as a matter of law.” *Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551, 554 (6th Cir.2009) (citing Fed.R.Civ.P. 56(c)). In evaluating a motion for summary judgment, we view the record in the light most favorable to the nonmoving party. *Id.* “A mere scintilla of evidence is insufficient to create a material question of fact and defeat a motion for summary judgment; ‘there must be evidence on which the jury could reasonably find for the [non-movant].’ ” *CareToLive v. FDA*, 631 F.3d 336, 340 (6th Cir.2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

“We ‘review the exclusion of expert testimony for abuse of discretion, even when the exclusion results in the entry of summary judgment for the opposing party.’ ” *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676 (6th Cir.2011) (quoting *Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861, 868 (6th Cir.2006)). “A district court abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence.” *Ky. Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 915 (6th Cir.2009) (citation and internal quotation marks omitted). Consequently, “we will not substitute our own judgment for that of the district court and will reverse an evidentiary decision only where we are left with a definite and firm conviction that [the district court] committed *519 a clear error of judgment.” *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir.2008) (alteration in original) (citation and internal quotation marks omitted).

III.

A.

Starting with the category of plaintiffs claiming personal injury damages from airborne benzene emissions, the parties here dispute whether the district court properly excluded Dr. Dahlgren's expert opinion. Resolution of this issue controls whether the district court properly granted summary judgment to Chevron because Dr. Dahlgren's opinion is plaintiffs' only evidence of causation. And although whether Dr. Dahlgren was properly excluded is outcome determinative, we nevertheless review the district court's decision under the abuse of discretion standard. See *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 532 (6th Cir.2012); *Pluck*, 640 F.3d at 676.

Plaintiffs argue that the district court erred because it did not “take into consideration the full record presented” in excluding Dr. Dahlgren. Plaintiffs claim that the court ignored his *Daubert* hearing testimony, a slideshow that he prepared but did not present at that hearing,³ and a CD containing numerous benzene-related scientific studies that he gave the court during the *Daubert* hearing. Plaintiffs also criticize the district court for rejecting a number of studies that Dr. Dahlgren relied on in his Fourth Report because those studies did not contain statistically significant findings.⁴

3 Plaintiffs' counsel apparently gave the district court a printed copy of Dr. Dahlgren's slideshow during the *Daubert* hearing.

4 “A study that is statistically significant has results that are unlikely to be the result of random error[.]” *Matrixx Initiatives, Inc. v. Siracusano*, — U.S. —, 131 S.Ct. 1309, 1319 n. 6, 179 L.Ed.2d 398 (2011) (quoting Federal Judicial Center, Reference Manual on Scientific Evidence 354 (2d ed. 2000)).

Chevron responds by first noting that plaintiffs do not specifically challenge the court's rulings that the First and Second Reports failed to comply with Rule 26(a)(2)(B) or that the Third Report was procedurally improper. Chevron next asserts that the district court was not required to consider Dr. Dahlgren's testimony, his slideshow, or CD of studies because those materials related to his *Third Report*, which the court correctly rejected as a prejudicially late, transparent effort to reopen an opinion after its weaknesses had been exposed. Finally, Chevron provides five reasons why Dr. Dahlgren's causation opinion in the Fourth Report lacks a reliable scientific foundation: (1) He never identified the dose of benzene from short-term bursts that he opined was causally related to plaintiffs' blood diseases; (2) he failed to proffer any specific information relating to the short-term benzene bursts each plaintiff allegedly received; (3) he did not cite any scientific literature establishing that short-term benzene exposure, of any intensity, was capable of causing plaintiffs' injuries; (4) he relied on results of studies that contained statistically insignificant results; and (5) the Fourth Report did not reflect any differential diagnosis or other accepted scientific methodology for ruling out non-benzene explanations for plaintiffs' diseases.

Chevron's arguments are well-taken, and we cannot conclude that the district court made a clearly erroneous assessment of either Dr. Dahlgren's opinion or the studies on which he

relied. Plaintiffs do not create a jury question on causation simply because Dr. Dahlgren opined that *520 the refinery's airborne benzene emissions caused plaintiffs' diseases. It is the district court's duty to ensure that all expert opinion evidence "rests on a reliable foundation." *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786. Federal Rule of Evidence 702 assigns the district courts a "gatekeeping role" in screening the reliability of expert testimony. *Id.*; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). "It is broadly accepted that the district court has considerable leeway in making these sorts of determinations." *Davison v. Cole Sewell Corp.*, 231 Fed.Appx. 444, 448 (6th Cir.2007) (internal quotation marks and brackets omitted).

In this case, the methodical analysis in the district court's forty-seven page order shows that it fully embraced its gatekeeper role and carefully considered, but ultimately rejected, the alleged scientific foundation of Dr. Dahlgren's expert opinion. First, we agree with Chevron that plaintiffs do not argue that the court abused its discretion by excluding the First and Second Reports for failing to comply with the requirements in Rule 26(a)(2)(B). These reports are therefore not considered in our analysis.

[1] Second, the court acted within its discretion when it refused to consider Dr. Dahlgren's Third Report and the information offered in support of that report. "We have recognized that '[d]istrict courts have broad discretion to exclude untimely disclosed expert-witness testimony,' particularly when these reports serve as a 'transparent attempt to reopen' the *Daubert* inquiry after the weaknesses in the expert's prior testimony have been revealed." *Pluck*, 640 F.3d at 681 (quoting *Pride v. BIC Corp.*, 218 F.3d 566, 578–79 (6th Cir.2000)). Other than vaguely objecting to the "procedural fairness" of the district court's ruling, plaintiffs do not specifically challenge the court's conclusion that the untimely Third Report was an obvious attempt to bolster a deficient opinion. Indeed, at the *Daubert* hearing, plaintiffs' counsel all but admitted it intentionally held back on the "how and why" of Dr. Dahlgren's initial opinions because, according to counsel, it was purportedly "unknown" how the district court would have liked that information presented.

[2] Third, the court exhaustively reviewed the medical studies that Dr. Dahlgren offered in the Fourth Report to support his opinion that a cumulative benzene exposure of 3.1 ppm-years can cause *Hodgkin's disease* (Brown); that 0.12 ppm-years can cause AML (Schrader); or that 2.2 ppm-years can cause *multiple myeloma* (Lipscomb). The court's primary

criticism was that the subjects of the cited studies generally had much higher exposures to benzene than the plaintiffs, and thus, "there [was] simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Based on a review of the district court's comprehensive analysis, we cannot say that its rejection of these studies was clearly erroneous. Relatedly, the district court acted within its discretion when it discounted studies that contained statistically insignificant results. See *Pluck*, 640 F.3d at 680 (affirming the district court's exclusion of expert evidence because, inter alia, the expert relied on studies containing statistically insignificant results).

Fourth, the court noted that there was no consistent support in the studies that benzene exposure significantly increases the risk of developing plaintiffs' various diseases. And although it is medically accepted that benzene exposure can cause AML, the court also observed that Dr. Dahlgren did not cite any study finding that a cumulative exposure of .12 ppm- *521 years (Schrader) significantly increases the risk of developing AML.

Finally, plaintiffs offer no response to Chevron's argument that the Fourth Report does not contain any differential diagnosis or other accepted scientific methodology for ruling out non-benzene explanations for plaintiffs' diseases. We have held previously that the absence of a differential diagnosis is fatal to the admissibility of an expert's opinion regarding disease causation in cases involving hazardous substances. See *Pluck*, 640 F.3d at 678–80; *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674–76 (6th Cir.2010). After reviewing this record, we are not left with a definite and firm conviction that the district court committed a clear error of judgment by excluding Dr. Dahlgren's expert opinion. Accordingly, we affirm the grant of summary judgment in favor of Chevron.

B.

Turning now to the category of plaintiffs who claim property damage, the parties dispute the legal thresholds of evidence necessary to establish two different types of property damage claims—groundwater damage and indirect subsurface trespass—under Ohio law. They also dispute whether the district court properly excluded Dr. Bedient's expert opinion. We start with the disagreements over the property damage claims.

[3] First, plaintiffs claim that they have a viable groundwater damage claim under *McNamara v. Rittman*, 107 Ohio St.3d 243, 838 N.E.2d 640 (2005), because the plume has unreasonably interfered with their groundwater rights. *McNamara* held that “[a] property owner has a potential cause of action against anyone who unreasonably interferes with his property right in groundwater.” *Id.* at 644. Plaintiffs argue that Chevron has unreasonably interfered with their groundwater rights because (1) the plume has made the groundwater undrinkable for some 500 years, and (2) Hooven is subject to a village-wide groundwater zoning use restriction because of the plume. Chevron responds that *McNamara* is distinguishable because it addresses harm to groundwater resources that homeowners were *actually using* at the time of the defendant's alleged interference.

We agree with Chevron that plaintiffs have no groundwater claim under *McNamara*. An Ohio landowner has a property right in groundwater only to the extent he actually uses that water; he has no property interest in that water simply because it resides beneath his land. See *Wood v. Am. Aggregates Corp.*, 67 Ohio App.3d 41, 585 N.E.2d 970, 972 (1990) (“One does not acquire title to underground water but rather a right to use a reasonable amount so long as neighboring landowners are not unduly prejudiced.”). Thus, under Ohio law, the property interest in groundwater is use-based, not title-based. See *Smith v. Summit Cnty.*, 131 Ohio App.3d 35, 721 N.E.2d 482, 486 (1998) (“No landowner in Ohio ... has ever held title to ground water.”). And here, it is undisputed that plaintiffs never used or planned to use the groundwater. Accordingly, Chevron did not “unreasonably interfere” with the plaintiffs' use of the groundwater under *McNamara*.

[4] Second, plaintiffs challenge the district court's holding that they had presented insufficient evidence that the plume and its soil vapors indirectly trespassed into the subsurface of their properties. The claim at issue here—an indirect subsurface trespass claim—was first recognized by the Ohio courts in *Chance v. B.P. Chemicals, Inc.*, 77 Ohio St.3d 17, 670 N.E.2d 985 (1996). In *Chance*, BP had a permit from *522 the State of Ohio and the EPA to dispose of hazardous waste by injecting it into wells drilled to a depth of some 2,600 feet below the ground surface. *Id.* at 986–87, 989. There, the injectate mixed with the groundwater and migrated in some instances to nearly five miles away from BP's property. *Id.* at 987. Plaintiff landowners brought claims against BP for, inter alia, trespass on the grounds that the injectate contaminated the groundwater beneath their properties. *Id.* at 986.

The Ohio Supreme Court held that plaintiffs had not demonstrated an unlawful entry on their properties by BP. First, the court defined the limited nature of plaintiffs' subsurface property rights, finding that “subsurface rights in their properties include the right to exclude invasions of the subsurface property that actually interfere with [their] reasonable and foreseeable use of the subsurface.” *Id.* at 992. Second, the court explained “[e]ven assuming that the injectate had laterally migrated to be in an offending concentration under some of the [plaintiffs'] properties, we find that some type of physical damages or interference with use must have been demonstrated for [plaintiffs] to recover for a trespass.” *Id.* at 993. The court further held that absent physical damage to, or interference with their properties, the plaintiffs could not recover damages for loss in value of their properties resulting from the stigma from the public perception that their properties were contaminated. *Id.* In the end, given the limited nature of the plaintiffs subsurface rights, and no proof of “physical damage” to the subsurface, the court determined that, as a matter of law, plaintiffs had not shown unlawful entry. *Id.* at 993–94.

In *Lueke v. Union Oil Co. of Cal.*, No. OT-00-008, 2000 WL 1545077 (Ohio Ct.App. Oct. 20, 2000) (unpublished), the Ohio Court of Appeals interpreted and applied *Chance*. Faced with a plaintiff advancing an indirect trespass claim for damages to a groundwater well that had been contaminated with gasoline from a nearby leaky underground storage tank, the court stated: “In cases of indirect trespass, damages are not presumed, and actual damages in the form of physical damages or interference with use must be shown before the person suing for trespass can prevail. Furthermore, the damages must be substantial.” *Lueke*, 2000 WL 1545077 at *7 (internal quotation marks and citations omitted). The appellate court affirmed the trial court's ruling that the plaintiff had not suffered a substantial or unreasonable interference with the use and enjoyment of the property because the defendant quickly remedied the problem by installing carbon filters to the plaintiff's water system. *Id.* at *8.

In this case, plaintiffs claim that the district court wrongly required them to establish “physical damage” under *Chance* with proof that the soil vapors from the plume were found on their properties at concentrations that were harmful to humans. They argue that the “physical damage” prong of an indirect trespass claim is satisfied upon the “mere detection of constituents” on the property, without regard to whether they are harmful. They argue that the presence of Chevron's

contamination on plaintiffs' properties ranging from above background to regulatory health threat levels is sufficient injury to meet the property damage requirements of *Chance*. Chevron responds that the "mere detection" of constituents is insufficient to constitute the physical property damage under *Chance*.

We agree with Chevron that plaintiffs have to show something more than the "mere detection" of soil vapors on their properties to establish the physical damage prong of an indirect trespass claim. *523 Under *Chance*, plaintiffs must produce evidence showing that (1) the plume or its soil vapors have invaded their property, and (2) that invasion has caused either substantial physical damage to the land or substantial interference with their reasonable and foreseeable use of the land. These elements are plainly apparent in *Chance* because, as the court explained, even if it assumed that BP's injectate invaded the plaintiffs' properties, the plaintiffs were still required to show that the invasion physically damaged the property or interfered with their use and enjoyment of the property. *Chance*, 670 N.E.2d at 993; see also *Rini v. Dyer*, No. 07CA3180, 2008 WL 3824790, *5 (Ohio Ct.App. Aug.13, 2008) (unpublished) (" '[W]here property owners are relying on a theory of "indirect" trespass, there is no presumption of damages.' ") (quoting 88 Ohio Jur.3d *Trespass* § 19); *Ramirez v. Akzo Nobel Coatings, Inc.*, 153 Ohio App.3d 115, 791 N.E.2d 1031, 1034 n. 2 (2003).

Plaintiffs unpersuasively criticize *Lueke* for adding the "substantial" qualifier to the second element. In *Merino v. Salem Hunting Club*, No. 07 CO 16, 2008 WL 5124549 (Ohio Ct.App. Dec. 4, 2008), plaintiffs explain, the court held that "if the plaintiff proves the elements of trespass, he has a right to nominal damages without proof of actual damages." *Id.* at *7. *Merino* does not help plaintiffs because it is plainly distinguishable from *Lueke*: *Merino* involved a direct trespass claim based on stray bullets entering the plaintiff's property from a nearby shooting club; *Lueke* involved an indirect subsurface trespass claim based on contaminant seepage. Moreover, in support of the "substantial" qualifier, the *Lueke* court cited the indirect trespass cases of *Williams v. Oeder*, 103 Ohio App.3d 333, 659 N.E.2d 379, 383 (1995) ("The trial court did not err in instructing the jury that appellees were culpable in trespass for causing dust or dirt to fall on appellants' property only if the jury concluded that appellants had established 'substantial damages.' ") and *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 622 N.E.2d 1153, 1161–62 (1993) (acknowledging that the modern view of indirect trespass liability requires "substantial actual damage"

to the property). See *Lueke*, 2000 WL 1545077 at *7. Having identified the essential elements of an indirect trespass claim under Ohio law, we now examine whether plaintiffs' proofs create a genuine issue of material fact on both elements, starting with the first.

[5] Because this is not a class action, the district court correctly required plaintiffs to offer sufficient evidence showing the presence of subsurface contamination or soil vapors originating from the plume on each and every property involved in this case. See *Brown*, 622 N.E.2d at 1161 (noting that there cannot be a trespass unless some substance has entered the land itself). Plaintiffs claim this is reversible error because it essentially amounts to a requirement that they install a monitoring well on every property in Hooven. We do not agree that the district court required this exacting level of specificity. Instead, it required something more than the speculative proof offered that Chevron's soil vapors were vaguely present "in Hooven." Plaintiffs' best evidence of soil vapor intrusion-completed subsurface pathways for two hydrocarbons at two monitoring wells under the ODH's "worst case scenario" conditions—was simply insufficient to justify a trial for the sixty-one property damage plaintiffs in this case.

[6] This leads us to the question of whether the district court abused its discretion by excluding Dr. Bedient's opinion that the mere presence of benzene, toluene, xylene, and ethyl benzene in varying concentrations in the soils of Hooven could *524 only have originated from the plume. It did not. Dr. Bedient is not a soil vapor expert, and he did not complete any vapor pathway analyses. Likewise, Dr. Cheremisinoff did not undertake such an analysis. These evidentiary deficiencies mean that plaintiffs have failed to create a genuine issue of material fact regarding whether the plume and its soil vapors invaded their properties.

[7] Even assuming arguendo that they had, plaintiffs cannot genuinely dispute whether that invasion caused *substantial* physical damage or *substantial* interference with use and enjoyment. Regarding the latter, plaintiffs claim that the odor of gasoline on and near their properties has caused substantial use interference because plaintiffs have abandoned various home improvement plans and refused to enter their basements. The district court correctly rejected this argument because the alleged interference, based on a thorough review of plaintiffs' depositions, was either *de minimis* or irrational and, therefore, not compensable. See *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210, 932

N.E.2d 313, 319 (2010) (“Fear and emotional harm alone are insufficient for damages for annoyance and discomfort.”).

[8] As for “substantial physical damage,” it appears the district court interpreted this element to mean that plaintiffs must demonstrate that the soil vapors found on the properties were harmful to humans. Plaintiffs’ proofs on this matter are insufficient to create a genuine issue of material fact. Their experts, Mr. Hagemann and Dr. Cheremisinoff—neither of which are medical doctors or health experts—simply adopted ODH’s early position that the health risk from the plume was “indeterminate.” And notably, the ODH later concluded, after conducting its “worst case scenario” sampling, that the concentrations of vapor-phase petroleum hydrocarbons detected in the indoor air of area residences and at the Hooven Elementary School “did not pose a public health hazard to residents, students or staff.” Further, plaintiffs’ best evidence of a cancer risk—the EPA’s 2005 letters to certain property owners that sub-slab hydrocarbons posed an increased cancer risk of “8.0E–5” (that is eight additional cases of cancer above the background cancer incidence rate) for every 100,000 individuals living in the basement for 24 hours, 365 days per year, for 70 years—is insufficient to establish a substantial injury to the property because there is no evidence that any Hooven resident will live under such circumstances. Accordingly, we affirm the grant of summary judgment in favor of Chevron on the property damage claims.

C.

As for the final category of plaintiffs, the parties agree that in order to justify medical monitoring damages under Ohio law, plaintiffs must demonstrate that they have been exposed to the plume and its soil vapors and that this exposure has proximately resulted in a substantially “increased risk” of contracting a serious disease to the extent that a reasonable physician would order a medical monitoring program. The parties disagree, however, on whether plaintiffs’ evidence creates a genuine issue of material fact on that question. We conclude it does not.⁵

⁵ We apply the summary judgment standard of review to this category of claims because we construe the district court’s order of dismissal with prejudice as an order granting summary judgment to Chevron *sua sponte*. Although the district court did not expressly invoke Rule 56(f)

in its order to show cause why these claims should not be dismissed, it followed the notice procedures contemplated therein and considered the evidence of record in reaching its decision. Additionally, we note that the parties treat this order on appeal as if it were one granting summary judgment to Chevron.

*525 As this court explained in *Hirsch*, in accordance with *Day v. NLO*, 851 F.Supp. 869 (S.D. Ohio 1994) and *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 817 N.E.2d 59 (2004), “medical monitoring” is a remedy for being presently injured with an “increased risk of—and corresponding cost of screening for—certain diseases that ... are more likely to occur as a result of [a defendant’s tortious conduct].” *Hirsch*, 656 F.3d at 363. And because “not every increased risk of disease warrants increased medical scrutiny[,]” plaintiffs must offer “evidence that a reasonable physician would order medical monitoring for them.” *Id.*

[9] The claim for medical monitoring damages fails most acutely in this case because plaintiffs lack individualized exposure data. “[I]t is well-settled that the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff’s symptoms[,]” the symptom being, in this case, a substantially “increased risk” of contracting a number of serious diseases. *Pluck*, 640 F.3d at 679; see also *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1242 (11th Cir.2005) (stating that causation “requires not simply proof of exposure to the substance, but proof of enough exposure to cause the plaintiff’s specific illness”). Plaintiffs’ medical expert, Dr. Lockey, admitted that he did not determine what exposure level to what chemical caused an increased risk of what disease in each plaintiff. Without reliable, individualized proof that each of the 118 plaintiffs were exposed to contaminants sufficient to cause an increased risk of a specified disease, there is no evidence that a reasonable physician would order medical monitoring because that doctor would have no idea which disease he would be screening for or treating. *Hirsch*, 656 F.3d at 363; see also *Ball v. Union Carbide Corp.*, 385 F.3d 713, 728 (6th Cir.2004) (“[Medical monitoring damages are] necessarily proportional to [a plaintiff’s] exposure to toxic emissions or waste.”).

Furthermore, Dr. Lockey drafted his plan “without regard to conditions potentially related to environmental contaminant exposure.” (Emphasis added.) Such a plan undeniably fails to satisfy the legal standard that plaintiffs must meet to prove they are entitled to medical monitoring, which is that

“monitoring must be directed toward the disease for which the tort victim is at risk, and will only include procedures which are medically prudent in light of that risk as opposed to measures aimed at general health.” *Day*, 851 F.Supp. at 881.

In sum, plaintiffs have not identified a specific chemical from the plume that can cause a serious latent disease; they prepared no estimate of each plaintiff's exposure to that specific chemical; and they have no idea whether they face an increased health risk from the alleged exposure. The district court rightfully observed that these evidentiary deficiencies mean that the claims for medical monitoring damages fail as a matter of law.

Plaintiffs cannot escape this conclusion by offering the ODH's cancer study incidence report as a substitute for individualized exposure data. See *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 266 (3rd Cir.2011) (“Averages or community-wide estimations would not be probative of any individual's [medical monitoring] claim because any one class member may have an exposure level well above or below the average.”). Although this report, an ecological cancer study, found “significantly *526 higher than expected number of cancer cases,” it ultimately concluded that “it is not likely a specific point source of exposure or single risk factor is playing a role in the increased cancer burden.” Most importantly, it did not find that the plume or its soil vapors were the reasons for the increased cancer rate in Hooven: “Information regarding the history of chemical and environmental exposures ... is not available to determine possible causes of each case of cancer.” Even plaintiffs acknowledge the equivocal nature of the report: “Although courts do view ecological studies as useful for establishing associations, they are relatively weak for establishing a conclusive or definitive causal relationship between exposure and the disease in question.”

Finally, we agree with the district court that *Hirsch* compels dismissal. In *Hirsch*, this court determined that the plaintiffs were not entitled to medical monitoring damages because they were unable to meet their burden of establishing an increased risk of disease. *Hirsch*, 656 F.3d at 363–64. *Hirsch* involved a derailment of a train carrying hazardous materials, leading to a serious fire and the spread of hazardous dioxins into the plaintiffs' neighborhood. *Id.* at 361. The *Hirsch* plaintiffs presented only speculative individualized exposure data—they sampled dioxin levels at homes in the area and used modeling to predict who in the community had been exposed to dioxins at concentrations above the U.S. EPA action level.

Id. Plaintiffs here have no individualized exposure data. The *Hirsch* plaintiffs established only a legally insignificant increased risk, a one-in-one-million increased risk of cancer. *Id.* at 364. Plaintiffs here have no evidence of a legally significant increased risk. The *Hirsch* plaintiffs failed to establish that a reasonable physician would order medical monitoring for such a *de minimis* risk of future harm. *Id.* Plaintiffs here have produced a physician who crafted a medical monitoring plan “without regard” to individualized exposure data. Thus, the district court correctly recognized that plaintiffs' proofs in this case compare less favorably to those of the plaintiffs in *Hirsch*. Accordingly, we affirm the dismissal of the claims for medical monitoring damages.

IV.

In the sanctions appeal, plaintiffs' counsel and Chevron dispute whether the district court abused its discretion in imposing Rule 11 sanctions. “We review a district court's decision to impose sanctions under Rule 11 for abuse of discretion[.]” *DiPonio Const. Co., Inc. v. Int'l Union of Bricklayers & Allied Craftworkers, Local 9*, 687 F.3d 744, 752 (6th Cir.2012), and apply this deferential standard of review to “all aspects of a district court's Rule 11 determination.” *Runfol & Assoc., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 372 (6th Cir.1996) (per curiam) (citation and internal quotation marks omitted).

Rule 11 permits sanctions if “a reasonable inquiry discloses the pleading, motion, or paper is (1) not well grounded in fact, (2) not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or (3) interposed for any improper purpose such as harassment or delay.” *Merritt v. Int'l Ass'n of Machinists and Aerospace Workers*, 613 F.3d 609, 626 (6th Cir.2010) (citation and internal quotation marks omitted). “Rule 11 sanctions are warranted if the attorney's conduct was unreasonable under the circumstances.” *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 833 (6th Cir.2005). Additionally, “it is important to review the grant of sanctions in *527 the context of the litigation history of th[e] action.” *Merritt*, 613 F.3d at 627.

[10] Plaintiffs' counsel argue that they did nothing more than zealously advocate for the medical monitoring plaintiffs. Counsel also argues that the district court sanctioned them with the benefit of hindsight and punished them for preserving their clients' appellate rights, rather than

voluntarily dismissing their claims. Chevron responds that counsel unreasonably interpreted the elements of the medical monitoring remedy, misrepresented their exposure evidence, and submitted a flawed medical monitoring plan.

The parties' positions reflect a fundamental disagreement over the quantity and quality of exposure evidence needed to justify medical monitoring damages under Ohio law. This disagreement has infected the entire case and how it was litigated. Under the circumstances of this case, however, we conclude that the district court did not abuse its discretion in holding that plaintiffs' attorneys were objectively unreasonable in maintaining that (1) they need not show individualized exposure data to obtain medical monitoring, and (2) plaintiffs need only show a *potential* "increased risk" of contracting a serious disease, as opposed to a *present* "increased risk," in order to be entitled to medical monitoring.

Even in this appeal, plaintiffs' attorneys continue to assert that "to justify medical monitoring, all the Plaintiffs needed to do in this case was prove the elements of one of the underlying torts pled in their complaint (negligence, nuisance, trespass and fraud)—nothing more and nothing less." This statement of the law is patently unreasonable. Claims for medical monitoring damages must be supported with individualized exposure data that justifies the cost of a defendant funding such a program. *Hirsch*, 656 F.3d at 363; see also *In re Welding Fume Prods. Liability Litig.*, 245 F.R.D. 279, 292 (N.D. Ohio 2007) (medical monitoring plaintiffs must offer proof that an exposure to a defendant's toxic substance caused an increased risk of serious disease); *Day*, 851 F.Supp. at 881 (plaintiffs must show by "expert medical testimony that they have increased risk of disease which would warrant a reasonable physician to order monitoring"). Counsels' position that medical monitoring is reasonable and appropriate *without* individualized exposure data has absolutely no support in the case law. And we do not consider their insistence otherwise a "good faith" argument to reverse, extend, or modify existing case law.

Counsels' position that Chevron should provide medical monitoring to plaintiffs, who only have a *potential* of suffering an "increased risk" of disease, but no *present* "increased risk," is likewise objectively unreasonable. Quite obviously, they are advancing claims that are not ripe in an attempt to collect damages for nonexistent harm. *Hirsch* suggests that a medical monitoring remedy potentially exists for plaintiffs who are presently injured with an "increased risk," not for those who might suffer the potential injury of an

"increased risk." See *Hirsch*, 656 F.3d at 363. Contrary to their repeated assertions otherwise, counsel cannot seek medical monitoring damages for clients who have yet to suffer an "increased risk" of contracting a serious disease. The district court did not abuse its discretion by sanctioning counsel for continually perpetuating such an "irrational" view of medical monitoring law, especially after counsel frankly admitted to the district court they had no causation proofs under the district court's standards.

Moreover, we do not agree with counsel that the district court imposed sanctions with the "benefit of hindsight." While the *528 court awarded sanctions only after reviewing Dr. Lockey's plan and this court issued *Hirsch*, it obtained no "benefit of hindsight" from that review because counsel conceded at a discovery conference—more than a year earlier—that they could not prove their medical monitoring claims by the causation standards required by the district court, which *Hirsch* did not alter. Thus, the court did not sanction counsel for litigating claims that were ultimately found to be without merit; rather, it sanctioned them for continuing to litigate claims that were admittedly meritless.

Finally, we are not persuaded that the district court punished counsel with sanctions because their clients wanted to preserve their appeal rights, rather than voluntarily dismiss their claims. After counsel admitted they had no causation proofs, the court suggested a *Raceway* dismissal⁶ so that counsel could challenge the court's legal rulings on appeal; the parties agreed. Later, however, counsel reneged because they wanted to dismiss the claims for medical monitoring *and* the non-bellwether property damage claims, whereas Chevron wanted to adhere to the compromise struck on the record and dismiss *only* the medical monitoring claims. In light of counsels' admission regarding their lack of evidence, Chevron subsequently sent counsel a *Rule 11* safe-harbor letter advising counsel to voluntarily dismiss or face the possibility of paying defense costs for the medical monitoring claims going forward. Counsel refused to dismiss, believing that they were ethically obligated to preserve the medical monitoring plaintiffs' appellate rights. Counsel was mistaken.

⁶ In *Raceway Properties v. Emprise Corporation*, the district court entered an interlocutory order in a private antitrust case that made it impossible for the plaintiffs to prevail. 613 F.2d 656 (6th Cir.1980) (per curiam). The plaintiffs requested, and the district court entered, a formal order of dismissal with prejudice that would permit a challenge of the

order on appeal. This court subsequently affirmed that it had appellate jurisdiction over the matter because the plaintiffs' "solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint." *Id.* at 657; see also *Libbey–Owens–Ford Co. v. Blue Cross and Blue Shield Mut. of Ohio*, 982 F.2d 1031, 1034 (6th Cir.1993) (describing the *Raceway* dismissal).

[Rule 11](#) sanctions are appropriate when an attorney refuses to dismiss a claim after becoming aware that it lacks merit. See *Merritt*, 613 F.3d at 627 ("Rule 11 imposes a continual obligation on attorneys to refrain from pursuing meritless or frivolous claims at any stage of the proceedings....") (citation and internal quotation marks omitted); *Runfola*, 88 F.3d at 373 (affirming [Rule 11](#) sanctions against counsel who failed to dismiss the action after becoming aware of their inability to assert any evidence in support of their claims). Given the history of this case, the district court did not commit a

clear error of judgment by sanctioning counsel for continuing to litigate meritless claims. Further, counsel's false dilemma argument—either dismiss and lose appeal rights or litigate and pay costs—is unpersuasive. The district court offered counsel a *Raceway* dismissal that would have allowed counsel to promptly challenge the district court's rulings in this court. Despite this offer, counsel refused to dismiss only the claims of the medical monitoring plaintiffs and continued litigating under the specter of [Rule 11](#) at their own peril.

V.

For these reasons, we affirm the judgment of the district court.

All Citations

533 Fed.Appx. 509

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 5

2019 WL 8683361

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Jimmy BANH et al.

v.

AMERICAN HONDA MOTOR COMPANY, INC.

Case No. 2:19-cv-05984-RGK-AS

Filed 12/17/2019

Attorneys and Law Firms

Christopher Pitoun, Hagens Berman Sobol Shapiro LLP, Pasadena, CA, Jeffrey S. Goldenberg, Pro Hac Vice, Todd B. Naylor, Pro Hac Vice, Cincinnati, OH, John C. Weisensell, Pro Hac Vice, Niekamp Weisensell Mutersbaugh and Mastrantonio LLP, Akron, OH, Sean R. Matt, Pro Hac Vice, Steve W. Berman, Pro Hac Vice, Catherine Y. N. Gannon, Pro Hac Vice, Hagens Berman Sobol Shapiro LLP, Seattle, WA, for Jimmy Banh et al.

Andrew J. Chinsky, Pro Hac Vice, King and Spalding LLP, Chicago, IL, John Christopher Mitchell, King and Spalding LLP, San Francisco, CA, Livia M. Kiser, Michael Brian Shortnacy, King and Spalding LLP, Los Angeles, CA, for American Honda Motor Company, Inc.

Proceedings: (IN CHAMBERS)
Order Re: Motion to Dismiss (DE 53)

The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

*1 On July 11, 2019, Plaintiffs filed this putative class action against Defendant American Honda Motor Co., Inc. ("Honda" or "Defendant"). On September 27, 2019, Plaintiffs filed a First Amended Complaint ("FAC"). The named Plaintiffs are individuals who purchased or leased a 2019 or 2020 Acura RDX vehicle (the "Vehicle" or "Vehicles") manufactured by Honda. These Plaintiffs span sixteen different states: Arizona, California, Florida, Georgia, Illinois, Massachusetts, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Virginia.

Plaintiffs seek to represent a class of all individuals and entities nationwide who purchased or leased the Vehicle (the "Proposed Nationwide Class"). Plaintiffs also seek certification of sixteen state-specific classes (the "Proposed State-Specific Classes"). Plaintiffs bring the following claims on behalf of the Proposed Nationwide Class: (1) breach of express warranty, Magnuson-Moss Warranty Act ("MMWA") (15 U.S.C. §§ 2301, *et seq.*); (2) breach of implied warranty, MMWA (15 U.S.C. §§ 2301, *et seq.*); (3) violations of the California Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code §§ 1750, *et seq.*); (4) violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*); (5) fraud by concealment; and (6) breach of implied warranty of merchantability (Cal. Com. Code § 2314). Plaintiffs also bring numerous state-law consumer protection and breach of warranty claims on behalf of the Proposed State-Specific Classes.

Presently before the Court is Defendant's Motion to Dismiss Plaintiffs' FAC for lack of subject matter jurisdiction and for failure to state a claim. For the following reasons, the Court **GRANTS in part** Defendant's Motion.

II. FACTUAL BACKGROUND

The FAC generally alleges the following:

Honda is a California corporation headquartered in Torrance, California. Honda is "responsible for the manufacture, development, distribution, marketing, sales, and servicing of Acura brand automobiles." (FAC ¶ 244, ECF No. 48.)¹ The named Plaintiffs are individuals who purchased or leased the Vehicle.

¹ Defendant contends that it does not design or manufacture the Vehicles.

A. The Infotainment System Defect

Plaintiffs allege that "the Vehicles contain a defect that causes many of the Vehicles' features associated with the infotainment system (e.g., the navigation system, audio system, backup camera, Bluetooth, Apple CarPlay) to malfunction." (*Id.* ¶ 5.) This defect poses a safety risk because when the infotainment system malfunctions, the driver becomes distracted. (*Id.* ¶ 6.) The defect can also cause safety-related systems such as the backup camera to fail. (*Id.* ¶ 5.)

Defendant has known (or should have known) about the issues with the infotainment system based on (1) pre-release design, manufacturing, and testing data; (2) warranty claims data; (3) consumer complaints made directly to Defendant, collected by the National Highway Transportation Safety Administration (“NHTSA”), and/or posted on public online forums; (4) testing done in response to those complaints; (5) aggregate data and complaints from authorized dealers; and (6) other sources. (*Id.* ¶ 7.) But “Defendant failed to disclose and actively concealed the Vehicles’ infotainment system defect from the public, and continues to manufacture, distribute, and sell the Vehicles without disclosing the defect.” (*Id.*)

*2 Honda administers a New Vehicle Limited Warranty (“NVLW”) for the Vehicles. Under the NVLW, “Honda is required to repair or replace any part that is defective in material or workmanship under normal use.” (*Id.* ¶ 8.) (internal quotation marks omitted). The infotainment systems are defective in material or workmanship under normal use. However, Honda has not repaired or replaced the infotainment system. “Instead, Honda tells Vehicle owners to wait for a forthcoming ‘software update’ to fix the infotainment problems, or alternatively simply replaces defective parts with equally defective parts, thereby leaving consumers caught in a cycle of use, malfunction, and replacement. In fact, Honda’s authorized dealerships are routinely discouraging Vehicle owners from bringing their Vehicles to the dealership because there is nothing the dealership can do to repair the defect.” (*Id.* ¶ 9.)

B. The Android Auto Feature

“[T]he Vehicles were originally scheduled to launch with both Android Auto and Apple CarPlay connectivity as standard features.” (*Id.* ¶ 10.) Indeed, before the Vehicles launched, Honda distributed promotional materials to dealers touting the Vehicles’ Android Auto compatibility. (*Id.*) Dealers, in turn, shared this information with consumers. (*Id.*) But when the Vehicles went on sale in 2018, they came equipped with only Apple CarPlay. (*Id.*) “Defendant both directly and indirectly through its authorized dealers promised, and continues to promise, prospective buyers that Android Auto would be made available to all Vehicle owners through a software update ‘soon’.” (*Id.*) However, this feature has still not been implemented. (*Id.*)

III. JUDICIAL STANDARD

To survive a motion under Rule 12(b)(6), a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible if the plaintiff alleges enough facts to permit a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* A plaintiff need not provide “detailed factual allegations” but must provide more than mere legal conclusions. *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

When ruling on a Rule 12(b)(6) motion, the Court must “accept all factual allegations in the complaint as true.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Court must also “construe the pleadings in the light most favorable to the nonmoving party.” *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). The Court, however, is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555.

IV. DISCUSSION

Defendant argues that: (1) Plaintiffs’ MMWA claims should be dismissed under Rule 12(b)(1); (2) the non-California Plaintiffs’ cannot pursue California law claims; (3) Plaintiffs’ state-law consumer protection act and fraudulent concealment claims should be dismissed under Rules 9(b) and 12(b)(6); (4) Plaintiffs’ state-law breach of warranty claims should be dismissed under Rule 12(b)(6); and (5) the Florida unjust enrichment claim should be dismissed under Rule 12(b)(6). The Court addresses each argument in turn.

A. Magnuson-Moss Warranty Act Claims

To bring a class action under the MMWA, the complaint must list at least one hundred named plaintiffs. 15 U.S.C. § 2310(d) (3). Defendant argues that because the Complaint here lists less than one hundred named Plaintiffs, the Court lacks subject matter jurisdiction over Plaintiffs’ MMWA claims. Plaintiffs, on the other hand, assert that the Court has subject matter jurisdiction over Plaintiffs’ MMWA claim pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d) (2).

*3 Many courts have held that a plaintiff need not meet the MMWA’s class-action pleading requirements if they can establish subject matter jurisdiction under CAFA. *See, e.g.*,

Kuns v. Ford Motor Co., 543 F. App'x 572, 574 (6th Cir. 2013); *Keegan v. Am. Honda Motor Corp.*, 838 F. Supp. 2d 929, 954–55 (C.D. Cal. 2012). “Because the MMWA predates CAFA, these courts found that ‘CAFA effectively supercedes the MMWA’s more stringent jurisdictional requirements.’ ” *Conti v. American Honda Motor Co., Inc.*, — WL —, No. 2:19-cv-02160-CJC-GJS, at *7 (C.D. Cal. Oct. 17, 2019) (quoting *Kuns*, 543 F. App'x at 574). “The Ninth Circuit[, however,] has not squarely addressed this question.” *Id.* As explained in *Conti*,

In *Birdsong v. Apple, Inc.*, a MMWA class action where the pleading requirements may not have been met, the court explained in a footnote, “[t]he parties do not dispute that the district court had subject matter jurisdiction over the class action. We agree.” 590 F.3d 955, 957 n.1 (9th Cir. 2009). After *Birdsong*, courts in the Ninth Circuit—including this Court—generally followed suit. *See, e.g., Keegan*, 838 F. Supp. 2d at 954–55. However, in at least three recent decisions, this Court changed course and found that “MMWA’s requirement to name one hundred plaintiffs must be met independently of CAFA’s jurisdictional standard.” *Floyd v. Am. Honda Motor Co.*, 2018 WL 6118582, at *3 (C.D. Cal. June 13, 2018) (Wilson, J.); *MacDougall v. Am. Honda Motor Co.*, 2017 WL 8236359, at *4 (C.D. Cal. Dec. 4, 2017) (Guilford, J.); *Cadena v. Am. Honda Motor Co.*, 2019 WL 3059931, at *11 (C.D. Cal. May 29, 2019) (Fitzgerald, J.). A[s] one decision explains, “CAFA—a basis for federal courts to exercise jurisdiction over state law disputes between diverse parties—doesn’t fill in the gaps for missing substantive requirements of a federal law.” *MacDougall*, 2017 WL 8236359, at *4. The Court agrees and finds that Plaintiffs must satisfy MMWA’s class-action pleading requirements.

The Court agrees with the rationale set forth in *Conti*, *Floyd*, *MacDougall*, and *Cadena* and finds that Plaintiffs must satisfy the MMWA’s pleading requirements. Accordingly, because Plaintiffs fail to do so, the Court dismisses Plaintiffs’ MMWA claims.

B. Extraterritoriality and Choice of Law Rules

Defendant next argues that the non-California Plaintiffs are barred from bringing California state-law claims on behalf of themselves and the Proposed Nationwide Class because they purchased their vehicles outside of California.

Defendant is correct that “[t]he default presumption is that the California legislature did not intend for its statutes to

have force or operation beyond the state’s boundaries.” *TRC & Assocs. v. NuScience Corp.*, No. 2:13-CV-6903-ODW CWX, 2013 WL 6073004, at *5 (C.D. Cal. Nov. 18, 2013). “Nevertheless, state statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California.” *Id.* (internal quotation marks omitted). To determine whether sufficient wrongful conduct occurred in California, the court considers (1) where the defendant does business, (2) whether the defendant’s principal offices are located in California, (3) where class members are located, and (4) the location from which advertising and other promotional literature decisions were made. *Gerstle v. Am. Honda Motor Co., Inc.*, No. 16-CV-04384-JST, 2017 WL 2797810, at *3 (N.D. Cal. June 28, 2017) (quoting *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 917 (C.D. Cal. 2011)).

*4 Here, Plaintiffs allege that (1) Honda does business in California; (2) Honda’s headquarters are located in California; (3) one of the named Plaintiffs (Banh) purchased his vehicle in California; and (4) “[t]he decisions regarding the marketing and sale of the infotainment system, and decisions regarding the disclosure or non-disclosure of the defect were in whole or substantial part made by Defendant in California and were purposefully emanated by Defendant in California.” (FAC ¶ 244.) Based on these allegations, the Court finds that Plaintiffs have alleged that sufficient wrongful conduct occurred in California such that the presumption against extraterritoriality does not apply. *See Gerstle*, 2017 WL 2797810, at *4.

Defendant also argues that California’s choice-of-law rules preclude the non-California Plaintiffs from invoking California law, and asks the Court to apply the conflict-of-law test set forth in *Mazza v. American Honda Motor Co.*, 666 F.3d 581, 590 (9th Cir. 2012). But “[a] detailed choice-of-law analysis is a fact-heavy analysis and is generally inappropriate on a motion to dismiss where the parties have not yet developed a factual record.” *Gerstle*, 2017 WL 2797810, at *4 (citing *Clancy v. The Bromley Tea Co.*, 308 F.R.D. 564, 572 (N.D. Cal. 2013)). Here, as in *Gerstle*, “the Court has no factual record to use in deciding which state has a greater interest in applying its laws. While *Mazza* will...be relevant to the decision whether to certify any proposed class or sub-class, at this early stage of the litigation, ‘it would be premature to speculate about whether the difference in various states’ consumer protection laws are material in this case.’ ” *Id.* (quoting *Clancy*, 308 F.R.D. at 572). Accordingly, the Court declines to dismiss the non-California Plaintiffs’

California law claims on choice-of-law grounds at this early stage. *See id.*

C. Fraud Claims

Plaintiffs bring fraud claims under sixteen different states' consumer protection statutes, on two different theories (fraudulent misrepresentation and fraudulent omission). Plaintiffs also bring fraudulent concealment claims under California, New York, and Florida law. Because each of these claims is "grounded in fraud," the heightened pleading requirement of Rule 9(b) apply. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (holding that the complaint as a whole must satisfy 9(b) where each claim is "grounded in fraud"). Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*.

1. *Whether Plaintiffs Sufficiently Allege a Fraudulent Misrepresentation Claim*

Defendant contends that Plaintiffs have failed to sufficiently allege a fraudulent misrepresentation claims because Plaintiffs have not identified any affirmative misrepresentations made by Honda. Plaintiffs concede that their fraud claims are "primarily omissions-based." (Opp. at 6, ECF No. 55.) However, Plaintiffs argue that ten Plaintiffs² allege actionable misrepresentations regarding the Vehicle's compatibility with Android Auto.

- ² Bilbrey (Arizona), Banh (California), Samaha, (Illinois), Chisari (New Jersey), Lawrence (North Carolina), Kleehtamer (Ohio), Denaro (Pennsylvania), Pryor (Tennessee), Subbarao (Texas), and Faden (Virginia).

a. *Whether Plaintiffs Allege an Actionable Misrepresentation*

The misrepresentations pointed to by Plaintiffs consist primarily of statements to the effect that Android Auto would be released "soon." One plaintiff, for instance, alleges that while at the dealership, a salesman told her that Android Auto would be available "soon" via a new software update. (Chisari ¶ 95.) Another alleges that while visiting Acura.com, he read

that Android Auto was "coming soon" to the 2019 RDX. (Banh ¶ 25.)

*5 "The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." *Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1469 (2014) (citations omitted); *Hinesly v. Oakshade Town Center*, 135 Cal. App. 4th 289, 295 (2005) ("[T]he general rules [are] that an action for fraud must be based on a statement of fact, not opinion, and that statements as to the future actions by some third party are deemed nonactionable opinions.").

Here, the misrepresentations at issue amount only to predictions regarding future actions by third parties. Accordingly, as to Plaintiff Banh (California) and Plaintiff Chisari (New Jersey), the Court agrees that the allegations of the FAC are insufficient to support a fraud claim on a fraudulent misrepresentation theory. *See Fram v. Memory Enterprises, LLC*, No. CV 177172 MWFJPRX, 2018 WL 6016967, at *4 (C.D. Cal. June 13, 2018).³

- ³ Plaintiff Chisari also alleges that she reviewed information on Honda's website regarding Android Auto. But, as noted by Defendant, under New Jersey law a plaintiff "cannot simply reference a statement on a website without providing the date when the statement was made or at what point (if ever) Plaintiff was exposed to that statement." *Glass v. BMW of N. Am., LLC*, No. 10-5259 (ES), 2011 WL 6887721, *8 (D.N.J. 2011). Plaintiff Chisari has therefore not alleged an actionable misrepresentation by Honda.

Accordingly, the California and New Jersey state-law fraudulent misrepresentation claims are dismissed with leave to amend.⁴

- ⁴ Defendant does not cite authority from other jurisdictions on this issue. Accordingly, the Court does not consider whether the alleged misrepresentations are sufficient under other state laws.

b. *Whether Misrepresentations Made by Dealers Can Be Imputed to Honda*

All ten Plaintiffs noted above allege that Honda dealers made misrepresentations regarding Android Auto. Defendant argues that these dealer statements cannot be imputed to Honda because dealers are not agents of Honda.

“Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 64 (9th Cir. 1973) (quoting another source). The scope of an agency relationship is a factual issue for the jury to resolve. *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 956 (N.D. Cal. 2014).

Here, the parties appear to agree that a dealer is not an agent of an automobile manufacturer merely by virtue of being a dealer. Indeed, at the pleading stage, a plaintiff seeking to establish agency must generally “allege *some* factual predicate (even though generalized rather than evidentiary in nature) to create the inference of agency.” *Azimi v. Ford Motor Co.*, 977 F. Supp. 847, 851 (N.D. Ill. 1996) (emphasis added and internal quotation marks omitted). For example, in *Bryde*, a California district court held that an agency relationship had been plausibly alleged where Plaintiffs asserted that (1) they bought their vehicles to GM’s dealers when they had problems with their airbag lights and sensors, (2) they contacted GM and its agents for repairs concerning the alleged airbag defect, and (3) GM issued technical service bulletins to its dealers, instructing how to deal with airbag light and sensor issues. *Bryde v. Gen. Motors, LLC*, No. 16-CV-02421-WHO, 2016 WL 6804584, at *16 (N.D. Cal. Nov. 17, 2016). Similarly, in *Baranco*, another California district court held that agency had been sufficiently alleged where (1) Ford issued a technical service bulletin instructing dealers how to repair the alleged defect, (2) Ford’s warranty directed vehicle owners to present their vehicles to dealers for repairs, and (3) Ford required dealers to submit detailed data regarding repairs. *Baranco v. Ford Motor Co.*, 294 F. Supp. 3d 950, 975 (N.D. Cal. 2018).

*6 In their Opposition, Plaintiffs aver that the FAC pleads “sufficient facts to infer an agency relationship: they allege...that Honda has instructed its dealerships how to respond to complaints about the defect (and to perform specific tasks on customers’ units) (¶¶ 9, 51), and has released software updates through its dealers (¶¶ 9, 80).” (Opp. at 16.) But a review of the cited paragraphs of the FAC does not support this conclusion. (See FAC ¶¶ 9, 51, 80.) Paragraph 9 of the FAC, for example, merely alleges that “Honda tells

Vehicle owners to wait for a forthcoming ‘software update’ to fix the infotainment problems” and that “Honda’s authorized dealerships are routinely discouraging Vehicle owners from bringing their Vehicles to the dealership because there is nothing the dealership can do to repair the defect.” (*Id.* ¶ 9.) It does *not* allege that it is at the direction of Honda that dealerships discourage Vehicle owners from bringing their cars in.

The allegations of the FAC do not support a plausible inference that Honda dealers are Honda’s agents. Unlike *Bryde* and *Baranco*, where plaintiffs alleged that the manufacturer sent dealers instructions on how to repair the alleged defect, here the FAC contains no such allegations. Therefore, Plaintiffs Bilbrey (Arizona), Kleehtamer (Ohio), and Subbarao (Texas)’s fraudulent misrepresentation claims are dismissed without prejudice, as these Plaintiffs allege only that *dealers* made misrepresentations to them regarding Android Auto.

The remaining Plaintiffs—Samaha (Illinois), Lawrence (North Carolina), Denaro (Pennsylvania), Pryor (Tennessee), and Faden (Virginia)—each allege at least one direct line of communication with Honda: they reviewed information on Honda’s website, (Samaha ¶ 56; Pryor ¶ 186); reviewed information on Honda’s Twitter account, (Lawrence ¶ 139; Faden ¶ 212); or directly contacted Honda, (Denaro ¶ 175), before purchasing their Vehicles. Accordingly, these claims survive the Motion to Dismiss.

In sum, all of Plaintiffs’ fraud claims—to the extent they are brought on an affirmative misrepresentation theory—are dismissed with leave to amend except for those of: Samaha (Illinois), Lawrence (North Carolina), Denaro (Pennsylvania), Pryor (Tennessee), and Faden (Virginia).

2. Whether Plaintiffs Allege Fraudulent Omissions

Plaintiffs’ fraud claims are also brought on an omission-based theory. To state a claim for a fraudulent omission, the plaintiff must generally allege that: (1) the defendant concealed or suppressed a material fact, (2) the defendant was under a duty to disclose that fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained

damage. *SCC Acquisitions Inc. v. Cent. Pac. Bank*, 207 Cal. App. 4th 859, 864 (2012).

a. Knowledge of the Defect

Defendant first argues that Plaintiffs' fraudulent omission claims should be dismissed because the FAC does not sufficiently allege Defendant's pre-sale knowledge of the defect.

Under Rule 9(b), "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "The Ninth Circuit's decision in *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136 (9th Cir. 2012), explains the degree of specificity to which a plaintiff must allege regarding a defendant's actual knowledge of a product defect in fraud claims." *Barrera v. Samsung Elecs. Am., Inc.*, No. SACV1800481CJCPJWX, 2019 WL 1950295, at *4 (C.D. Cal. Feb. 27, 2019). Under *Wilson*, a plaintiff must allege "how the defendant obtained knowledge of a specific defect prior to the plaintiff's purchase[.]" *Id.* Conclusory statements are not enough. *Id.* However, "the 'amassed weight' of consumer complaints may be sufficient along with other indications that the defendant had knowledge of the defect." *Id.*

*7 The Court finds that Plaintiffs have adequately alleged that Honda had pre-sale knowledge of the alleged defect with the Vehicle's infotainment system. The FAC alleges that Honda learned about the defect through (1) pre-release design, manufacturing, and testing data; (2) warranty claims data; (3) consumer complaints made directly to Defendant, collected by the NHTSA, and/or posted on public online forums; (4) testing done in response to those complaints; (5) aggregate data and complaints from authorized dealers; (6) and other sources. (FAC ¶ 7.) Plaintiffs also allege that in March 2019, Acura's public relations manager publicly acknowledged that "radio and GPS woes are both known issues with the RDX." (*Id.* ¶ 282.) These allegations, taken together, lead to a plausible inference that Honda had knowledge of the defect before Plaintiffs purchased then Vehicles. See *Conti* at * 10–11. The Court therefore declines to dismiss Plaintiffs' fraudulent omission claims on this basis.

b. Specificity and Causation

Defendant next argues that Plaintiffs fail to allege sufficient details regarding Defendant's alleged omissions.

Generally, "[a]llegations of fraud must meet the heightened pleading standards of Rule 9(b), which requires 'specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" *Baggett v. Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1267 (C.D. Cal. 2007) (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007)). However, when "a plaintiff is alleging a failure to act instead of an affirmative act," it is often the case that "the plaintiff cannot point out the specific moment when the defendant failed to act." *Id.* A plaintiff proceeding on such a theory may therefore succeed without providing "the same level of specificity required by a normal fraud claim." *Falk v. General Motors Corporation*, 496 F. Supp. 2d 1088, 1098–99 (N.D. Cal. 2007).

At the outset, Plaintiffs challenge Defendant's reliance on *Eisen v. Porsche Cars N. Am., Inc.*, 2012 WL 841019, at *3 (C.D. Cal. Feb. 22, 2012) and its holding that a plaintiff must "describe the content of the omission and where the omitted information should or could have been revealed as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information." (Mot. at 17, ECF No. 53) (quoting *Eisen*, 2012 WL 841019, at *3.) Plaintiffs correctly observe that "when presented with omission-based fraud claims like those alleged here, '[v]irtually every court' has rejected *Eisen* and the case from which the above quoted requirements derive...in favor of a more practical 'who, what, when, where' test." (Opp. at 9) (citations omitted).

Here, all but three Plaintiffs⁵ allege that they reviewed information on Acura's website or Honda promotional materials before purchasing the Vehicle. These allegations—although not a model of specificity—provide sufficient detail about how and where the alleged omissions occurred to survive the Motion to Dismiss. Plaintiffs have also properly alleged causation and reliance by asserting that had the omitted information been disclosed, they would have behaved differently. See *Conti* at *13.

⁵ Ortiz (Nevada), Bartholomew (North Carolina), and Kleehtamer (Ohio).

As for Plaintiffs Ortiz, Bartholomew, and Kleeamer, the Court finds that the allegations are insufficient to support a fraudulent omission claim. Each of these claims relies exclusively on the alleged actions and inactions of dealers. *See Conti* at *11. As set forth above, Plaintiff has not alleged facts which would plausibly support an agency relationship. Accordingly, the Court dismisses Ortiz (Nevada), Bartholomew (North Carolina), and Kleeamer (Ohio)'s fraudulent omission claims with leave to amend.

In sum, Plaintiffs' Ortiz (Nevada), Bartholomew (North Carolina), and Kleeamer (Ohio)'s fraudulent omission claims are dismissed with leave to amend. All of Plaintiffs' remaining omissions-based fraud claims survive the Motion to Dismiss.

3. Plaintiffs' Concealment Claims

*8 Plaintiffs bring concealment claims under California, New York, and Florida law. The elements of a concealment claim are essentially the same as the elements of a fraudulent omission claim. *Mui Ho v. Toyota Motor Corp.*, 931 F. Supp. 2d 987, 998 (N.D. Cal. 2013).

Defendant argues that in the absence of allegations establishing that Honda was aware of the alleged defect at the time Plaintiffs purchased their Vehicles, Honda could not have affirmatively concealed or suppressed any facts regarding the defect. Defendant also argues that the FAC fails to allege facts showing an affirmative act by Honda to suppress or obscure information in the public domain. The Court disagrees. Plaintiffs have sufficiently alleged that Honda was aware of the alleged defect at the time of purchase, (*see, e.g.*, FAC ¶¶ 7, 28) and that Honda suppressed information about those defects by, for instance, replacing components in the Vehicles with parts that were equally as defective (*see, e.g., id.* ¶¶ 297–98.). *See Falk*, 496 F. Supp. 2d at 1097. Accordingly, the Court declines to dismiss Plaintiffs' concealment claims on this basis.

Defendant also asserts that Florida Plaintiff Goldman's concealment claim is barred by the products liability economic loss rule, which prohibits "a party from suing in tort for purely economic losses to a product or object provided to another for consideration[.]" *Koski v. Carrier Corp.*, 347 F. Supp. 3d 1185, 1197 (S.D. Fla. 2017). Plaintiffs do not provide any response to this argument in their Opposition.

In *Tiara*, the Florida Supreme Court explained that "[t]he products liability economic loss rule developed to protect manufacturers from liability for economic damages caused by a defective product beyond those damages provided by warranty law." *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 403 (Fla. 2013). Relying on *Tiara*, several Florida district courts have "held that the economic loss rule bars claims for negligent misrepresentation and fraudulent concealment in products liability cases." *Koski*, 347 F. Supp. 3d at 1197. Indeed, as one court put it, "[t]o hold otherwise would allow the economic loss rule to be manipulated such that any time a purchaser received a defective product that did not cause any injuries or damage to other property, such a purchaser could assert claims for negligent and fraudulent concealment regarding the defect to avoid the economic loss rule." *Burns v. Winnebago Indus., Inc.*, No. 8:13-CV-1427-T-24, 2013 WL 4437246, at *4 (M.D. Fla. Aug. 16, 2013)

Here, the allegations supporting Florida Plaintiff's fraudulent concealment claim are substantially the same as those supporting all of his claims. *See Koski*, 347 F. Supp. 3d at 1198. Accordingly, the Court finds that the products liability economic loss rule applies. The Court therefore dismisses Florida Plaintiff Goldman's fraudulent concealment claim.

4. Plaintiffs' Massachusetts, Nevada, Texas, and Virginia State Law Claims

Defendant asserts that Plaintiffs' consumer protection claims under Massachusetts, Nevada, Texas, and Virginia law fail because Plaintiffs fail to plead that Honda knowingly failed to disclose a concealed fact at the time Plaintiffs relied on Honda's statement or omission in the purchase of their vehicle. As set forth above, the Court finds that Plaintiffs have sufficiently pled Honda's knowledge of the defect. The Court therefore declines to dismiss on this basis.

5. Plaintiffs' Tennessee and Georgia Consumer Protection Claims

*9 Finally, Defendant argues that Plaintiffs' Tennessee and Georgia law consumer protections should be dismissed because the relevant statutes bar class action claims. But the Court need not address this argument, as it is premature in a motion to dismiss for failure to state a claim and can be properly addressed at the class certification stage. *See, e.g.,*

Falk v. Nissan N. Am., Inc., No. 17-cv-04871-HSG, 2018 WL 2234303, at *7 (N.D. Cal. May 16, 2018); *Conti* at n.4.

D. Express Warranty

Defendant also moves to dismiss Plaintiffs' breach of express warranty claims.

The FAC alleges that Honda expressly warranted in its NVLW that it "will repair or replace any part that is defective in *material or workmanship* under normal use" and that "all repairs/replacements made under this warranty are free of charge." (FAC ¶ 8) (emphasis added). Plaintiffs assert that Defendant breached this warranty because the defective infotainment systems were present in the Vehicles at the time of sale.

Defendant does not dispute the existence of a binding warranty. Instead, Defendant argues that (1) Plaintiffs' breach of express warranty claims fail because the NVLW is a "material or workmanship" warranty that covers only manufacturing defects, not design defects; and (2) in any event, Plaintiffs do not adequately allege breach because Plaintiffs did not provide Honda a reasonable opportunity to fix the Vehicles. The Court addresses each argument in turn.

1. Defective in Material or Workmanship

Defendant cites several authorities for the proposition that a "material or workmanship" warranty covers only manufacturing defects. At the outset, Plaintiffs claim that Defendant's Motion should be denied as to all states other than California, Illinois, New Jersey, and New York because Defendant fails to provide any authority suggesting that "material or workmanship" warranties exclude design defects in those jurisdictions. In its Reply, Defendant does not respond to this argument. Accordingly, the Court agrees with Plaintiffs that Defendant has not established as a matter of Arizona, Florida, Georgia, Massachusetts, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, or Virginia law that material and workmanship warranties such as the NVLW exclude design defects.

As for California, Illinois, New Jersey, and New York law, Plaintiffs emphasize that the FAC refers repeatedly to alleged defects "in material or workmanship," rather than design. (See Opp. at 19.) Plaintiffs essentially urge the Court to adopt the reasoning set forth in *Conti*, in which the court declined

to dismiss plaintiffs' express warranty claims as improper design defect claims. See *Conti* at *15. There, plaintiffs alleged "that the infotainment systems were defective in manufacture, assembly, material, and/or workmanship." *Id.* In support, plaintiffs offered "specific allegations about the symptoms of the defect." *Id.* The *Conti* court held these allegations were sufficient to survive the motion to dismiss.

Here, the Court agrees with Plaintiffs that the allegations of the FAC are sufficient to survive the Motion. Here, as in *Conti*, Plaintiffs allege that the infotainment systems are defective "in material or workmanship," that the "manufacturing and/or assembly defect existed at the time these Class Vehicles containing the infotainment system left the hands of Honda," and that Honda breached its warranty by failing to repair the "Vehicles' materials and workmanship defects." (Opp. at 19.) In support, Plaintiffs offer specific allegations about the symptoms of the defect. Accordingly, the Court declines to dismiss the express warranty claims on this basis.

2. Opportunity to Repair

*10 Defendant next argues that Plaintiffs' express warranty claims should be dismissed because the FAC fails to allege that Honda refused or failed to repair the purported defect. See *Gertz v. Toyota Motor Corp.*, No. CV 10-1089 PSG VBKX, 2011 WL 3681647, at *2 (C.D. Cal. Aug. 22, 2011) ("[I]n the context of automobile warranties, courts have held that an express warranty is not considered breached unless and until the defendant refuses or fails to repair.") According to Defendant, Plaintiffs have either (1) given Honda no chance to repair; (2) received assistance or interim fixes; or (3) been told that a software update is forthcoming.

The Court finds that the following Plaintiffs have not stated a claim for breach of express warranty: Banh (California); Samaha (Illinois); Quinlan (Illinois); Lawrence (North Carolina); Kleehtamer (Ohio); and Faden (Virginia). These Plaintiffs allege that the Vehicle's infotainment system is defective. However, none of these Plaintiffs ever asked Honda or a dealership to address this issue. Their breach of express warranty claims are therefore dismissed without prejudice. The remaining Plaintiffs properly allege an opportunity to repair.

3. Notice

“The U.C.C. provides that a buyer of goods ‘must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.’ ” *In re Rust-Oleum Restore Mktg., Sales Practices & Prod. Liab. Litig.*, 155 F. Supp. 3d 772, 799 (N.D. Ill. 2016) (citing UCC § 2-607.18). Many courts “have applied this U.C.C. provision to require that a plaintiff give the defendant reasonable pre-suit notice before asserting a breach of warranty claim in court.” *Id.*

Defendant asserts that the California, Illinois, Florida, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, and Virginia Plaintiffs’ express and implied warranty claims must be dismissed for lack of pre-suit notice. (Reply at 12, ECF No. 55.) However, Defendant concedes that New Jersey, New York, and Pennsylvania courts are split as to whether pre-suit notice is a condition precedent to filing suit for breach of warranty. The parties appear to agree that *some* pre-suit notice is required under California, Illinois, Florida, Nevada, North Carolina, Oregon, and Virginia law. Accordingly, the Court considers only whether notice is sufficient under these states’ laws.

a. California Plaintiff

Under California law, a plaintiff must provide pre-suit notice to bring a breach of warranty claim. *Cal. Com. Code* § 2607(3)(A). Generally, such notice is not required where a breach of warranty claim is brought “by injured consumers against manufacturers with whom they have not dealt.” *Park-Kim v. Daikin Indus., Ltd.*, No. 215CV09523CASKKX, 2016 WL 5958251, at *20 (C.D. Cal. Aug. 3, 2016) (quoting another source). But this exception does not apply where, as here, the plaintiffs allege that they had direct dealings with the manufacturer and its authorized retailers. *Id.*; *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 817 (N.D. Cal. 2014).

Here, Plaintiff Banh alleges that he purchased the Vehicle in September 2018 and that he began experiencing problems with the infotainment system within days of owning the Vehicle. Plaintiff Banh also alleges that he sent a statutory notice letter on July 10, 2019. The Court cannot say that this delay is “unreasonable per se, such that the claim should be dismissed at the pleading stage.” *AI-Daiwa, Ltd. v. Apparent, Inc.*, No. 13-CV-04156-VC, 2014 WL 4063146, at *2 (N.D. Cal. Aug. 15, 2014). Accordingly, the Court declines to dismiss California Plaintiff’s breach of warranty claims for lack of notice.

b. Illinois Plaintiffs

*11 Illinois law requires a buyer alleging a breach of warranty to “notify the seller of the breach within a reasonable time after he discovers it or else he is barred from any remedy.” *Hedges v. Earth, Inc.*, No. 14 C 9858, 2015 WL 1843029, at *1 (N.D. Ill. Apr. 21, 2015) (internal quotations omitted); 810 ILCS 5/2–607(3)(a). The notice must let “the seller know that the particular transaction is still troublesome and must be watched.” *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 589 (Ill. 1996) (internal quotations omitted). “Pre-suit notice is an essential element of a breach of warranty claim, and the absence of such notice results in dismissal.” *Hedges*, 2015 WL 1843029, at *1.

Under Illinois law, direct notice is not required where the seller has actual knowledge of the defect. *Id.* at *2. This “actual knowledge” exception applies only “where the manufacturer is somehow apprised of the trouble with the particular product purchased by a particular buyer.” *Id.* (quoting another source). It does not apply simply because “a manufacturer is aware of problems with a particular product line[.]” *Id.*

Here, neither Plaintiff Samaha nor Plaintiff Quinlan allege that they ever notified Honda of the alleged defect with the infotainment system. Accordingly, the Court finds that the Illinois Plaintiffs’ breach of warranty claims must be dismissed with leave to amend.

c. Florida Plaintiff

Florida law also requires reasonable pre-suit notice to assert a breach of warranty claim. *Fla. Stat.* § 672.607; *see Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1340 (S.D. Fla. 2011) (dismissing breach of warranty claim where plaintiff did not allege that he notified defendants of the alleged breach).

Plaintiff Goldman alleges that he purchased the Vehicle in September 2018 and began experiencing issues with the infotainment system within weeks of the purchase. Plaintiff Goldman also alleges that he called Acura’s corporate office in February 2019 to inquire as to when a software update was to be released to fix the problem.

At this early stage of the proceedings, Plaintiff Goldman's allegations suffice to establish notice. If this case proceeds, Plaintiff Goldman will have the burden of proving that he provided notice as required by state law.

d. Nevada Plaintiff

Under Nevada law, reasonable pre-suit notice of a breach of warranty claim is required. *Nev. Rev. Stat. Ann. § 104.2607*.

Here, although Plaintiff Ortiz alleges she called Honda about the issues she was experiencing with the infotainment system, she does not allege when this took place. To sufficiently allege pre-suit notice, Plaintiff must allege facts from which the Court can plausibly infer that notice was given "within a reasonable time." *Id.* Because Plaintiff Ortiz has not done so, her breach of warranty claims are dismissed with leave to amend.

e. North Carolina Plaintiffs

Reasonable pre-suit notice of a breach of warranty claim is required under North Carolina law. *N.C. Gen. Stat. Ann. § 25-2-607*; *Maybank v. S. S. Kresge Co.*, 302 N.C. 129, 133 (1981) ("seasonable notification is a condition precedent to the plaintiff-buyer's recovery").

Plaintiff Bartholomew alleges that he leased the Vehicle in September 2018, began experiencing issues with the infotainment system within days, and called Honda directly through its toll-free number. Plaintiff Lawrence alleges that he leased the Vehicle in October 2018 and began experiencing issues with the infotainment system "shortly" thereafter.

As with Plaintiff Ortiz, Plaintiff Bartholomew fails to allege *when* he notified Honda of the issues with the infotainment system. Plaintiff Lawrence does not even allege that he contacted Honda about the issue. Accordingly, the Court dismisses both Plaintiffs' breach of warranty claims with leave to amend.

f. Oregon Plaintiffs

*12 Reasonable pre-suit notice of a breach of warranty claim is also required under Oregon law. *Or. Rev. Stat. Ann. § 72.6070*.

Plaintiff M. Klein alleges that he contacted Acura's customer service department at least three times about the infotainment system. Plaintiff B. Klein alleges that he has taken his Vehicle to the dealership "repeatedly."

The Court finds that Plaintiffs M. Klein and B. Klein fail to adequately allege pre-suit notice. Plaintiff M. Klein does not allege when he contacted Acura's customer service department. Plaintiff B. Klein does not allege that he ever contacted Honda about the issue. Accordingly, the Court dismisses both Plaintiffs' breach of warranty claims with leave to amend.

g. Virginia Plaintiffs

Finally, pre-suit notice is also required under Virginia law. *Va. Code Ann. § 8.2-607*.

Plaintiffs Faden and Hines both allege that they purchased the Vehicle in February 2019 and began experiencing problems with the infotainment system within days. Plaintiff Hines also alleges that he contacted Honda on many occasions about the defect.

Plaintiff Gratton alleges she purchased the Vehicle in May 2019, began experiencing problems with the infotainment system the day she drove it home, took the Vehicle to a dealership in mid-June 2019, and called Acura service representatives approximately two-dozen times seeking a solution to the defect.

The Court finds that Plaintiffs Faden, Hines, and Gratton have not sufficiently alleged pre-suit notice. Plaintiff Faden does not allege that he ever contacted Honda about the issues with the infotainment system. Plaintiffs Hines and Gratton allege that they contacted Honda, but do not allege when such communications occurred. Accordingly, the Court dismisses Plaintiffs Faden, Hines, and Gratton's breach of warranty claims with leave to amend.

In sum, the Illinois, Nevada, North Carolina, Oregon, and Virginia law Plaintiffs' breach of express and implied warranty claims are dismissed with leave to amend for failure to adequately allege pre-suit notice.

E. Implied Warranty

1. Merchantability

Defendant argues that Plaintiffs' implied warranty of merchantability claims should be dismissed for failure to allege unmerchantability.

To be merchantable, goods must be "fit for the ordinary purposes for which such goods are used." UCC § 2-314(2) (c). Honda acknowledges that states may impose different standards of merchantability but asserts that "Plaintiffs' allegations flunk even the most lenient standard." (Mot. at 23.)

Accepting Plaintiffs' well-pleaded allegations as true, the Court finds that the implied warranty of merchantability claims survive the Motion to Dismiss. "Some of the alleged problems with the infotainment system are relatively harmless... Others, however, could pose safety and reliability issues."⁶ *Conti* at 19. "Based on these allegations, the Court finds that the risks posed by the alleged defects cannot be discredited in a Rule 12(b)(6) motion." *Id.*; see *MyFord Touch*, 46 F. Supp. 3d at 981.

- ⁶ For example, Plaintiffs allege that the infotainment system defect causes the Vehicle's GPS operation to malfunction.

2. Privity

*13 Defendant next argues that the Arizona, California, Florida, Illinois, Nevada, New York, Oregon, Tennessee, Texas, and Virginia Plaintiffs' implied warranty claims fail for lack of vertical privity, given that Plaintiffs purchased the Vehicles from independent Honda dealers—not Honda itself.

The Court has already dismissed multiple Plaintiffs' breach of warranty claims for failure to sufficiently allege pre-suit notice. Accordingly, in the interest of efficiency, and given the lack of briefing on this issue, the Court declines to address Defendant's privity argument at this time. Should Plaintiffs file an amended complaint, they may address any deficiencies raised by Defendant with respect to privity.

F. Unjust Enrichment (Florida Law)

Finally, Defendant argues that Florida Plaintiff's unjust enrichment claim must be dismissed because Florida law

bars unjust enrichment claims where an express contract governs the subject matter of the dispute. (*See* Mot. at 25 ("Here, Florida Plaintiff specifically alleges the existence of an express warranty governing his rights—in fact, he sues under that warranty... As a result, the unjust enrichment claim must be dismissed with prejudice.")) Plaintiffs counter that Florida Plaintiff is permitted to plead unjust enrichment in the alternative. Plaintiffs also aver that until an express contract is proven, dismissal is premature.

The Court agrees with Defendant that Florida Plaintiff's unjust enrichment claim must be dismissed. "As an equitable remedy, an unjust enrichment claim *cannot* be maintained where a plaintiff has an adequate remedy at law. Here, because there is an express warranty governing Plaintiff[s'] rights, [the] unjust enrichment claim must fail." *Speier-Roche v. Volkswagen Grp. of Am. Inc.*, No. 14-20107-CIV, 2014 WL 1745050, at *8 (S.D. Fla. Apr. 30, 2014) (emphasis added and internal citation omitted). This is particularly true where, as here, Defendant concedes that an express contract exists. (*See* Reply at 15); see *ThunderWave, Inc. v. Carnival Corp.*, 954 F. Supp. 1562, 1566 (S.D. Fla. 1997) (holding "that *because Defendant denies the existence of an express contract*, the Plaintiff has properly presented the claim for unjust enrichment.") (emphasis added). The Court therefore dismisses Florida Plaintiff's unjust enrichment claim.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part** Defendant's Motion. All dismissals are without prejudice, except for (1) the dismissal of Plaintiff's MMWA claims; (2) the dismissal of Florida Plaintiff's fraudulent concealment claim; (3) the dismissal of Florida Plaintiff's unjust enrichment claim. Plaintiffs must file an amended complaint within **28 calendar days** of this Order's issuance. In addition to the "clean" version of the Second Amended Complaint, such a filing shall also include a "redlined" version clearly indicating all changes.

Proposed Class	Claims	Disposition
Nationwide	MMWA Express Warranty	GRANT
	MMWA Implied Warranty	GRANT
	CLRA (CA)	GRANT – misrepresentation DENY – omission
	Unfair Competition (CA)	DENY
	Fraud by Concealment (CA)	DENY
	Implied Warranty of Merchantability (CA)	DENY
California (Banh)	CLRA	GRANT – misrepresentation DENY – omission
	Unfair Competition	DENY

201WL 8 959©C51

	Fraud by Concealment	DENY
	Express Warranty	GRANT
	Implied Warranty of Merchantability	DENY
Arizona (Bilbrey)	AZ Consumer Fraud Act	GRANT – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty of Merchantability	DENY
Florida (Goldman)	FL Deceptive and Unfair Trade Practices Act	GRANT – misrepresentation DENY – omission
	Fraudulent Concealment	GRANT
	Express Warranty	DENY
	Implied Warranty	DENY
	Unjust Enrichment	GRANT
Georgia (Peoples)	GA Fair Business Practices Act	GRANT – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty of Merchantability	DENY
Illinois (Samaha, Quinlan)	IL Consumer Fraud and Deceptive Practices Act	DENY as to Plaintiff Samaha – misrepresentation GRANT as to Plaintiff Quinlan – misrepresentation DENY – omission
	Express Warranty	GRANT
	Implied Warranty of Merchantability	GRANT
Massachusetts (Hanna)	MA Consumer Protection Act	GRANT – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty of Merchantability	DENY
Nevada (Ortiz)	NV Deceptive Trade Practices Act	GRANT – misrepresentation GRANT – omission
	Express Warranty	GRANT
	Implied Warranty of Merchantability	GRANT
New Jersey (Chisari)	NJ Consumer Fraud Act	GRANT – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty of Merchantability	DENY
New York	NY General Business Law § 349	GRANT – misrepresentation

(Brunner, Jahsman)		DENY – omission
	Fraudulent Concealment	DENY
	Express Warranty	DENY
	Implied Warranty	DENY
North Carolina (Bartholomew, Lawrence)	NC Unfair and Deceptive Trade Practices Act	DENY (Lawrence) GRANT (Bartholomew)
	Express Warranty	GRANT
	Implied Warranty of Merchantability	GRANT
Ohio (Kleehammer)	OH Consumer Sales Practices Act	GRANT
	Express Warranty	GRANT
	Implied Warranty in Tort	DENY
Oregon (M. Klein, B. Klein)	OR Unlawful Trade Practices Act	GRANT – misrepresentation DENY – omission
	Express Warranty	GRANT
	Implied Warranty of Merchantability	GRANT
Pennsylvania (Denaro)	PA Unfair Trade Practices and Consumer Protection Law	DENY – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty of Merchantability	DENY
Tennessee (Pryor)	TN Consumer Protection Act	DENY – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty of Merchantability	DENY
Texas (Subbarao, Allan)	TX Deceptive Trade Practices Act	GRANT – misrepresentation DENY – omission
	Express Warranty	DENY
	Implied Warranty	DENY
Virginia (Faden, Hines, Gratton)	VA Consumer Protection Act	DENY (Faden) – misrepresentation GRANT (Hines, Gratton) – misrepresentation DENY – omission
	Express Warranty	GRANT
	Implied Warranty of Merchantability	GRANT

*14 IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 8683361

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 6

2000 WL 1742064

2000 WL 1742064

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES
 FOR REPORTING OF OPINIONS AND
 WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth
 District, Franklin County.

Leigh BANKS, Plaintiff-Appellant,
 v.

NATIONWIDE MUTUAL FIRE INSURANCE
 COMPANY, Defendant-Appellee.

No. 99AP-1413.

Nov. 28, 2000.

Appeal from the Franklin County Court of Common Pleas.

Attorneys and Law Firms

Murdock & Goldenberg, L.P.A., and [John C. Murdock](#);
[Hagens Berman, L.L.P.](#), [Steve W. Berman](#), [Sean R. Matt](#) and
[Christopher A. O'Hara](#), for appellant.

Bricker & Eckler, L.L.P., [Randolph C. Wiseman](#) and [Stephen C. Gray](#);
[Swartz, Campbell & Detweiler](#), and [Curtis P. Cheyney, III](#);
[Post & Schell, P.C.](#), and Michael R. Nelson, for appellee.

OPINION

[BRYANT](#).

*1 Plaintiff-appellant, Leigh Banks, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion to dismiss of defendant-appellee, Nationwide Mutual Fire Insurance Company ("Nationwide") pursuant to [Civ. R. 12\(B\)\(6\)](#). Plaintiff assigns the following errors:

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR FRAUD.

III. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR VIOLATION OF THE DUTY OF GOOD FAITH AND FAIR DEALING.

IV. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR UNJUST ENRICHMENT REQUIRING THE CREATION OF A CONSTRUCTIVE TRUST.

For the reasons set forth below, we affirm in part and reverse in part, finding that although the trial court properly dismissed part of plaintiff's complaint against Nationwide, plaintiff sufficiently stated a claim for relief against Nationwide on other grounds. See [O'Brien v. University Community Tenants Union](#) (1975), 42 Ohio St.2d 242; and [Slife v. Kundtz](#) (1990), 40 Ohio App.2d 179.

According to plaintiff's complaint, plaintiff entered into an insurance contract with Nationwide for the repair of her vehicle in the event of collision. Plaintiff alleged her insured motor vehicle was damaged in an accident, she took her vehicle to the manufacturer's dealership, and she received a repair estimate of \$4,597. She asserts Nationwide insisted she obtain a bid from Wreck Tech, which provided an estimate of \$3,679. According to plaintiff, Wreck Tech explained on its estimate form that twelve of the forty-two replacement parts would be "supplied by a supplier other than the original equipment manufacturer." (Complaint, par. 27.) Such parts are commonly referred to as non-OEM parts, and in plaintiff's estimate included exterior crash parts: bumpers, grills, radiator supports, fenders and hood. Plaintiff alleges she complained about the use of non-OEM parts and the amount of the estimate, but Nationwide refused to pay for OEM parts and gave her a check based on the estimate issued by Wreck Tech. Plaintiff does not allege that any non-OEM parts were installed on her vehicle. Rather, plaintiff asserts the Nationwide check, based on the estimate issued by Wreck Tech, was insufficient to provide the promised level of repairs.

The parties agree on the text of the insurance policy and endorsements. Under "Coverages," below the heading "Insuring Agreements," the insurer agreed:

B. COLLISION. To pay for any direct and accidental damage including glass breakage to the described automobile and its equipment, other than trailers, caused

2000 WL 1742064

by collision or upset of such automobile,
less the deductible amount * * *.

Under the “Limits of Liability” heading, under “Conditions,” the insurance policy stated:

The limit of the Company's liability for loss is the actual cash value of the automobile or its damaged parts at time of loss. The Company may pay any loss or repair or replace the automobile or its damaged parts, or may return stolen property * * *.

*2 The parties further agree that the policy includes the following amendatory Endorsement 2276A, which states in pertinent part:

B. Collision. To pay for any direct and accidental damage including glass breakage to the described automobile and its equipment, other than trailers, caused by collision or upset of such automobile, less the deductible amount * * *.

* * *

5. LIMITS OF LIABILITY

Coverages A and B

The limit of the Company's liability for loss is the actual cash value of the automobile or its damaged parts at time of loss. The Company *may pay any loss or repair or replace the described automobile or its damaged parts with parts furnished either by original equipment manufacturers or non-original equipment manufacturers*. The Company may return stolen property * * *. In addition to payment of the loss, necessary and reasonable towing and storage will be paid to protect the automobile from further damage. (Emphasis added.)

Two contentions are at the heart of plaintiff's complaint. Initially, plaintiff asserts that Nationwide breached its contract by requiring repair shops to use non-OEM parts to repair damaged vehicles. Similarly, plaintiff claims a breach of

contract when Nationwide paid reimbursement for losses directly to the insured by calculating the payment based on non-OEM parts.

Secondly, plaintiff asserts that, regardless of whether the contract permits the insurer to provide non-OEM parts, Nationwide nonetheless had an obligation to provide replacement parts that were materially equivalent to that of the damaged parts. Plaintiff contends that Nationwide breached that duty when it provided non-OEM parts of materially inadequate and inferior quality. In that regard, plaintiff concedes she is not arguing that non-OEM parts are inherently deficient. Rather, she asserts that the non-OEM parts “used by Nationwide” were materially inadequate, inferior, and/or defective.

Pursuant to the above-quoted language of the insurance policy, the contracting parties plainly agreed to the use of non-OEM parts to repair damaged vehicles. The contract unambiguously states that Nationwide may satisfy its obligations to repair vehicles by providing parts made by manufacturers other than the original manufacturer. Moreover, the specific, limiting language regarding non-OEM parts does not conflict with the more general language regarding the insurer's obligation to repair damaged vehicles in the event of a collision. Rather, the amendatory language permitting the use of non-OEM parts defines and describes the insurer's obligation to repair. Thus, plaintiff cannot reasonably argue that the insurer had an obligation to provide OEM parts exclusively.

Given the plain and unambiguous language in the contract regarding the type of parts that may be used for repairs, plaintiff did not state a claim for breach of contract when she alleged that Nationwide required the use of, or premised its repair estimates on, non-OEM parts. We therefore affirm the trial court's conclusion that plaintiff failed to state a claim for breach of contract based solely on the practice of requiring the use of non-OEM parts for the repair of vehicles, or paying the cost of non-OEM parts.

*3 Nonetheless, even though Nationwide had the right to provide non-OEM parts in meeting its obligation to repair, the contract included an implied agreement that, regardless of who manufactured the parts, the replacement parts would be comparable to OEM parts in design, make and quality. In other words, although Nationwide had the contractual right to provide non-OEM parts, it did not have the contractual right to provide defective parts or parts that were substandard as

2000 WL 1742064

compared to non-OEM parts that are comparable in design, make and quality to OEM parts (“allowable non-OEM parts”) to the parts that were damaged.

This implied term of the contract flows from Nationwide's obligation of good faith and fair dealing. When an insurer promises to provide repair parts for a vehicle, the insured may reasonably expect that the replacement parts will be comparable to the parts to be replaced. See, generally, *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552. Thus, any insurer engaged in the practice of providing non-OEM parts which were materially substandard or defective, as compared to allowable non-OEM parts, would be in violation of its contract. We note that to determine whether the non-OEM parts were substandard or defective, the comparison is to allowable non-OEM parts, not OEM parts.

Here, plaintiff has alleged that: (1) Nationwide engaged in the practice of providing materially inferior, inadequate and/or defective parts, (2) the amount of the check was based on the cost of materially inferior, inadequate, and/or defective parts, and (3) the check provided by Nationwide did not meet its contractual obligation to repair plaintiff's vehicle. Given those allegations, the trial court improperly concluded that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. The trial court thus erred in dismissing that part of the complaint in which plaintiff alleged that the payment plaintiff received was insufficient due to a calculation based on substandard or defective non-OEM parts as compared to allowable non-OEM parts.

Regarding Nationwide's obligation to pay for repairs, the parties vigorously dispute the nature and extent of the insurer's promise to repair damaged vehicles, raising several specific issues including the following: (1) whether Nationwide promised to restore vehicles to their pre-loss condition, (2) whether Nationwide promised to restore vehicles to their pre-loss actual cash value, (3) whether Nationwide promised to compensate owners for diminution in value following a collision, and (4) whether [Ohio Adm.Code 3901-1-54](#) is applicable to a determination of the contract rights or otherwise applicable to the claims stated by plaintiff, issues discussed in cases such as *Morrison v. Allstate Indemnity* (Sept. 9, 1999), U.S. Dist.Ct. (M.D.Fla.) Case No. 98-377-CIVJ-20C, and *Avery v. State Farm Mutual Auto. Ins. Co.* (Oct 8, 1999), Ill. Cir. Ct. (Williamson Co.) Case No. 97-L-114.

*4 The trial court, however, addressed none of those issues, given its dismissal of the complaint based on the amendatory endorsement permitting use of non-OEM parts. Because the complaint states a claim for breach of contract to the extent noted above, the trial court will have the opportunity to address the issues in the first instance in the context of the proceedings on remand.

Accordingly, plaintiff's first assignment of error is sustained in part and overruled in part.

Plaintiff's second assignment of error asserts the trial court erred in dismissing her claim of fraud. The Supreme Court of Ohio has identified six elements that must be proven to establish a claim of fraud: (1) a representation or, where there is a duty to disclose, concealment of fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) with justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Burr v. Stark Co. Bd. of Cmms.* (1986), 23 Ohio St.3d 69.

As with her contract claim, plaintiff's fraud claim appears to have two distinct aspects. Initially, plaintiff alleges that, by promising to restore vehicles to pre-accident condition and then offering non-OEM parts as a regular practice, Nationwide defrauds its customers because non-OEM parts cannot restore a vehicle to pre-accident condition. Given Nationwide's disclosure that non-OEM parts could be used for repairs, coupled with Wreck Tech's disclosure that replacement parts would include non-OEM parts, plaintiff cannot state a claim for fraud based solely on the fact that Nationwide provided or offered to provide non-OEM parts for her vehicle repair: plaintiff cannot reasonably argue that she was justified in relying on general language about repairs to the exclusion of specific and unambiguous language stating the insurer's option to provide non-OEM parts. To the contrary, plaintiff had every reason to expect that the insurer would supply non-OEM parts. Moreover, plaintiff stated at oral argument that she was not alleging that non-OEM parts are necessarily deficient *per se*. As a result, plaintiff's allegation that Nationwide committed fraud by calculating her reimbursement check based on non-OEM parts does not state a claim.

2000 WL 1742064

Plaintiff, however, also alleged that Nationwide engaged in a widespread practice of promising to provide a certain level of repair and then insisting that, after sustaining losses, policyholders accept parts Nationwide knew to be materially substandard or defective. According to plaintiff's complaint, Nationwide intended from the inception of the contractual relationship to provide substandard or defective non-OEM parts, as compared to allowable non-OEM parts, but concealed that intention from plaintiff, causing her to enter into or remain in her insurance contract with Nationwide in the reasonable expectation and in reliance on the representation that, following a collision, her vehicle would be repaired with parts of materially equivalent quality and performance, whether OEM or non-OEM.

*5 Reduced to its essence, plaintiff's complaint asserts: (1) Nationwide deliberately made promises that it never intended to keep, thereby inducing plaintiff to pay insurance premiums, and (2) plaintiff, relying on those representations, suffered a covered loss but Nationwide followed through on its scheme to deny the promised level of repairs that plaintiff reasonably expected from the contract language.

Given those allegations, plaintiff's complaint sufficiently states a claim for fraud. Nonetheless, the allegations regarding representations in advertising materials, including the website, cannot support plaintiff's claim of fraud. Plaintiff never alleged she saw the advertising materials or visited the website. Thus, even if those materials exist as alleged, plaintiff has failed to allege any reliance on them.

Accordingly, plaintiff's second assignment of error is sustained in part and overruled in part.

Plaintiff's third assignment of error focuses on the duty of good faith and fair dealing. Ohio courts have held that the duty of good faith and fair dealing gives rise to a cause of action in tort separate from a claim sounding in contract. *Hoskins, supra*. See, also, *Zoppo, supra*. Here, as noted, plaintiff has alleged deliberate concealment and intent to deprive plaintiff of benefits promised to her under the contract. Regardless of whether she can prove them, the allegations state a claim for bad faith in the processing of her insurance claim, sufficient to withstand a motion under Civ.R. 12(B)(6). While most of the reported decisions focus on a complete refusal to pay a claim rather than an alleged insufficient payment of the claim, insurers nevertheless have a duty to act in good faith in the processing of a claim, and a violation of that duty is actionable. Plaintiff's third assignment of error is sustained.

In her fourth assignment of error, plaintiff contends the trial court erred in dismissing her claim for unjust enrichment. The doctrine of unjust enrichment provides an equitable remedy, under which the court implies a promise to pay a reasonable amount for services rendered where a party has conferred a benefit on another without receiving just compensation for his or her services. Thus, under the theory of *quantum meruit*, a party may recover compensation in the absence of a contract where an unjust enrichment would result if the recipient were permitted to retain the benefit without paying for it. *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St.3d 44; *Fox & Associates Co. v. Purdon* (1989), 44 Ohio St.3d 69.

Under these equitable principles, a contract is implied as a legal fiction under a theory of quasi-contract, which does not rest on the written intent between the parties but is imposed to prevent injustice. *Paugh, supra*, at 46. Where, however, a written contract between the parties addresses the matter in dispute, the contract governs the parties' performance, unless the contract is void due to illegality, fraud, or otherwise cannot govern the relationship. Generally, where damages are available for breach of contract or in tort, the party cannot also invoke the equitable remedy for unjust enrichment. Rather, if no remedy is available in contract or tort, then the equitable remedy in unjust enrichment may be afforded to prevent injustice. See, generally, *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 55; *Norton v. Gallon* (1989), 60 Ohio App.3d 109, certiorari denied (1990), 48 Ohio St.3d 711; *Weiper v. W.A. Hill & Assoc.* (1995), 104 Ohio App.3d 250; *Sammarco v. Anthem Ins. Cos.* (1998), 131 Ohio App.3d 544, 557. In addition, although the remedy of restitution for unjust enrichment has been applied under some circumstances in the absence of any quasi-contractual relationship, such as where the case involves a compensation-paying relationship imposed by statute, those circumstances are not present here. Cf. *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109. Rather, here the parties had a written agreement governing the insurer's obligation to repair damaged vehicles. In addition, plaintiff has stated a claim in tort. The law, therefore, need not imply a debt at equity to provide a remedy. Indeed, under plaintiff's theory, almost every alleged consumer fraud would be actionable as "unjust enrichment," and, likewise, a broad array of contract violations would be actionable as "unjust enrichment." Because it is unnecessary and unwise to broaden this equitable doctrine to provide a remedy in circumstances where remedies at law, in contract and tort,

2000 WL 1742064

provide an adequate remedy, we overrule plaintiff's fourth assignment of error.

*6 Having sustained in part and overruled in part plaintiff's first and second assignments of error, sustained plaintiff's third assignment of error, and overruled her fourth assignment of error, the judgment of the trial court is affirmed in part and reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

Judgment affirmed in part and reversed in part; case remanded.

TYACK and PETREE, JJ., concur.

All Citations

Not Reported in N.E.2d, 2000 WL 1742064

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 7

20WL 1 7 42L664W

2017 WL 6273361

Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia.

Evelyn BENTON, Plaintiff,

v.

PHILLIPS EDISON & CO., LTD., Defendant.

Civil Action No. 3:17cv630-HEH

|
Filed 12/08/2017**Attorneys and Law Firms**

Evelyn Benton, Henrico, VA, pro se.

Matthew Yanovitch, Spotts Fain PC, Richmond, VA, for Defendant.

MEMORANDUM OPINION**(Granting Motion to Dismiss & Denying Motion
for Leave to File Second Amended Complaint)**

Henry E. Hudson, United States District Judge

*1 Evelyn Benton ("Plaintiff"), acting *pro se*, brought this action against Phillips Edison & Co., Ltd. ("Defendant") alleging that Defendant breached the terms of Plaintiff's commercial lease, violated the Federal Trade Commission Act, and violated various provisions of the Virginia Code. This matter is before the Court on Defendant's Motion to Dismiss Under Rule 12(b)(6) ¹ (ECF No. 7), filed on October 20, 2017, and Plaintiff's Motion for Leave to File Second Amended Complaint ("Pl. Mot.," ECF No. 12), filed on October 27, 2017. Although Plaintiff did not file either a response to the Motion to Dismiss or a reply in support of her Motion for Leave to File Second Amended Complaint, the Court finds that the facts and legal contentions are adequately presented in the materials before it, and oral argument would not aid in the decisional process. *E.D. Va. Local Civ. R. 7(J)*. For the reasons stated herein, Defendant's Motion to Dismiss will be granted, and Plaintiff's Motion for Leave to File Second Amended Complaint will be denied.

¹ Defendant included an appropriate Roseboro Notice with its Motion, as required by Local Civil

Rule 7(K) and the Fourth Circuit's decision in *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

I. BACKGROUND

As required by Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court assumes Plaintiff's well-pleaded allegations to be true and views all facts in the light most favorable to her. *T.G. Slater & Son v. Donald P. & Patricia A. Brennan, LLC*, 385 F.3d 836, 841 (4th Cir. 2004) (citing *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). Legal conclusions, however, enjoy no such deference. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Generally, the district court does not consider extrinsic materials when evaluating a complaint under Rule 12(b)(6). The court may, however, consider "documents incorporated into the complaint by reference," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), as well as documents attached to a motion to dismiss, so long as they are integral to or explicitly relied upon in the complaint, and the authenticity of such documents is not disputed. *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014); *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). In this case, the lease Plaintiff executed with Ashland Junction, L.C., the lease-amendment documents, and the notification Plaintiff received from Defendant telling her that her lease was ending ("Termination Notice") are all incorporated into the Complaint by reference, and they are additionally attached to both the Motion to Dismiss and Plaintiff's proposed Second Amended Complaint. Neither party disputes the authenticity of these documents, and so the Court will consider them for purposes of resolving the motions before it.

Viewed through this lens, the facts are as follows.

In 2012, Plaintiff entered into a lease with Ashland Junction, L.C., to rent commercial space in Ashland Junction Shopping Center in Ashland, Virginia ("Lease"). (ECF Nos. 8-1, 12-1.) Plaintiff and Ashland Junction, L.C. executed three subsequent lease renewal amendments ("Lease Amendments") in 2013, 2014, and 2015. (ECF Nos. 8-2, 8-3, 8-4, 12-3, 12-4, 12-5.) The Third Lease Amendment, executed in 2015, extended the term of the Lease through August 31, 2017. (ECF Nos. 8-4, 12-5.)

*2 At the time the original Lease was executed, Ashland Junction, L.C. was registered as a Virginia limited liability

company. In February of 2016, Ashland Junction L.C. domesticated in the state of Delaware and changed its name to Ashland Junction, LLC. The new entity, Ashland Junction LLC, assumed all the rights and obligations of Ashland Junction L.C., including all rights and obligations assigned to the Landlord in Plaintiff's Lease. (See Termination Notice, ECF No. 12–8 (referring to Ashland Junction, LLC as successor-in-interest to Ashland Junction, L.C.).)

On August 22, 2017, in its capacity as the property management agent for Ashland Junction LLC, Defendant sent Plaintiff a Termination Notice reminding her that the Lease was set to expire on August 31, 2017. (*Id.*) The Termination Notice also provided that, pursuant to the Lease's 30-day notice requirement, the effective date of lease-termination would be September 21, 2017. (*Id.*)

Plaintiff filed the instant action on September 19, 2017, alleging that Defendant's behavior and practices violated the terms of the lease, Virginia Code §§ 55–248.31, 55–222, and 54.1–2106.1, as well as the Federal Trade Commission Act. On September 22, 2017, before Defendant was served with process, Plaintiff filed an Amended Complaint. Defendant filed its Motion to Dismiss with *Roseboro* Notice on October 20, 2017. Plaintiff then filed her Motion for Leave to File Second Amended Complaint on October 27, 2017, and Defendant filed its opposition thereto on November 7, 2017.

II. STANDARD OF REVIEW

A. Motion to Dismiss

“A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citation omitted). The Federal Rules of Civil Procedure “require[] only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint need not assert “detailed factual allegations,” but must contain “more than labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555 (citations omitted). Thus, the “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *id.* (citation omitted), to one

that is “plausible on its face,” *id.* at 570, rather than merely “conceivable.” *Id.* In considering such a motion, a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. *T.G. Slater*, 385 F.3d at 841 (citation omitted). Legal conclusions enjoy no such deference. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Additionally, “[a] document filed *pro se* is ‘to be liberally construed.’ ” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104–105 (1976)). To that end, “a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Id.* (citation and internal quotation marks omitted). Moreover, “[p]leadings must be construed to do justice.” Fed. R. Civ. P. 8(d). At the same time, courts recognize that a plaintiff “can plead himself out of court by pleading facts that show that he has no legal claim.” *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (Posner, J.) (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 777 (7th Cir. 2007); *Orthmann v. Apple River Campground*, 757 F.2d 909, 915 (7th Cir. 1985); *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006)); see also *Dolgaleva v. Va. Beach City Pub. Sch.*, 364 Fed.Appx. 820, 827 (4th Cir. 2010).

B. Motion for Leave to File Second Amended Complaint

*3 When a plaintiff may not file an amended pleading as a matter of right, “the disposition of a motion to amend is within the sound discretion of the district court.” *Davis v. Virginia Commonwealth Univ.*, 180 F.3d 626, 628 (4th Cir. 1999) (citing *Foman v. Davis*, 371 U.S. 178 (1962)). Pursuant to Fed. R. Civ. P. 15(a)(2), “[t]he court should freely give leave [to amend pleadings] when justice so requires.” “Motions to amend are typically granted in the absence of an improper motive, such as undue delay, bad faith, or repeated failure to cure a deficiency by amendments previously allowed.” *Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 447 (4th Cir. 2004). A lack of prejudice to the nonmoving party, alone, ordinarily warrants granting leave to amend. *Ward Elec. Serv., Inc. v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987). However, if the amendment would be futile such that it fails to satisfy federal pleading requirements and would not survive a motion to dismiss, then a court may deny leave to amend. *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011) (citation omitted).

III. DISCUSSION

Taking the facts in Plaintiff's Amended Complaint as true, the Court finds that she has failed to state a claim for relief. The Court further finds that Plaintiff's proposed Second Amended Complaint would not survive a subsequent motion to dismiss and therefore leave to amend is not warranted.

A. Motion to Dismiss

Plaintiff's Amended Complaint can be read as presenting four counts: Defendant violated the Lease (Count One) and [Virginia Code § 55-222](#) (Count Two) by only giving Plaintiff thirty days' notice regarding the termination of her lease; Defendant violated [Virginia Code § 55-248.31](#) "by non-compliance with its rental agreement" (Count Three); and Defendant violated the Federal Trade Commission Act ("FTCA") by operating as a managing agent for Ashland Junction, L.C./LLC without a license issued by the Department of Professional and Occupational Regulation ("DPOR") or Certificate of Authority issued by the State Corporation Commission ("SCC") (Count Four). As discussed below, however, the facts and the Lease documents, construed as liberally as possible, show that Plaintiff has not raised any viable legal claims.²

- ² Because the Court finds that Plaintiff fails to state a claim upon which relief may be granted, it need not address the legality and/or suitability of the various forms of relief sought in the Amended Complaint.

Defendant argues that Plaintiff has failed to state a claim on Counts One through Three because Defendant is neither the Landlord referenced in the Lease nor a party to the Lease or its Amendments. (Mem. Supp. Mot. Dismiss 7, ECF No. 8; Lease & Lease Amendments, ECF Nos. 8-1, 8-2, 8-3, 8-4.) Instead, all of Defendant's allegedly unlawful actions pertaining to the termination of Plaintiff's lease were performed in its capacity as property management agent for the landlord, Ashland Junction L.C./LLC. (Termination Notice, ECF No. 12-8.) The law is clear that a fully disclosed agent who acts on behalf of their principal cannot be held personally liable for such conduct. [Duncan v. Peninger](#), 624 F.2d 486, 490 (4th Cir. 1980) (citing [Restatement \(Second\) of Agency § 320](#) & Comment a (1958)); [Inova Health Sys. Servs. v. Bainbridge](#), 2011 Va. LEXIS 255 *3-4 (Va. Oct. 21, 2011) (citing [Richmond Union Passenger Ry. Co. v. New York & Sea Beach Ry. Co.](#), 95 Va. 386, 395 (1897)). In the

Amended Complaint, Plaintiff herself alleges that Defendant is the "Management Agent" and/or "Managing Agent" "for the Landlord" (Am. Compl. 2, ECF No. 4.) The Court finds that, by doing so, Plaintiff has effectively pled herself out of court on her claim for breach of contract and the accompanying claims for violation of the Virginia Code. *See Atkins*, 631 F.3d at 588; [Dolgaleva](#), 364 Fed.Appx. at 827.

*4 Regarding Count Four, Plaintiff's claim that Defendant has violated the FTCA, the Court finds that Plaintiff lacks a private right of action under the Act. The Fourth Circuit has explicitly recognized that "the substantive prohibitions of [the FTCA] [are] 'inextricably intertwined with provisions defining the powers and duties of a specialized administrative body charged with its enforcement,'" and, as a result, "courts have declined to imply any private right of action [in the FTCA] and have relied upon the regulatory scheme to police the industry." [A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.](#), 798 F.2d 669, 675 (4th Cir. 1986) (quoting [Holloway v. Bristol-Myers Corp.](#), 485 F.2d 986, 988-989 (D.C. Cir. 1973)). Accordingly, this Court follows the Fourth Circuit and numerous other circuit courts in finding that Plaintiff has no legal claim against Defendant under the FTCA.

Because Plaintiff has pled facts that show she cannot recover from Defendant for the alleged breach of contract or violations of the Virginia Code, and because she has no right to relief under the FTCA, the Amended Complaint must be dismissed.

B. Motion for Leave to File Second Amended Complaint

Facing Defendant's Motion to Dismiss, Plaintiff attempted to cure the deficiencies of her Amended Complaint by filing the Motion for Leave to File Second Amended Complaint. In the proposed Second Amended Complaint, which was incorporated into Plaintiff's Motion, Plaintiff seeks to add Phillips Edison Limited Partnership, Phillips Edison & Company, Inc.,³ and Ashland Junction, L.C.⁴ as defendants. (See Pl. Mot. 1, ECF No. 12.) Plaintiff additionally reframes her claims and asserts what the Court liberally construes as nine counts: (1) breach of the Lease; (2) violation of [Virginia Code § 55-222](#); (3) violation of [Virginia Code § 54.1-2105.2](#); (4) fraud in the factum and fraud in the inducement, under Virginia law; (5) violation of the FTCA; (6) violation of federal criminal fraud statutes, [18 U.S.C. §§ 1341, 1343](#); (7) violation of the Age Discrimination in Employment Act ("ADEA"), [28 U.S.C. § 621, et seq.](#); (8) tortious interference with a business expectancy under Virginia law; and (9)

20WL 1 7 42L664W

violation of § 3631 of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*

3 When appropriate, the Court will adopt Plaintiff's collective label "PECO" to refer to Phillips Edison & Co., Ltd. (the original Defendant), Phillips Edison & Company, Inc., and Phillips Edison Limited Partnership.

4 Despite explicitly adding Ashland Junction, L.C. as a defendant, Plaintiff does not name the entity in any of her claims. Plaintiff does, however, refer to Ashland Junction, LLC in her claim for "Termination of the Lease by an Entity Not a Party to the Lease," which the Court construes in part as Count One: breach of the Lease. (Pl. Mot. 7–8.) Because Ashland Junction, LLC is the successor in interest to Ashland Junction, L.C., and because the Court must construe *pro se* complaints "to do justice," see Fed. R. Civ. P. 8(d), the Court will consider Ashland Junction, LLC to be a named Defendant for purposes of analyzing Plaintiff's Motion for Leave to File Second Amended Complaint.

1. Counts Two, Three, Five, Six, Seven, & Nine

As a preliminary matter, the Court notes that Count Two of the proposed Second Amended Complaint is identical to Count Two of the Amended Complaint, and as a result the Court can summarily dispose of that Count as unable to survive a motion to dismiss. See *supra* discussion at Part III.A. The Court can also dispose of Counts Three, Five, Six, Seven, and Nine because these claims are founded on inapplicable law and/or laws that do not provide for private, civil relief. Plaintiff's claims that the PECO Defendants violated Virginia Code § 54.1–2105.2 (Count Three), the FTCA (Count Five), and federal criminal fraud statutes (Count Six) all fail for lack of a private right of action.⁵ The claim that the PECO Defendants violated the Age Discrimination in Employment Act (Count Seven) necessarily fails because the statute only applies to discrimination in the context of an employment relationship, and nowhere in the Amended Complaint or the proposed Second Amended Complaint does Plaintiff allege that she was an employee of any of the Defendants. Finally, Plaintiff's attempted claim of housing discrimination (Count Nine) is not viable because the Fair Housing Act only governs residential properties, not commercial spaces such as the leased property that is the subject of the present dispute.

Accordingly, amendment would be futile as to each of these proposed counts.

5 Virginia Code § 54.1–2105.2 provides solely for regulatory enforcement by the Virginia Real Estate Board, the FTCA provides for regulatory enforcement by the Federal Trade Commission (*see supra* Part III.A), and federal criminal law is reserved for the Department of Justice to prosecute.

2. Count One

*5 Plaintiff's claim that Ashland Junction, LLC⁶ breached the Lease (Count One) would similarly not survive a motion to dismiss. To the extent that Plaintiff alleges that Ashland Junction, LLC, is not a party to the Lease and therefore had no authority to terminate it, her argument fails as contrary to both law and the text of the Termination Notice, which explicitly designates Ashland Junction, LLC as successor-in-interest to Ashland Junction, L.C, the original "Landlord". (ECF 12–8.) Additionally, Plaintiff's assertion that the Lease was breached because she was only given ten days' notice of termination fails to state a claim because it is contradicted by the facts as alleged and the text of the incorporated Lease documents.

6 See *supra* note 4.

Plaintiff received the Termination Notice on August 21, 2017. (Pl. Mot. 8.) The Notice provided Plaintiff a full 30 days before the termination would become effective on September 21, 2017. (*Id.*) By doing so, Ashland Junction, LLC actually allowed Plaintiff to continue renting the premises beyond the date on which the Third Lease Amendment would have naturally expired: August 31, 2017. (*Id.*; Third Lease Am., ECF No. 12–5.) Moreover, although Plaintiff relies on Paragraph 26 of the Lease to claim that she should have been relocated rather than have her lease terminated, Plaintiff misconstrues the text of the Lease. Paragraph 26 states explicitly that, in the event it wished to relocate the Tenant (Plaintiff), the "Landlord *may*, upon ninety (90) days' prior written notice" do so. (Lease at 5, ECF No. 12–1 (emphasis added).) The word "may" imparts no legal obligation; rather, it creates an option for the Landlord. Accordingly, even if Paragraph 26 was applicable to Plaintiff's lease-termination scenario, Ashland Junction, LLC, could not be held liable for failing to exercise this option.

For these reasons, the Court finds that Plaintiff has failed to state a claim for breach of contract against Ashland Junction, LLC, the successor-in-interest to the only other party to the

Lease. To the extent that Plaintiff attempts to state a claim for breach of contract against the PECO defendants as well, such claim fails for the reasons discussed in the Court's analysis of the Motion to Dismiss.

3. Count Four

In Count Four, Plaintiff alleges that the PECO Defendants committed fraud by misrepresenting their status as authorized to transact business in the Commonwealth of Virginia, despite allegedly lacking any such certificate of authority or registration. (Pl. Mot. at 9–10.) Specifically, Plaintiff asserts that this constituted fraud in the factum and fraud in the inducement. Under Virginia law, the elements of common law fraud are: “(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance thereon by the party misled, and (6) resulting damage to the party misled.” *Owens v. DRS Auto. Fantomworks, Inc.*, 288 Va. 489, 497 (2014). A claim of fraud in the factum requires a showing of fraud in the execution of a negotiated instrument itself, for example where the instrument was misread to the signor or the signor was presented a document other than that which she believed herself to be signing. *Sager v. W. T. Rawleigh Co.*, 153 Va. 514, 526–27 (1929). Finally, to state a claim for fraud in the inducement, a plaintiff must show that misrepresentations were made, which were “positive statements of fact, made for the purpose of procuring the contract; that they are untrue; that they are material; and that the party to whom they were made relied upon them, and was induced by them to enter into the contract.” *Brame v. Guarantee Finance Co., Inc.*, 139 Va. 394, 124 S.E. 477 (1924).

Other than alleging that the PECO Defendants' actions constituted fraud in the factum, Plaintiff has made no allegation that fraud occurred in the execution of the Lease, such that the document she ultimately signed was not what she believed it to be. Plaintiff has therefore not stated a claim for fraud in the factum. Similarly, Plaintiff has not alleged any facts to show that the PECO Defendants positively represented to her that they were registered with the SCC, or that Plaintiff relied upon any such statements when she negotiated the Lease and its Amendments. For this reason, Plaintiff has failed to state a claim for fraud in the inducement or common law fraud in general.

4. Count Eight

*6 Plaintiff's last proposed claim is that “Phillips Edison & Company constructive[ly] denied Plaintiff other empty

properties.” (Pl. Mot. at 12.) The Court construes this as a claim for tortious interference with a business expectancy (Count Eight). In support of her claim, Plaintiff presents excerpts of what appears to be a failed negotiation for alternative rental space, occurring two days after Plaintiff received the Termination Notice. (*Id.* at 12–13.)

As established by the Virginia Supreme Court, the elements of tortious interference with a business expectancy are as follows: “(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damage to plaintiff.” *Commercial Bus. Sys. v. Halifax Corp.*, 253 Va. 292, 300 (1997) (quoting *Glass v. Glass*, 228 Va. 39, 51–52 (1984)).

The facts alleged in the Complaint and the excerpted e-mail exchange fail to demonstrate that Plaintiff had a business expectancy in continuing to lease space from the PECO Defendants after the expiration of the Third Lease Amendment. Additionally, the facts presented are insufficient to show that the PECO Defendants engaged in intentional misconduct by refusing to offer Plaintiff the lease-rates and/or discounts she sought. As a result, Plaintiff has failed to state a claim on this Count as well.

For all the foregoing reasons, the Court finds that granting Plaintiff leave to amend her Amended Complaint would be futile because none of the claims in the proposed Second Amended Complaint would survive a successive motion to dismiss. Therefore, Plaintiff's Motion for Leave to File Second Amended Complaint will be denied.

IV. CONCLUSION

In sum, the Court finds that Plaintiff has failed to state a claim upon which relief may be granted in the Amended Complaint. The Court further finds that granting Plaintiff leave to file the proposed Second Amended Complaint would be futile, as the claims stated therein are similarly deficient as a matter of law. Accordingly, the Motion to Dismiss (ECF No. 7) will be granted, the Motion for Leave to File Second Amended Complaint (ECF No. 12) will be denied, and the action will be dismissed.

20WL 1 7 42L664W

An appropriate Order will accompany this Memorandum Opinion.

All Citations

Not Reported in Fed. Supp., 2017 WL 6273361

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 8

2001 WL 8898591



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Herrera v. LCS Financial Services Corp.](#), N.D.Cal., June 1, 2011

2004 WL 3313614

Only the Westlaw citation is currently available.

United States District Court,
W.D. Tennessee, Western Division.

James BOSTICK and Bobby H. Thrasher, Plaintiffs,

v.

ST. JUDE MEDICAL, INC., and St.
Jude Medical S.C., Inc., Defendants.

No. 03-2626 BV.

|

Aug. 17, 2004.

Attorneys and Law Firms

[Carroll C. Johnson, III](#), Law Offices of Carroll C. Johnson,
[Paul Berry Cooper, III](#), Deal, Cooper, & Holton, PLLC,
Memphis, TN, for Plaintiff.

[DeWitt M. Shy, Jr.](#), [J. Brook Lathram](#), [Melissa A. Maravich](#),
Burch Porter & Johnson, Memphis, TN, [James C. Martin](#),
[Steven M. Kohn](#), Reed Smith, LLP, Oakland, CA, for
Defendant.

REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[VESCOVO](#), Magistrate J.

*1 This action involves a product liability claim against defendants St. Jude Medical, Inc., and St. Jude Medical S.C., Inc. (collectively "St. Jude"). Before the court is the March 31, 2004 motion of the plaintiffs, James Bostick and Bobby Thrasher, seeking a determination, pursuant to [Rule 23\(c\)\(1\) of the Federal Rules of Civil Procedure](#), that this action may be maintained as a class action on behalf of the following class:

All persons in the United States and its territories who have had a [coronary artery bypass graft](#) procedure utilizing the St. Jude Medical Symmetry Bypass System Aortic Connector Device, designed, manufactured and marketed by

Defendant, St. Jude Medical, Inc. and/or
St. Jude Medical S.C., Inc.

Or, in the alternative:

All persons who have had a [coronary artery bypass graft](#) procedure utilizing the St. Jude Symmetry Bypass System Aortic Connector Device, designed, manufactured and marketed by Defendant, St. Jude Medical, Inc. and/or St. Jude Medical S.C., in the state of Tennessee.

The plaintiffs also seek an order confirming that James Bostick and Bobby Thrasher may serve as the representative plaintiffs and may be represented by the law firm of Deal, Cooper & Holton, PLLC, 296 Washington Avenue, Memphis, TN 38103. The motion was referred to the United States Magistrate Judge for report and recommendation. The magistrate judge held oral argument on August 3, 2004. Present at the hearing were Carroll Johnson for plaintiffs and DeWitt Shy and James Martin for St. Jude. Based on the briefs submitted by the parties, argument of counsel, and the record as a whole, it is recommended that the plaintiffs' motion for class certification be denied.

I. PROPOSED FINDINGS OF FACT

St. Jude Medical is a cardiac device manufacturer based in St. Paul, Minnesota. (Defs.' Mem. of Law in Opp'n to Class Certification at 4.) St. Jude manufactures pacemakers, [prosthetic heart valves](#), and cardiac repair devices. One of their cardiac products is the St. Jude Medical Symmetry Aortic Connector ("aortic connector"). (*Id.* at 5.) St. Jude began developing, designing, manufacturing, marketing, and selling the aortic connector in 2001. (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 1.)

The aortic connector is a small, star-shaped mechanical anastomosis device made of Nitinol that was designed for use by cardiac surgeons during surgery. (*Id.*) [Coronary artery bypass graft surgery](#) ("CABG") is designed to improve blood

2001 WL 8898591

flow through coronary arteries to the heart muscle. (Def.'s Mem. of Law in Opp'n to Pl.'s Mot. for Class Certification at 2.) During bypass surgery, the surgeon removes a portion of a blood vessel from the patient's leg, arm, or chest and uses the vessel as a conduit to bypass or detour an obstructed coronary artery. (*Id.* at 3.) Most often, surgeons use the saphenous vein from the leg as the bypass vessel. (*Id.*) The aortic connector is used to attach the saphenous vein graft to the aortic surface without sutures or the need for cross clamping or side biting of the aorta during CABG. (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 1.)

*2 Prior to the aortic connector's placement on the market, St. Jude submitted to the Food and Drug Administration ("FDA") a "pre-market notification" for the aortic connector claiming the device was a "substantially equivalent device" as contemplated in the Medical Device Amendment at 21 U.S.C. § 301 et seq.¹ The aortic connector received § 510(k) approval by the FDA on May 21, 2001. (*Id.* at 7.)

¹ Pursuant to the Medical Device Act of 1976, amended in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-95, a medical device covered under the statute may be marketed pursuant to a pre-market approval, or pursuant to a section 501(k) finding of "substantial equivalence." 21 U.S.C.A. § 360c(i).

The plaintiffs allege that St. Jude received adverse event reports from the medical community regarding complications associated with the aortic connector as early as August 2001. (*Id.*) The adverse reports describe a significantly higher incidence of complications in the form of [restenosis](#) and occlusion at the connector sites resulting in the need for re-operation using traditional hand-sewn techniques or other devices. (*Id.* at 2.) The first reported death associated with the aortic connector was on August 14, 2001. (*Id.*) The plaintiffs assert that since that date, multiple deaths associated with the aortic connector have been reported on the FDA's adverse events database. (*Id.*)

In addition to adverse reports, the plaintiffs also assert that a study conducted by Dr. G. Phillip Schoettle, a thoracic and cardiovascular surgeon in Memphis, on patients who had undergone bypass surgery using the aortic connector "revealed an 80 percent rate of occlusion or stenosis, uniformly occurring at the connector site" on patients having a repeat [cardiac catheterization](#) after the bypass surgery. (*Id.* at 8; *id.*, Ex. 1.) Dr. Schoettle's research indicated that in

traditional bypass surgery using hand-sewn grafts, there were roughly the same number of repeat [cardiac catheterizations](#) performed but with only a 15 to 20 percent rate of occlusion and stenosis. (*Id.*)

The plaintiffs also rely on minutes obtained from a FDA Circulatory System Devices Advisory panel meeting during which Ulwe Klima, a professor of cardiac surgery at Hanover Medical School for Cardiac Surgery, stated that follow-up [angiography](#) six months after bypass surgery on ten patients revealed six patients with occlusions and one with highly significant stenosis. (*Id.* at 9.) Klima further stated "angiographic follow-up at six months after surgery 'was sufficient to detect a real, real problem at the site of the anastomosis, even though these patients were asymptomatic. This is a very clear message as I say that even though you have an asymptomatic patient, you might have a significant problem at the site of the anastomosis.' " (*Id.*)

In addition to the independent studies presented to the court, the plaintiffs also submitted the affidavit of Dr. H. Frank Martin, Jr., a cardiologist who is board certified in [cardiovascular disease](#) and internal medicine.² Dr. Martin is not a cardiac surgeon, but asserts that he is familiar with techniques used during CABG and performs follow up care to CABG patients. (Martin Supp. Aff. at 1.) Dr. Martin opines, based upon his own personal knowledge and a review of Thrasher's and Bostick's medical records, that the implantation of St. Jude's aortic connector results in a "significantly increased risk of developing re-stenosis or occlusion of the [bypass graft](#) ... as opposed to traditional bypass surgery using sutures." (Martin Aff. at 2.) Dr. Martin states in his opinion that the "re-stenosis and occlusion associated with use of this device is uniformly located at the connector site and is causally related to use of the connector." (*Id.*)

² St. Jude has filed motions to strike both Dr. Martin's initial affidavit and his supplemental affidavit. At the time of the hearing, the plaintiffs had not responded to St. Jude's motion to strike Dr. Martin's supplemental affidavit and the time for response had not lapsed. Therefore, for the purposes of this report, the court will assume Dr. Martin's affidavit is admissible without deciding it is so, and the motions to strike will be addressed by separate order.

2001 WL 8898591

*3 Dr. Martin indicates that the increased risk associated with the aortic connector can be attributed to the material from which the device is made and the procedure in which the [bypass graft](#) must be installed. (*Id.*) He suggests that all persons who have undergone a bypass surgery in which the aortic connector was used are in “need of immediate testing and medical monitoring to determine the extent of any compromise of the [bypass graft](#) because of the significantly increased risk of developing re-stenosis or occlusion associated with this device.” (*Id.*) According to Dr. Martin, a [cardiac catheterization](#) is the “preferred procedure to determine the extent of [bypass graft](#) compromise.” (*Id.*)

The plaintiffs contend that St. Jude's device has led to “severe and disabling medical conditions resulting from collapse and scarring of the graft as a result of the implanted aortic connector.” (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 2.) The plaintiffs assert that it is undisputed that over 40,000³ aortic connectors have been implanted in persons worldwide, including at least 300 implantations in Tennessee. (*Id.* at 3, 18.) They contend that those patients receiving the implanted device “suffer a significantly increased risk of developing severe and life threatening compromise of the aortic/venous [bypass graft](#)” and is at “risk of occlusion and/or stenosis.” (*Id.* at 10.) The plaintiffs assert that the condition has “necessitated removal of the aortic connector in numerous patients, and severe harm to others who must now be monitored for further signs and symptoms of potentially fatal [arterial bypass graft](#) compromise.” (*Id.* at 2.)

³ In the class action complaint, the plaintiffs aver that over 50,000 aortic connectors have been implanted in persons worldwide. (Compl. at 6.) The discrepancy between 40,000 and 50,000 has little impact on the court's analysis of [Rule 23\(a\)](#)'s numerosity requirement.

The amended complaint alleges negligence, strict product liability failure to warn, strict product liability, negligence, breach of implied and express warranties, and unjust enrichment. On March 31, 2004, the plaintiffs filed a motion for class certification with this court. The plaintiffs assert that their nationwide class, or in the alternative, Tennessee class is comprised of two sub-classes:

Class I consists of all people in the United States and its territories who have had a [coronary artery bypass graft](#) procedure utilizing the St. Jude Medical Symmetry Bypass System Aortic Connector Device, or in the alternative all such

people who received the device in the State of Tennessee, *except* those whose injuries have resulted in their death or serious injury resulting in the removal of the device.

Class II consists of all people in the U.S. or the State of Tennessee who received the aortic connector, or in the alternative all such people who received the device in the State of Tennessee, and who have sustained presently compensable physical injuries due to the aortic connector, including, without limitation, injuries requiring the removal of the aortic connector and injuries resulting in serious damages and/or death.

(Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 4-5.) As a remedy for Class I (“medical monitoring class”), the plaintiffs seek access to a “coordinated program of medical monitoring services” to include diagnostic testing and preventative screening care along with an approved epidemiological study and review of the results of the monitoring. (*Id.* at 4.) The plaintiffs suggest that medical monitoring could take place in the form of a [cardiac catheterization](#), [MRI](#), [CT scan](#), [stress test](#), and/or [echocardiogram](#). They contend that the court should create and control a trust fund to provide for necessary medical monitoring and research.⁴ (*Id.*) For Class II (“personal injury class”), the plaintiffs seek damages for personal injury, and if applicable, wrongful death and survival damages. (*Id.* at 5.)

⁴ The plaintiffs assert that a medical monitoring program must include: locating and notifying the class members of the defects and the potential medical harm; the creation of a registry and a baseline database of Class members; the funding for periodic monitoring and assessment of the Class members; the researching, gathering and forwarding of epidemiological and treatment/diagnostic modality information to Class members' treating physicians and other health care providers; the researching and assessment of the injuries or complications which are or may result from the subject products' defects, including the recognition and assessment of risks of explant versus no-explant alternatives; providing medical treatment to remove the aortic connectors in those individuals who exhibit bypass graft compromise as a result of implantation of the device; the research and development and implementation of

2001 WL 8898591

appropriate psychological and emotion support and treatment programs for Class members and their spouses.

(Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 11.)

*4 Plaintiff James Bostick is a seventy-seven year old resident of Shelby County, Tennessee who seeks to represent Class I and II. Bostick underwent triple bypass surgery performed by Dr. Phillip Schoettle on August 27, 2002 in which the St. Jude aortic connectors were implanted. (*Id.* at 12; Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Class Certification at 8.) In November 2002, Bostick experienced a sudden onset of intense chest pain. (Opp'n at 8.) He subsequently underwent a [heart catheterization](#), [stress tests](#), and an [angioplasty](#) performed on November 15, 2002. (*Id.* at 9.) Bostick contends that he has experienced medical problems due to his initial bypass surgery and describes feeling tension, a nagging pain in his chest and a general lack of comfort in doing many of the things he previously did. (Pls.' at 12; Opp'n at 9.) Nevertheless, Bostick has not had the aortic connectors removed and is purported to represent the class of presently asymptomatic bypass patients. Bostick seeks compensatory and other damages for medical expenses and pain and suffering. He does not, however, seek lost wages or loss of consortium damages.

Plaintiff Bobby Thrasher is a sixty-one year old resident of Alcorn County, Mississippi who seeks to represent Class II. Thrasher underwent bypass surgery performed by Dr. Schoettle on May 2, 2002 during which an aortic connector was implanted. Thrasher alleges that he began experiencing problems in October, 2002. (*Id.*) He continued to experience burning and pressure in his chest into November and December of 2002. (*Id.* at 13.) A [cardiac catheterization](#) revealed blockage, and on January 16, 2003, Thrasher underwent another bypass surgery to remove the aortic connector as a result of occlusion at the connector sites. (*Id.* at 13, 29.) Thrasher seeks compensatory and other damages for medical expenses, pain and suffering, wage loss, reduced earning capacity and loss of consortium type injuries.

At the August 3, 2004 evidentiary hearing, plaintiffs' counsel presented his argument for class certification first. During his opening remarks, counsel acknowledged that the variations in state law for the claims asserted in the complaint would make the certification of a nationwide class difficult but indicated nevertheless that plaintiffs were not abandoning that request. He then proceeded to address the certification of a Tennessee class almost exclusively and presented no information on how

a nationwide class action for either Class I or Class II could be maintained. Furthermore, plaintiffs' counsel failed to outline how variations in state law could be managed on a nationwide basis and did not address choice-of-law considerations.

II. PROPOSED CONCLUSIONS OF LAW

The defendants argue that courts in every circuit and the Supreme Court have denied certification of personal injury, product liability actions like this one because the requirements of [Rule 23](#) could not be met. Essentially, the defendant's primary argument against certification is that there are too many individualized legal and factual circumstances in this case, which would make class treatment futile.

A. Framework of [Federal Rule of Civil Procedure 23](#)

*5 Within the framework of [Federal Rule of Civil Procedure 23](#), the district court has broad discretion in determining whether an action should be certified as a class action. *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 401 (M.D.Tenn.1996) (citing *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988)). That being said, district courts are required to conduct a "rigorous analysis" into whether the federal rule's prerequisites for a class action are met before certifying a class, "especially" in products liability cases involving drug or medical products that require FDA approval. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79, 1089 (6th Cir.1996) (emphasis in original).

[Rule 23](#) provides a two-part test for class certification and the burden of proof is on the plaintiff to establish that the lawsuit is maintainable as a class action. *Id.* at 1079. First, a plaintiff seeking class certification must meet the threshold requirements of [Rule 23\(a\) of the Federal Rules of Civil Procedure](#). The plaintiff must show that

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). After establishing those requirements, the plaintiff must satisfy one of the three subsections of Rule 23(b) that determine whether a class action is maintainable.

1. *Rule 23(a)*

a. *Impracticable Joinder of All Members*

Rule 23(a)(1) requires that a proposed class be “so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1). The impracticability of joinder for class action purposes is not determined by employing a strict numerical test. *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079. “When class size reaches substantial proportions, however, the impracticability requirement is usually satisfied by the numbers alone.” *Id.* (citations omitted).

Here, the plaintiffs contend that the class members are so numerous and geographically diverse that joinder of all members is impracticable. St. Jude does not dispute that both proposed classes meet the numerosity requirement of Rule 23(a)(1). Accordingly, the requirement for numerosity as to both classes is satisfied by the fact over 40,000 aortic connectors have been implanted worldwide and approximately 300 in Tennessee.

b. *Questions of Law and Fact Common to the Class*

This requirement is ordinarily referred to as the commonality test. The commonality test “is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class.” *In re Am. Med. Sys., Inc.*, 75 F.3d at 1080 (quoting Newberg & Alba Conte, *Newberg on Class Actions*, § 3.10, at 3-50 (3d ed.1992)). Nevertheless, “the prerequisites of commonality and typicality will normally be hard to satisfy” in a products liability case. *In re Temple*, 851 F.2d 1269, 1273 n. 7 (11th Cir.1988) (cited in *In re Am. Med. Sys. Inc.*, 75 F.3d at 1089).

*6 The plaintiffs contend that in this case, all class members seek to resolve the legal issue of whether a product was defective and caused plaintiffs harm.⁵ In turn, St. Jude argues that there are no common legal issues and no common factual issues from which the commonality requirement can be satisfied. As for common legal questions, St. Jude contends that the court must undertake a choice-of-law analysis to determine which state law applies to the claims of each class member. With state law differences on issues such as strict

product, negligence, and medical monitoring, St. Jude asserts that there will not be any legal issues common to the class as a whole.

5

The plaintiffs assert that the questions of law and fact common to Class I and II include:

- (a) whether the subject aortic connector designed, developed, manufactured, distributed, fabricated, supplied, advertised, promoted and/or sold by St. Jude has a defect or defects;
- (b) the nature of said defect(s);
- (c) whether the aortic connector causes an increased risk of occlusion at the connector sites;
- (d) whether St. Jude conducted testing on the aortic connectors to the extent reasonably necessary to determine its safety prior to selling and/or distributing it;
- (e) whether said testing was adequate and responsible;
- (f) whether St. Jude accurately reported its test results;
- (g) whether St. Jude failed to disclose to the FDA information known to it and relevant to the aortic connector's safety and efficacy;
- (h) whether the warnings, if any, given by St. Jude were reasonable in light of what it knew or should have known;
- (i) whether St. Jude's failure to give adequate and timely warnings of the dangers of the aortic connector constitutes negligence per se;
- (j) whether consumers who were implanted with the aortic connector are at an increased risk of developing serious adverse health effects including respiratory failure, heart attacks, and death;
- (k) whether monitoring and testing procedures which make early detection and treatment of the serious adverse health effects caused by occlusion at the connector sites are possible and beneficial;
- (l) whether medical monitoring and an epidemiological program is appropriate and necessary;
- (m) whether St. Jude designed and manufactured aortic connectors that were dangerously defective because they had a tendency to cause occlusion at the connector sites which could lead to serious adverse health effects including respiratory failure, heart attacks and death;

- (n) whether St. Jude concealed adverse information regarding the testing and safety of the aortic connectors used during their bypass surgeries;
 - (o) what steps, if any, St. Jude took to cure or mitigate the defects in the aortic connectors after it knew of the defects and of the injuries and risks associated with their use;
 - (p) whether St. Jude is strictly liable to those injured by their defective aortic connectors;
 - (q) whether St. Jude acted negligently towards Plaintiffs and members of the classes;
 - (r) whether Plaintiffs and others similarly situated need and would benefit from a notice and registry program, a medical surveillance program, and/or medical research program designed to address the substantially increased risk of harm that St. Jude's defective products have put them in;
 - (s) whether Class II Plaintiffs have suffered injury and/or death as a result of the implanted St. Jude aortic connector.
- (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 20-22.)

As for common factual issues, St. Jude contends that any claim of commonality is overshadowed by individual variations in the factual circumstances of each class member. St. Jude points to differences in class members' individual case histories and the fact that complications with the device could be due to surgical error. St. Jude notes that in a failure-to-warn case, each plaintiff's surgeon would be required to testify to determine what oral and written statements were made by St. Jude to the physician, and what he in turn told the patient. *See In re Am. Med. Sys., Inc.*, 27 F.3d at 1081.

c. Typicality of Claims and Defenses of the Representative Parties as Compared to the Class

Rule 23(a)(3)'s typicality requirement requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3).

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class,

and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

In re Am. Med. Sys., Inc., 75 F.3d at 1082 (6th Cir.1996) (quoting 1 *Newberg, supra*, § 3.13, at 3-76). "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *Id.* The plaintiff "whose claim is typical will ordinarily establish the defendants' liability to the entire class by proving his or her individual claim." ALBA CONTE & HERBERT B. NEWBERG, 6 NEWBERG ON CLASS ACTIONS § 18:8, at 29 (4th ed.2002).

The named plaintiffs contend that their claims are typical because each representative plaintiff's claim arises from the same course of events as other members of each class, apparently referring to, without explicitly stating, bypass surgery and implantation of the aortic connector. The plaintiffs argue that their claims "involve specific actions taken by St. Jude which affect each class member, including the marketing of thousands of aortic connectors each of which had the same dangerous defect." (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 24.) Bostick and Thrasher assert that the relief they seek is exactly the same as the relief sought by absent class members and that each individual claim will rely on the same evidence proving St. Jude's wrongful conduct. (*Id.*) Moreover, the plaintiffs argue that St. Jude's defenses will be the same. (*Id.* at 26.)

*7 St. Jude contends that are "numerous aspects" of the representative class members' claims that establish the absence of typicality. (Opp'n at 24.) In support of its argument, St. Jude directs the court's attention to the case of *In re Baycol Products Litig.*, 218 F.R.D. 197, 205 (D.Minn.2003), where a district court in Minnesota rejected plaintiff's argument that their claims were typical merely because they involved a single product and the same purported conduct. *Cf. In re Paxil Litigation*, 212 F.R.D. 539, 550 (C.D.Cal.2003) ("In focusing its typicality argument almost exclusively on the fact that there is a single defendant [], a single drug [], and a single

set of alleged misleading statements nationwide, Plaintiffs misconstrue the typicality requirement.”) The court went on to recognize the existence of issues such as “injury, causation, the learned intermediary defense, and comparative fault” would require the presentation of individualized evidence. *Id.* Furthermore, the court noted that “[b]ecause the theories asserted by this putative class are based on what Defendants’ knew at the time Baycol was prescribed, and whether Defendants acted reasonably based on such knowledge, the claims of the named representatives are not typical of the class.” *Id.* at 205-06; *see also*.

Applying the rationale of *In re Baycol Products Litigation* to the facts at hand, St. Jude argues that the plaintiffs’ claims are not typical of the classes they seek to represent. First, St. Jude contends that the plaintiffs allege breach of warranty, which may require in some states that plaintiffs present proof that they relied on statements made regarding the product. However, Thrasher and Bostick cannot recall whether they were informed Dr. Schoettle would be using St. Jude’s aortic connector during bypass surgery or not. Thus, St. Jude argues that the plaintiffs are not typical of class members who were informed of the use of aortic connectors. (Opp’n at 24.)

Furthermore, St. Jude asserts that plaintiff Bostick’s claims are not typical of the thousands of other patients who received an aortic connector and have experienced no trouble with the device. It contends that other aspects of Thrasher’s and Bostick’s medical and family histories are unique, which present substantial proof problems that may not be shared by all class members. St. Jude also argues that the plaintiffs’ damage claims are not typical of the class and notes that Class II includes aortic connector recipients with claims for wrongful death and survival while the plaintiffs themselves are alive and well. *But see Alpern v. UtiliCorp. United Inc.*, 84 F.3d 1525, 1540 (8th Cir.1996) (“The fact that damage calculations might differ slightly for [different plaintiffs] is a minor matter in comparison with the fundamental similarities.”) *See also In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 288-89 (S.D. Ohio 1997) (“No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action.”).

d. Adequacy of Representation

*8 The final requirement of Rule 23(a) is that “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). This rule has two requirements. First, “the representative must have

common interests with unnamed members of the class.” *In re Am. Med. Sys., Inc.*, 75 F.3d at 1083. Second, “it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel.” *Id.* The adequate representation requirement “overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members.” *Id.*

In addition to their arguments for typicality, the plaintiffs contend that Thrasher and Bostick possess all of the qualities of adequate class representatives. They assert that each named plaintiff meets the definition of his respective class and is willing to represent others similarly situated. Thrasher and Bostick have responded to St. Jude’s discovery requests and the disclosure requirements of the federal rules. Moreover, both plaintiffs have attended and participated in a class representative deposition. The plaintiffs argue that no facts suggest that Bostick and Thrasher have any conflict or other interest antagonistic to the vigorous pursuit of class claims against St. Jude on behalf of the entire class. Finally, Bostick and Thrasher propose that they have retained experienced and qualified counsel to vigorously represent the interests of the proposed classes.

St. Jude does not challenge the adequacy and qualifications of plaintiffs’ counsel; however, St. Jude does challenge Bostick’s and Thrasher’s suitability as class representatives on the same grounds upon which it opposed the representative plaintiffs’ satisfaction of the typicality requirement.

2. Rule 23(b)

Even if the prerequisites of Rule 23(a) are met, the plaintiff also has the burden of meeting one of the three criteria listed in 23(b). A class action will be maintained only if one of the criteria of Rule 23(b) is satisfied. In this case, the plaintiffs seek certification under all three provisions of Rule 23(b). They first seek to certify both classes under Rule 23(b)(3), which permits certification where plaintiffs can show that common questions predominate and that a class action is the superior method to adjudicate the controversy. Plaintiffs also seek to certify Class I, the medical monitoring class, under Rule 23(b) 2), which permits injunctive relief, if plaintiffs can show that St. Jude acted or refused to act on grounds generally applicable to the class. Finally, plaintiffs seek certification of Class I under Rule 23(b)(1)(A), which provides for class certification when separate actions would create a risk of inconsistent or varying adjudications that would establish

incompatible standards of conduct for the party opposing the class.⁶

⁶ The plaintiffs did not seek class certification under Rule 23(b)(1) in their complaint. They raise this argument only in their motion for class certification, and plaintiffs' counsel indicated at the hearing that the plaintiffs primarily sought certification of the medical monitoring class under the second and third subsections of Rule 23(b).

a. *Certification of Medical Monitoring Class under Rule 23(b)(1) and (b)(2)*

*9 St. Jude challenges certification of Class I under Rules 23(b)(1) and (b)(2) on four grounds. First, St. Jude contends that plaintiffs in Class I do not have constitutional standing to bring a medical monitoring claim. Second, St. Jude argues that medical monitoring is not an injunctive remedy and is therefore unavailable under Rule 23(b)(2). Third, St. Jude asserts that the medical monitoring class is not sufficiently cohesive. Finally, St. Jude claims that certification under Rule 23(b)(1) is inappropriate because there is no risk of inconsistent judgments.

Rule 23(b)(1)(A) provides for class certification when separate actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class. The plaintiffs contend that medical monitoring relief must be uniform to be effective. In response, St. Jude argues that any risk of divergent results from multiple cases exists only because the individual issues surrounding each class members claims will dictate each class member's prospective entitlement to medical monitoring. Therefore, St. Jude contends that class certification is inappropriate as a altogether.

Rule 23(b)(2) provides that plaintiffs may be eligible for relief when the party opposing certification has acted or refused to act on grounds generally applicable to the class. FED. R. CIV. P. 23(b)(2). The rule permits class actions in which the plaintiffs seek damages, but only in those cases where the primary relief sought is injunctive or declaratory. *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372 (6th Cir.1977) (emphasis in original). Unlike Rule 23(b)(3), Rule 23(b)(2) has no requirement of superiority or predominance. *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 01-1396, 2004 U.S. Dist. LEXIS 149, at 14 n. 7 (D.Minn. Jan. 5, 2004). However, the rule does include "an implicit 'cohesiveness' requirement, which precludes

certification when individual issues abound." *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 577 (D.Minn.1999) (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d. Cir.1998) (relying on the cohesiveness requirement enunciated by the Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)).

Here, Bostick and Thrasher seek medical monitoring relief consisting of a "supervised trust, funded by St. Jude, that would provide to the class the medical procedures and diagnostic tests recommended to uncover the likely conditions resulting from the implantation of an aortic connector." (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 37.) The plaintiff's assert that the monitoring program they seek would not provide compensation for any personal injuries that patients have suffered or might suffer. (*Id.* at 37-38.) Furthermore, the plaintiffs contend that the tests and procedures they propose are "not routinely performed as part of a routine follow-up of a patient who has received a bypass surgery." (*Id.* at 38.)

*10 St. Jude contends that Class I may not be certified under this subsection of Rule 23(b) because plaintiffs do not seek equitable relief. St. Jude claims that because the proposed medical monitoring trust fund would be paid for by St. Jude, the medical monitoring claim is equivalent to one for money damages. There is a Tennessee case holding otherwise. In *Craft v. Vanderbilt Univ.*, 174 F.R.D. 396, 406-07 (M.D.Tenn.1996), the court held that an action for court-supervised medical monitoring could qualify as injunctive relief under Rule 23(b)(2). *See also In re St. Jude Med., Inc. Heart Valves*, 2003 WL 1589527 (D.Minn., March 27, 2003); *Day v. NLO, Inc.*, 144 F.R.D. 330, 336 (S.D.Ohio 1992) (holding that a medical monitoring program could constitute injunctive relief as required by Rule 23(b)(2)). *But see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195-96 (9th Cir.2001) (addressing *Craft* decision and citing other cases where the equitable nature of medical monitoring was at issue). The key query is whether the plaintiffs can demonstrate that the "primary relief they are seeking is injunctive or declaratory" as opposed to a request for what is essentially monetary relief. *Kurcz*, 160 F.R.D. at 672.

b. *Predominance of Common Issues Versus Individual Issues under Rule 23(b)(3) for Classes I and II*

The plaintiffs argue that both classes can be certified under Rule 23(b)(3). This rule has two requirements: (1) that common questions of law or fact predominate over any questions affecting only individual class members and (2)

that a class action is superior to other available methods of adjudicating the controversy. [FED. R. CIV. P. 23\(b\)\(3\)](#). This rule parallels [Rule 23\(a\)\(2\)](#) in that both subdivisions require that common issues exist, but 23(b)(3)'s predominance test goes further by insuring that the common issues predominate over individual issues. *In re Am. Med. Sys., Inc.* 75 F.R.D. at 1084.

St. Jude argues that certification under [Rule 23\(b\)\(3\)](#) is not appropriate because there are too many factual and legal differences among the class members, thereby destroying predominance. Furthermore, St. Jude contends that a class action would not be a superior method of adjudicating either class's allegations because of the inherent difficulties in dealing with the laws of many states.

“[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual issues.” *Weinberg v. Insituform Tech.*, No. 93-2742, 1995 WL 368002, at *7 (W.D.Tenn. April 7, 1995) (Gibbons, C.J.). “Predominance is usually decided on the question of liability, so that if the liability issue is common to the class, common questions are held to predominate over individual ones.” *Id.*

The plaintiffs contend that the controlling issues of whether aortic connectors are defective, and whether St. Jude was negligent in failing to adequately test the product before placing in the stream of commerce “plainly predominate over any individual issues in this case.” (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 33.) The plaintiffs also argue that as to Class I, there are no legally relevant individual issues at all because Dr. Frank Martin contends that anyone with an aortic connector is injured by the aortic connector's presence in them alone and thus requires monitoring. (Pls.' at 33.) The plaintiffs do not address the fact that all class members claims will not be governed under the law of a single jurisdiction. Various jurisdictions have rejected class certification where the applicable states' laws vary and preclude a finding that common issues predominate. *In re Am. Med. Sys., Inc.*, 75 F.3d at 1085.

*11 “[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of settling the controversy...” Wright, 7 *Federal Practice & Procedure*, § 1780 at 562. [Rule 23\(b\)\(3\)](#) identifies

four factors which should be examined by the court to determine whether class treatment would be fair and efficient: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

[FED. R. CIV. P. 23\(b\)\(3\)\(A\)-\(D\)](#). In analyzing superiority, the court primarily considers “the difficulties likely to be encountered in the management of a class action.” [FED. R. CIV. P. 23\(b\)\(3\)](#). Here, the main factor affecting superiority involves application of state law to plaintiff's claims. Even if common questions of law exist, the application of multiple state laws may render the case unmanageable as a class action. See *Teletronics*, 172 F.R.D. at 290-91.

Bostick and Thrasher claim that variations in state law should not bar this class action and assert that “[i]f the elements of the cause of action are the same and legal standards on significant issues are substantially similar the state laws can be grouped for purposes of class certification.” (Pls.' Mem. of Law in Supp. of Mot. for Class Certification at 34 (citing *Teletronics*, 172 F.R.D. at 292).)

B. Certification of a Nationwide Class

After a careful review of the record, argument presented at the hearing, and the briefs submitted to the court, it is clear that the plaintiffs have not carried their burden of establishing that this medical product liability action is maintainable or manageable as a nationwide class under either prong of [Rule 23](#). Turning first to the threshold requirements of [Rule 23\(a\)](#), the plaintiffs have not presented any argument or evidence to the court as to how choice of law considerations and variations in state law can be reconciled with the requirements of commonality, typicality, and adequate representation of a nationwide medical monitoring or personal injury class.

Before the court can determine, for instance, whether the commonality requirement of [Rule 23\(a\)\(2\)](#) is satisfied, the court must undertake a choice of law analysis to determine

2001 WL 8898591

which state's law applies to the claims of each class member. *See In re Am. Med. Sys., Inc.* 75 F.3d 1069, 1085 (6th Cir.). In diversity cases, a federal court must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Thus, Tennessee's choice of law rules will apply to this case. Tennessee follows the approach of the *Restatement (Second) of Conflicts of Laws* and “provides that the law of the state where the injury occurred will be applied unless some other state has a more significant relationship to the litigation.” *Hattaway v. McKinley*, 830 S.W.2d 53, 59 (Tenn.1992). The plaintiffs have averred that approximately 40,000 patients in all fifty states have received the aortic connector in bypass surgeries. Therefore, the possibility exists that the laws of all fifty states could apply to the rights and liabilities of the parties.

*12 With state law differences on issues such as strict product liability, negligence, medical monitoring, and the availability of affirmative defenses, such as comparative fault and the learned intermediary doctrine, this court finds it difficult to see a common legal standard applicable to all class members, and the plaintiffs have not provided the court with any analysis on the issue. At most, the plaintiffs have listed generic “common questions” that can be characterized as “common” at the most superficial level. For instance, the plaintiffs include within their list of common questions issues such as whether St. Jude is strictly liable, whether St. Jude is negligent, and whether a medical monitoring program is appropriate and necessary. Because a choice of law analysis will be required to determine the law to be applied to the claims of each class member, the law that applies to these questions necessarily will differ as to each class member. Even the basic question of whether St. Jude's aortic connectors are defective will depend on the application of the laws of all fifty states and perhaps upon facts particular to each individual plaintiff.

The plaintiffs, both in their briefs and during oral argument, merely gloss over the choice of law issues. They give the court general assurances that any issues arising out of state law variations will be overcome. They have not submitted to the court a plan as to how the differences in state law could be managed. Without more, the plaintiffs have failed to meet their burden of proof under Rule 23 and have not illustrated that a common question of law exists, much less predominates as required under Rule 23(b)(3). *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 453 (D.N.J.1998) (finding that the plaintiff failed to meet its burden to “credibly demonstrate, through

an ‘extensive analysis’ of state law variances, ‘that class certification does not present insuperable obstacles’ ”); *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079, 1085. For this reason and for others that will be discussed below in the court's analysis of the certification of a Tennessee class, this court does not recommend the certification of Class I or II on a nationwide basis.

C. Certification of a Tennessee Class Action

In the alternative to a nationwide class, the plaintiffs seek certification of a Tennessee class action with two subclasses limited to patients who received the aortic connector in Tennessee. St. Jude asserts, however, that limiting the classes to Tennessee will not solve the problem plaintiffs face with state law variations because patients receiving the bypass in Tennessee may reside elsewhere, which would necessitate a choice of law analysis for the claims of each Tennessee class member. As this court stated above in the court's choice of law analysis for a nationwide class, there is a presumption in Tennessee that the law of the location of the injury controls. Under the plaintiffs' theory of this case, the location of the alleged injury is the place where the patients were implanted with the aortic connector and that place would be Tennessee under the plaintiffs' alternative class definition. In light of the place-of-injury presumption, this court submits that narrowing the medical monitoring class and personal injury class to Tennessee would in fact remove the overwhelming choice-of-law issues facing a nationwide class. The plaintiffs have asserted, without challenge by St. Jude, that at least 300 aortic connectors have been implanted in the state of Tennessee. That figure, as opposed to the 40,000 possible nationwide class members, would be manageable even if the court had to determine if another state had a more significant relationship to the plaintiffs' claims. Thus, there are common issues of law in a Tennessee class, and there is no dispute as to the numerosity requirement. Accordingly, the court must analyze the two Tennessee classes in more detail to determine whether the other requirements of Rule 23 are satisfied.

1. Class I-The Medical Monitoring Class

*13 At the outset, the court must address whether Class I has standing to bring an action for medical monitoring because standing is a requirement of Article III. *Sutton v. St. Jude Med., Inc.*, 292 F.Supp.2d 1005, 1007 (W.D.Tenn.2003) (citations omitted) (“Standing must be determined at the outset of litigation, as failure of a plaintiff to show standing deprives the federal courts of jurisdiction to hear the case.”); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,

2001 WL 898591

612-13, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (“Rule 23’s requirements must be interpreted in keeping with Article III constraints....”).

The burden is on the plaintiff to prove standing. Standing consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the injury and the defendant’s conduct of which the plaintiff complains; and (3) it must be likely that the injury will be redressed by a favorable decision. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The “injury in fact must be actual or imminent, not conjectural or hypothetical.” *Id.* Furthermore, in a class action, “the named plaintiff must allege an individual personal injury in order to seek relief on behalf of himself, or herself, or any other member of a class.” *Id.* (citing *O’Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). When analyzing standing at the class certification stage, the court assumes the truth of facts alleged by the plaintiff. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The plaintiffs have stated in support of their motion for class certification that “[t]here can be no confusion as to who belongs to Class I. Quite simply, Class I includes every U.S. or Tennessee patient who still has an aortic connector.” (Pls.’ Mem. of Law in Supp. of Mot. for Class Certification at 12.) At the hearing, plaintiffs’ counsel repeatedly referred to Class I as the class encompassing those patients who have been implanted with the aortic connector but are asymptomatic or without injury. After the hearing, however, the plaintiffs filed a Supplemental Statement Regarding Oral Argument on Motion for Class Certification that indicated that Class I also includes patients like Bostick who have allegedly suffered injury related to the aortic connector. (*See* Pls.’ Supplemental Statement Regarding Oral Argument at 1.) Thus, proposed Class I includes not only those people who have allegedly been injured but also patients who have experienced no trouble whatsoever with the implantation of the connector.

In addition to proposed class members who allege injury in fact, the plaintiffs argue that all members of Class I have been injured merely by the aortic connector’s presence in their bodies. The plaintiffs cite the opinion of Dr. Martin, the study conducted by Dr. Schoettle, and statements made by Dr. Klima as support for their assertion. (*See* Pls.’ Mem. of Law in Supp. of Motion for Class Certification at 33.) The argument plaintiffs make here is basically the same argument made by

the plaintiff in *Sutton v. St. Jude Medical, Inc.*, 292 F.Supp.2d 1005, 1007 (W.D.Tenn.2003).

*14 In *Sutton*, the plaintiff represented a class of individuals who had had an aortic connector implanted in their bodies. *Id.* While some patients included in the class had actually incurred physical injuries, the plaintiff had not suffered any physical injury or medical consequences from implantation of the aortic connector. *Id.* Nevertheless, the plaintiff argued that he and similarly situated class members suffered an increased risk of physical complications by merely having the device. *Id.* The issue confronted by the District Court of Western Tennessee in *Sutton* was “whether [plaintiff’s] increased risk of complications constitutes an ‘injury in fact’ sufficient to confer standing.” *Id.* The court noted that the issue was one of first impression in Tennessee. *Id.* After analyzing cases outside the Sixth Circuit, including a case specifically relied upon by Bostick and Thrasher in the present case,⁷ the *Sutton* court held that the plaintiff’s increased risk of harm did not meet the “constitutional requirement that an injury be neither ‘conjectural’ nor ‘hypothetical’ ” because the plaintiff had not presented any evidence of increased risks or complications among aortic connector recipients or any specific incidents of harm. *Id.* at 1008. Consequently, the court found that the plaintiff was unable to demonstrate standing and the court was without jurisdiction to hear the case. *Id.*

⁷ The plaintiffs rely on an unreported medical device products liability case currently pending in the District of Minnesota in support of their increased risk of harm argument. In *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 01-1396 JRTFLN, 2003 WL 1589527 at *11-12 (D.Minn. March 27, 2003), a district court found that a class of patients who had heart valve implants, but who had not suffered any injurious side effects as a result, had an increased risk of harm constituting injury in fact. That medical monitoring class, however, was later limited to patients from fifteen states in which medical monitoring is recognized as a stand-alone cause of action, without proof of injury. In *In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 01-1396 JRTFLN, 2004 U.S. Dist. LEXIS 149 at *17 (D.Minn. Jan. 5, 2004). Tennessee was originally included as a state recognizing such a claim but was withdrawn from the class in a later order. *See In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab.*

Litig., No. MDL 01-1396 JRTFLN, 2004 U.S. Dist. LEXIS 13965 at *15-16 (D.Minn. July 15, 2004). Accordingly, this case no longer supports Bostick's and Thrasher's increased risk of harm argument because Tennessee was specifically excluded from the medical monitoring class.

Here, Bostick and Thrasher are essentially making the same "increased risk of harm" argument. Unlike the plaintiff in *Sutton*, however, Bostick and Thrasher have presented what they contend is evidence of an increased risk of harm associated with the aortic connector by way of a study performed by Dr. Schoettle, comments made by Dr. Klima, and an affidavit filed by Dr. Martin. The evidence presented, however, does not demonstrate to a reasonable medical certainty that the aortic connector, in and of itself, increases the risk of physical complications. See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1204-05 (6th Cir.1988).

In light of the court's ruling in *Sutton*, this court finds that the asymptomatic members of Class I lack standing to bring an action for medical monitoring under the laws of Tennessee. Moreover, not only have the plaintiffs failed to demonstrate that asymptomatic Class I members have standing, they have not presented to the court any case law from Tennessee supporting their assertion that Tennessee recognizes an action for medical monitoring in the absence of a present injury. In fact, a review of the applicable case law reveals that Tennessee does require a present injury. See *In re St. Jude Med., Inc., Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 01-1396(JRT/FLN), 2004 U.S. Dist. LEXIS 13965 at *12 n. 3 (July 15, 2004) (noting that Tennessee requires present injury for medical monitoring claims); *Jones v. Brush Wellman, Inc.*, No. 1:00 CV 0777, 2000 WL 33727733 at *8 (N.D. Ohio, Sept.13, 2000) ("No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury."); *Potts v. Celotex Corp.*, 796 S.W.2d 678, 681 (Tenn.1990). Because there can be no showing that each class member has been injured, this court recommends that a medical monitoring class not be certified because the class is overly broad and lacks standing.

*15 The court also recommends that Class I not be certified on the grounds that plaintiff Bostick is not an adequate class representative as required by Rule 23(a)(4). Bostick is said to represent Class I and Class II because he still has an aortic connector and has been injured, although not injured enough to require the removal of the device. However, Bostick does not represent those members of Class I that are asymptomatic because he alleges he has been injured. An adequate class

representative "must be part of the class and possess the same interest and suffer the same injury as the class members." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594-95, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); see *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 210-11 (D.Minn.2003) ("Given the nature of a medical monitoring claim, the Court is not convinced that the named representatives will adequately represent the interests of those class members who have not suffered any injury as a result of taking Baycol...."). As a patient who allegedly has been injured by the implantation of the aortic connector, Bostick cannot adequately represent the portion of Class I that has experienced no problem whatsoever with the device.

The fact that Bostick has been injured also affects his satisfaction of the typicality requirement of Rule 23(a)(3). See *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.1996) (no typicality where class representative alleges different injuries from those suffered by other class members).

As the definition for Class I stands, an undetermined portion of the class has not established standing to bring an action for medical monitoring because they lack an injury-in-fact as required under Tennessee law, and they are not adequately represented by plaintiff Bostick who has allegedly sustained an injury. In addition, Bostick claims are not typical of the other members of the medical monitoring class. While the court has the discretion to redefine the class, it is recommended that the court decline to exercise that discretion. Accordingly, it is recommended that the plaintiffs' motion to certify a Tennessee medical monitoring class be denied.

2. Class II-The Personal Injury Class

In addition to its argument that the plaintiffs cannot satisfy the requirements of Rule 23 for a personal injury Tennessee class, St. Jude contends that the definition of Class II, which is limited to patients who have "sustained presently compensable physical injuries due to the aortic connector," is an improper definition because "it purports to identify the class member by reference to the ultimate question in this case-whether either plaintiff or any individual they purport to represent has a 'presently compensable injury due to the aortic connector.' " (Opp'n at 26.) The court need not conduct a detailed evaluation of the requirements of Rule 23(a) and 23(b) and an analysis of whether those requirements are met in this instance, because the court agrees with St. Jude's argument that the definition of Class II is an improper definition.

*16 “Although not specifically mentioned in Rule 23(a), a class must be sufficiently definite in order to warrant certification.” *Hagen v. Winnemucca*, 108 F.R.D. 61, 63 (D.Nev.1985). An inquiry into the merits of the case should not be required of the court in its determination of whether a person is a member of a class. *Id.* at 63-64; accord *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 403 (E.D.Pa.1995) (rejecting class defined to include all those who “received unsolicited facsimile advertisements” because determination of class membership would require a “mini-hearing on the merits” as to the central issue of liability); *Dunn v. Midwest Buslines, Inc.*, 94 F.R.D. 170, 172 (E.D.Ark.1982) (finding class definition “vague[] and ambigu[ous]” where class definition depended on an initial determination by the court that the each potential class member experienced discrimination); see also *Telectronics Pacing Sys., Inc.*, 172 F.R.D. at 282 (“While the Court must probe behind the pleadings in order to determine if class certification is proper, it is inappropriate for the Court to examine the merits of the claim in doing so.”). The ascertainability of class member is important so a court can decide “who will receive notice, who will share in any recovery, and who will be bound by the judgment.” *Van Nest v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 451 (D.R.I.2001). The requirement of ascertainability “is not satisfied when the class is defined simply as consisting of all persons who may have been injured by some generically described wrongful conduct allegedly engaged in by a defendant.” *Id.*

This appears to be exactly what the plaintiffs have done in this case in their definition of Class II. To establish who belongs in the personal injury class, the court would have to conduct “mini-trials on the merits” to determine the patients who have “sustained presently compensable physical injuries due to the aortic connector.” The fact that the aortic connector caused injury to each bypass patient would have to be established before class notice could be issued.

Furthermore, the court would have the daunting task of determining whether the injury caused by the aortic connector is “presently compensable” for over 300 patients receiving the device in Tennessee. As St. Jude has indicated to the court, such a determination “would involve all the diverse issues of liability, causation, etc. that these claims present” and would essentially require the adjudication of every potential class member's individual claim. (Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Class Certification at 27.) Because the members of Class II are not presently ascertainable without an adjudication of the merits of their claim, it is recommended that the court decline class certification of a Tennessee personal injury class as Class II is presently defined. Therefore, this court finds it unnecessary to complete further analysis of class certification pursuant to Federal Rule of Procedure 23.

CONCLUSION

*17 Accordingly, for the reasons stated herein, it is recommended that the plaintiffs' motion for certification of a nationwide class, a Tennessee medical monitoring class, and a Tennessee personal injury class be denied.

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.

All Citations

Not Reported in F.Supp.2d, 2004 WL 3313614

TAB 9



KeyCite Yellow Flag - Negative Treatment

Distinguished by *Bell v. 3M Company*, D.Colo., September 25, 2018

1998 WL 910271

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut.

Thomas BOWERMAN, et al.,

v.

UNITED ILLUMINATING, et al.

No. X04CV 940115436S.

|

Dec. 15, 1998.

Memorandum of Decision on Defendants'
Motion for Summary Judgment

KOLETSKY.

*1 In fifteen separate lawsuits, approximately one hundred and nine plaintiffs filed personal injury actions against the defendants, United Illuminating Company (UI), ABB C-E Services, Inc. (ABB), New England Abatement Resources, Inc. (NEAR) and Allwaste Asbestos Abatement, Inc. (Allwaste), for their alleged exposure to asbestos while working at the Harbor Station Power Plant located in Bridgeport, Connecticut. The five plaintiffs in the case of *Bowerman, et al v. United Illuminating, et al.*, No. X04-CV-94-0115436-S, and the five plaintiffs in the case of *Goodall, et al. v. United Illuminating, et al.*, No. X04-CV-95-0115437-S, are the “test plaintiffs” for purposes of the defendants' motion for summary judgment.

The critical issue in this matter is whether the plaintiffs, who claim exposure to asbestos, can maintain an action in negligence absent the manifestation of symptoms of any asbestos-related disease.

In 1993, the plaintiffs worked at the Bridgeport Harbor Station as boilermakers, steamfitters, welders, plumbers or pipefitters. During the same period of time, an asbestos abatement project was undertaken at this UI facility. UI contracted with ABB, NEAR and Allwaste for repairs and asbestos removal. The plaintiffs claim that, because of the actions of these defendants, they were exposed to asbestos and suffered injuries as a result thereof.

The amended complaint states three causes of action against each defendant: negligence; reckless and wanton misconduct; and intentional misconduct. The plaintiffs allege that, as a result of the defendants' conduct, they incurred the following injuries:

1. scarring of their lung tissue caused by inhalation of asbestos dust and fibers;
2. permanent implantation of [carcinogenic] asbestos fibers in plaintiffs' lungs;
3. an increased risk of developing lung cancer, mesothelioma, and other asbestos-related diseases; and
4. a present fear, apprehension and anxiety about developing asbestos-related diseases including cancer.

It is also claimed that they will incur future medical expenses relating to continuing medical surveillance to monitor whether plaintiffs' exposure causes health problems.

For the purposes of this summary judgment motion only, the plaintiffs and the defendant submitted a Joint Statement of Undisputed Facts dated April 17, 1998. In that document, the parties agreed to a number of facts, including the following:

Asbestos abatement at the Harbor Station project was conducted from October 2, 1993 until November 25, 1993. The ten plaintiffs have not manifested physical symptoms of an injury, illness or disease that could be asbestos-related. Six of the ten plaintiffs have not been diagnosed with an injury, illness or disease that could be asbestos-related.

One plaintiff was diagnosed with bibasilar fibrosis in 1990. Plaintiffs' medical expert reported this plaintiff revealed no evidence of an asbestos-related disease.

*2 One plaintiff was diagnosed with a restrictive ventilatory defect, with borderline diffusing capacity, in 1994. Plaintiffs' medical expert reported this plaintiff revealed no evidence of an asbestos-related disease.

Two of the plaintiffs have been diagnosed with an injury, illness or disease that could be asbestos-related. One plaintiff was diagnosed with [pleural thickening](#) on the right and obstructive pulmonary impairment. The other plaintiff was diagnosed with 0/1 ILO reading and bilateral circumscribed [pleural thickening](#).

None of the four plaintiffs referenced in the previous three paragraphs have had a doctor causally connect their conditions to asbestos exposure at Harbor Station. No plaintiff has undergone a lung tissue biopsy, received a medical diagnosis of lung tissue scarring as a result of his presence at Harbor Station or has received any treatment for asbestos-related injury, illness or disease. With the exception of one plaintiff, plaintiffs' claims for emotional distress arise solely from the fear of a future asbestos-related illness or disease.

The defendants filed a motion for summary judgment, with separate appendix, affidavits and exhibits, on May 1, 1998, seeking judgment on all counts of the plaintiffs' amended complaint, on the following grounds: 1) plaintiffs do not allege an actionable harm; 2) plaintiffs cannot prove to a reasonable degree of medical certainty that the defendants proximately caused their alleged injuries; 3) plaintiffs cannot recover for an increased risk of a future injury because they did not suffer a present injury; and 4) plaintiffs' claims of emotional distress are objectively unreasonable. The plaintiffs filed a memorandum in opposition, with accompanying attachments, affidavits and exhibits, on July 20, 1998. Thereafter, the defendants filed a reply to the plaintiffs' objection to the defendants' motion for summary judgment on August 10, 1998, and the plaintiffs filed a response to the defendants' reply, with accompanying affidavits, on August 21, 1998.

"Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact ... a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue ... It is not enough, however, for the opposing party merely to

assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Citations omitted; internal quotation marks omitted.) *Home Ins. Co. v. Aetna Life & Casualty Co.*, 235 Conn. 185, 202-03, 663 A.2d 1001 (1995). "A 'material' fact has been defined adequately and simply as a fact which will make a difference in the result of the case." *Catz v. Rubenstein*, 201 Conn. 39, 48, 513 A.2d 98 (1986).

*3 To successfully maintain an action in negligence, a plaintiff must demonstrate: 1) that the defendant has acted in a tortious manner; 2) that the plaintiff has sustained *actual injury* as a result of the defendant's actions; and 3) that the plaintiff knows of the causal connection between the defendant's tortious conduct and the resulting injury to the plaintiff. *BellSouth Telecommunications, Inc. v. W.R. Grace & Co.*, 77 F.3d 603 (2nd Cir.1996); *Dennis v. ICL, Inc.*, 957 F.Supp. 376, 379 (D.Conn.1997). Regardless of any breach of a standard of care by a defendant, a *compensable injury* must occur in order for an action in negligence to survive. *Barrett v. Danbury Hospital*, 232 Conn. 242, 252-53, 654 A.2d 748 (1995). The initial question, therefore, is whether the scarring of lung tissue and implantation of asbestos fibers in the lungs due to asbestos exposure, as alleged in the plaintiffs' amended complaint, are compensable injuries as a matter of law. The plaintiffs claim that, although there are currently no physical symptoms of an asbestos-related disease, the inhalation of asbestos fibers caused a biological-physical harm to the lung tissue which has not yet manifested itself. There are no Connecticut cases addressing this precise issue.

An injury occurs when a party suffers some form of actionable harm, although the harm need not have reached its fullest manifestation for a cause of action to accrue. *Burns v. Hartford Hospital*, 192 Conn. 451, 460, 472 A.2d 1257 (1984). "Actionable harm occurs when the plaintiff discovers or should discover, through the exercise of reasonable care, that he or she has been injured and that the defendant's conduct caused such injury." *Champagne v. Rabestos-Manhattan, Inc.*, 212 Conn. 509, 521, 562 A.2d 1100 (1989).

As to what constitutes an "injury" or "harm," section 7 of the Restatement of Torts, Second, provides the following definitions:

The word "injury" ... denote[s] the invasion of any legally protected interest of another.

The word “harm” ... denote[s] the existence of loss or detriment in fact of any kind to a person resulting from any cause.

The words “physical harm” ... denote the physical impairment of the human body ...

In the “Comment” section of the Restatement, it is noted that “harm” implies “a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. Physical changes or alterations may be either beneficial, detrimental or of no consequence to a person. In so far as physical changes have a detrimental effect on a person, that person suffers harm.”

Although no Connecticut courts have had the occasion to rule upon the issue of whether or not the scarring of lung tissue and the implantation of fibers in the lungs due to asbestos exposure constitute a detrimental physical harm, there are decisions in other jurisdictions concluding asymptomatic plaintiffs have no actionable claims under such circumstances.

*4 In *Eagle-Picher Industries, Inc., v. Liberty Mutual Insurance*, 682 F.2d 12, 18, (1st Cir.1982), the court noted that even when asbestos fiber becomes embedded in the lungs and the scarring process has begun, disabling disease or death is by no means inevitable. For this reason, many courts fail to recognize a viable claim until after some physical manifestation of an asbestos-related disease. In *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1102 (5th Cir.1973), for example, after remarking that a worker's present condition is the biological product of many years of exposure to asbestos dust, the court noted that “courts have consistently held that the cause of action does not accrue until the effects of such exposures manifest themselves.”

The District Court in Hawaii was even more specific when it concluded that “the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functional impairment” is not an injury sufficient to support a claim for damages. In *re Hawaii Federal Asbestos Cases*, 734 F.Supp. 1563, 1567 (D.Hawaii 1990). Similarly, in *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 239 (Pa.1996), the Pennsylvania Supreme Court held that asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action. The court went on to say that the plaintiffs are

not precluded, however, from subsequently commencing an action for an asbestos-related injury when symptoms develop and physiological impairment begins.

Plaintiffs' argument in the present case that, although asymptomatic, the plaintiffs have suffered some type of “pathological harm” due to their inhalation of asbestos, is an argument which has failed in the following cases. In *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3rd Cir.1985), the court held that “subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.” (Emphasis added.) In *Bernier v. Raymark Industries, Inc.*, 516 A.2d 534, 543 (Me.1986), the court concluded that subclinical injury is not an actionable injury under tort law “even assuming that any inhalation of asbestos dust immediately causes microscopic injury to lung tissues ...” See also *Anchor Packing v. Grimshaw*, 115 Md.App. 134, 692 A.2d 5, 17 (Md.App.1997), wherein the court held that “cellular changes resulting from asbestos exposure, such as pleural plaques and thickening, alone” does not constitute a legally compensable injury.

Another line of cases denying relief for exposure without the manifestation of physical injuries involves claims brought pursuant to the Federal Employers' Liability Act (FELA). Although not controlling precedent in this case, those cases hold that actional injury under FELA does not exist until the accumulated effect of the inhalation of or exposure to deleterious substances manifests itself as a physical injury. *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997); *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); *Amendola v. Kansas City Southern Railway Co.*, 699 F.Supp. 1401 (W.D.Mo.1988). “The words ‘physical impact’ do not encompass every form of ‘physical contact.’ And, in particular, they do not include a contact that amounts to no more than an exposure ...” *Metro-North Commuter Railroad Co. v. Buckley*, *supra*, 2118.

*5 There are other cases, however, in which the courts have concluded that whether such injuries as those alleged by the plaintiffs in the present case are actionable injuries is a question of fact rather than a matter of law. In *Bryson v. Pillsbury Co.*, 573 N.W.2d 718 (Minn.App.1998), the court held that the trier of fact should determine whether asymptomatic chromosome damage constituted a legally compensable present injury. The New Jersey Supreme Court,

in *Caterinicchio v. Pittsburgh Corning Corp.* 605 A.2d 1092 (N.J.1992), concluded that the question was factual and remained within the province of the trier of fact because the plaintiffs' medical experts and the defendants' medical experts disagreed on the critical issue whether the plaintiffs' **pleural thickening** and **pleural plaques** constituted a physical injury.

In another case, claiming damages based upon exposure to contaminated air and drinking water, the District Court in Minnesota stated: “[T]his Court cannot rule as a matter of law that plaintiffs' alleged injuries are not ‘real’ simply because they are subcellular. The effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to determine whether plaintiffs have sufficient present harm.” *Werlein v. United States*, 746 F.Supp. 887, 901 (D.Minn.1990). A Third Circuit decision, decided under Pennsylvania law, similarly concluded that with respect to asbestos-related pleural thickening, substantial medical disagreement over the classification of such a “condition” prevented the court from declaring it to be an injury as a matter of law. “This question is factual and remains within the province of the trier of fact.” *Howell v. Celotex Corp.*, 904 F.2d 5 (3rd Cir.1990).

This court is persuaded that the better line of reasoning warrants the conclusion that whether or not the scarring of lung tissue and implantation of asbestos fibers in the lungs constitute a compensable legal harm is an issue of fact if there is evidence showing such conditions to be detrimental and if there is evidence showing the existence of such conditions in the plaintiffs. Although the plaintiffs contend that their expert, Dr. Cullen, opined that a biological-physical harm occurs to the lung tissue almost immediately after the inhalation of asbestos fibers, an examination of his affidavits does not reveal any such statement. The nearest approximation appears to be the statement in paragraph 6 of his letter to Attorney Shafner dated July 9, 1998, wherein he says:

There is ample evidence that asbestos is ingested by certain cells within the respiratory tract and other organs which, in turn, leads those cells to incite an inflammatory response in their vicinity. Within the lung tissue, it is most likely that the inflammatory response itself initiates and promotes **carcinogenesis** in the epithelial cells, eventually leading to ... **lung cancer** ... In any event, I think that the best evidence at the present

time suggests that within the lung, the most important aspect of **carcinogenesis** relates to inflammation and in the pleura, probably direct interaction and **tumor initiation** via genetic change.

*6 Dr. Cullen, at paragraph 12 of his letter, addresses pleural changes.

Individuals who have asbestos-related pleural changes have, as a group, clearly experienced substantial asbestos exposure which is the basis for such pleural changes. In general, as a group, they are also reasonably older since it takes approximately 20 years from first exposure for the appearance of asbestos-related pleural changes. Having said that, in most epidemiologic studies which have looked at the question, individuals with pleural changes compared to co-workers without such pleural changes, appear to have a higher risk of developing asbestos-related malignancy. The basis for this is uncertain and may relate to the fact that as a group they have had more exposure to asbestos or may relate to the fact that as a group they have more evident biological responsiveness to asbestos than that group which has been exposed but has shown no pleural response. In any event, it is not that the **pleural plaques** are, themselves, are [sic] pre-malignant or auger malignancy, but only that they serve as a good marker for previous exposure and/or biologic responsiveness and, therefore, help us select a group which probably has a somewhat higher risk of developing **lung cancer** and/or **mesothelioma** than others who appear comparable in other ways.

The Court holds that Dr. Cullen's statements, taken as a whole, do not characterize the conditions alleged in plaintiffs' amended complaint as detrimental physical harms or state that those conditions constitute “bodily changes” as commented upon in the Restatement of Torts, Second.

Even if the Court were to conclude that Dr. Cullen's remarks are sufficient to establish that such conditions are detrimental and constitute an actionable harm, nothing has been submitted to demonstrate that these particular plaintiffs suffer from either of the alleged conditions. Simply stated, the plaintiffs have failed to put this matter in issue.

At oral argument on this motion for summary judgment, plaintiffs' counsel contended that it is a reasonable inference

that some of the plaintiffs have asbestos fibers in their lungs. In addition, it is claimed that the opinions of Dr. Cullen expressed in his letters dated July 9, 1998 and August 18, 1998, support the plaintiffs' claims that they are reasonably certain to have suffered a harm due to their inhalation of asbestos and that these opinions are based upon reasonable medical probability rather than mere speculation or conjecture. The court disagrees.

The letters of Dr. Cullen speak generally to risks of exposure to asbestos. Nowhere can the statement be found that these plaintiffs suffered scarring of the lung tissue and permanent implantation of asbestos fibers in their lungs as a result of their inhalation of asbestos at the Harbor Station. What he does say, at paragraph 11 of his letter dated July 9, 1998, is that he believes "it would be fair to say that even at the low levels postulated under the limited exposure assumption, there could be some biologic response to asbestos exposure in the men at the harbor station. I do not believe that his [sic] could be ascertained by any known clinical testing, including lung biopsy, in view of the fact that the changes are likely to be relatively slight compared to the normal variation seen in industrial workers who have been exposed to a wide variety of air pollutants and toxins over a working career."

*7 Not only does this statement fail to rise above the level of "speculation and conjecture," but the plaintiffs' medical expert has even concluded that there is no way to demonstrate that these plaintiffs suffer from the conditions alleged in the amended complaint. His letter dated August 18, 1998, does nothing to further the plaintiffs' claims. He does give an opinion with respect to medical monitoring for these plaintiffs: "I have recommended medical monitoring of asbestos-exposed individuals at intervals appropriate to their level of exposure as I have for all asbestos-exposed individuals." His recommendation, therefore, is that medical monitoring is needed for anyone exposed to asbestos. He does not say that these particular plaintiffs require monitoring because of the biologic harms already incurred as a result of their exposure at the UI facility.

In addition to Dr. Cullen's affidavits, the individual plaintiffs have submitted affidavits in support of their objection to the defendants' motion for summary judgment. One of the affidavits (Affidavit of Samuel Ray) contains the statement: "I have trouble breathing from time to time, and I believe it is related to the asbestos exposure I have had throughout my 29-year career as a boilermaker." This subjective statement, without any medical documentation to

support it, is insufficient to demonstrate that this symptom actually resulted from this plaintiff's claimed exposure to asbestos at the Harbor Station. It does not rise to the level of establishing a genuine issue of material fact as to whether the plaintiff's alleged asbestos exposure is the cause of his current shortness of breath. "The medical effect upon the human system of the infliction of injuries, is generally not within the sphere of the common knowledge of a lay witness ..." *Aspiazu v. Orgera*, 205 Conn. 623, 631, 535 A.2d 338 (1987).

No causal connection has been shown between the inhalation of asbestos and the "harm" alleged to have been suffered by these plaintiffs. At the outset, one must show the fact of "damage." *Simon v. New Haven Board & Carton Co., Inc.*, 516 F.2d 303, 306 (2d Cir.1975). Further, the plaintiffs must demonstrate that the defendants' actions were the proximate cause of the plaintiffs' injuries. *Fleming v. Garnett*, 231 Conn. 77, 85, 646 A.2d 1308 (1994). Proximate cause establishes a reasonable connection between the acts or omissions of the defendants and the harm suffered by the plaintiffs. *Stewart v. Federated Dept. Stores, Inc.* 234 Conn. 597, 662 A.2d 753 (1995).

"To be entitled to damages a plaintiff must establish a causal relation between the injury and the physical condition which he claims resulted from it ... This causal connection must rest upon more than surmise or conjecture ... A trier is not concerned with possibilities but with reasonable probabilities ... [The causal relationship between an injury and its later physical effects may be established] by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Citations omitted.) *Aspiazu v. Orgera*, 205 Conn. 623, 630-31, 535 A.2d 338 (1987); *Struckman v. Burns*, 205 Conn. 542, 554, 534 A.2d 888 (1987); *Budney v. Zalot*, 168 Conn. 388, 388-89, 362 A.2d 861 (1975). "Any expert opinion that describes a 'condition' as possible or merely fifty-fifty is based on pure speculation." *Aspiazu v. Orgera*, *supra*, 632.

*8 The plaintiffs have failed to meet the requisite standard of reasonable medical probability. Not only have they failed in demonstrating that these plaintiffs have lung scarring and implantation of asbestos fibers in their lungs, they have also failed to establish any connection between the defendants' alleged conduct and the harm they claim resulted from it. The plaintiffs "failed to prove the injur[ies], and therefore could

not prove causation.” *LaBieniec v. Baker*, 11 Conn.App. 199, 208, 526 A.2d 1341 (1987).

The plaintiffs' amended complaint also alleges that as a result of the defendants' conduct, the plaintiffs suffer an increased risk of developing lung cancer, mesothelioma, and other asbestos-related diseases.

“[I]n a tort action, a plaintiff who has established a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm is entitled to compensation to the extent that the future harm is likely to occur.” *Petriello v. Kalman*, 215 Conn. 377, 397-98, 576 A.2d 474 (1990). A plaintiff is not burdened with proving the occurrence of the claimed future event is more likely than not, when it is a present risk rather than a future event for which damages are sought. *Id.*, 396, 576 A.2d 474. “[A] plaintiff may recover for the fear of future medical treatment and disability, as distinguished from a recovery for the future disability itself, even if there is only a possibility that such future treatment or disability will take place.” *Goodmaster v. Houser*, 225 Conn. 637, 645, 625 A.2d 1366 (1993).

The plaintiffs fail in their claims for increased risk of future harm for the simple reason that they have failed to establish that they personally have suffered present injuries. Without a present injury, under the *Petriello* rationale, there can be no claim for an increased risk of future harm. Even if it is assumed that the scarring of lung tissue and implantation of asbestos fibers in the lungs are compensable present injuries, there is nothing to indicate these plaintiffs have suffered these injuries as a result of actions of the defendant.

The plaintiffs' cause is not furthered by the claim that many of the individual plaintiffs had previous exposure to asbestos and therefore face a higher risk for the development of asbestos-related diseases. Such an argument cannot prevail without the existence of a present injury. Furthermore, such a claim may actually preclude the establishment of proximate cause if a plaintiff's exposure in the present case was minimal in comparison to his total exposure to asbestos over his work life.

In the plaintiffs' amended complaint, it is alleged that their injuries include “a present fear, apprehension and anxiety about developing asbestos-related diseases including cancer” as a result of the negligent and intentional actions of the defendants. The parties' briefs make reference to the negligent and intentional infliction of emotional distress.

*9 It is important to note at the outset that the claims of emotional distress have not been pleaded as separate causes of action. To support an action for negligent infliction of emotional distress, a plaintiff has “the burden of pleading and establishing that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm.” *Morris v. Hartford Courant Co.*, 200 Conn. 676, 683, 513 A.2d 66 (1986). There are no such allegations made in the plaintiffs' amended complaint.

To sufficiently plead a cause of action for intentional infliction of emotional distress, it must be alleged: 1) that the defendant intended to inflict emotional distress, or that he knew or should have known that emotional distress was a likely result of the defendant's conduct; 2) that the conduct was extreme and outrageous; 3) that the defendant's conduct was the cause of the plaintiff's distress; and 4) that the emotional distress sustained by the plaintiff was severe. *DeLaurentis v. New Haven*, 220 Conn. 225, 266-67, 597 A.2d 807 (1991); *Petyan v. Ellis*, 200 Conn. 243, 253, 510 A.2d 1337 (1986). There are no such allegations in the plaintiffs' amended complaint.

For this reason, the emotional distress alleged to have been suffered by the plaintiffs must be treated as a claim for damages resulting from the alleged negligent and intentional conduct of the defendants. The emotional distress would be the fear of contracting an asbestos-related disease in the future as a result of past exposure to asbestos.

Because the plaintiffs failed to show that they have suffered any present injuries, a claim for emotional distress in this case could only survive if mere exposure to asbestos entitles a claimant to emotional distress damages. There are no Connecticut cases directly on point. The case of *Barrett v. Danbury Hospital*, 232 Conn. 242, 654 A.2d 748 (1995), however, does involve a claim for compensation based upon the plaintiff's fear of contracting a blood-borne disease as the result of the alleged negligent actions of the defendant. The plaintiff had been placed on a stretcher in the defendant's emergency room and came in contact with the blood from a prior patient because of a torn vinyl pad which covered the stretcher. The defendants moved for summary judgment and the court granted the motion.

Our Supreme Court affirmed the trial court's decision, noting that the “trial court did not grant the motion for summary judgment on the basis of a finding that there was no

negligence on the part of the defendants. The trial court determined that, regardless of any breach of the standard of care by the defendants, a compensable injury did not result.... [E]ven if the applicable standard had been violated, the plaintiffs' alleged injuries were not compensable as a matter of law." *Id.*, 252-53, 654 A.2d 748.

*10 The plaintiffs' claim that the fear arises from an increased risk of future asbestos-related diseases cannot succeed for the reasons previously discussed, i.e., the plaintiffs have made no showing of present injuries and therefore cannot prevail on a claim for an increased risk of related injuries. *Goodmaster v. Houser*, 225 Conn. 637, 625 A.2d 1366 (1993); *Petriello v. Kalman*, 215 Conn. 377, 576 A.2d 474 (1990).¹ For these reasons, the plaintiffs' claims of emotional distress are not viable.

¹ With respect to the one plaintiff who actually has received treatment for emotional problems, there was no evidence submitted indicating an issue of fact as to a causal connection between the alleged actions of the defendants and the plaintiff's emotional distress.

Counsel for the plaintiffs conceded at oral argument that the claim for medical monitoring expenses does not stand alone. Recovery for such expenses would only be allowable if these plaintiffs have sustained actionable injuries. The court, having ruled that the plaintiffs have furnished no evidence showing the existence of such injuries, concludes that the claim for future medical expenses relating to continuing medical surveillance must fail.²

² Although the plaintiffs' expert, Dr. Cullen, recommended medical monitoring for these plaintiffs in his letter dated August 18, 1998, he indicated he recommends such monitoring "for all asbestos-exposed individuals." He does not say these particular plaintiffs require monitoring because of the biologic harms already incurred as a result of exposure to asbestos.

The plaintiffs cite the case of *Doe v. Stamford*, 241 Conn. 692, 699 A.2d 52 (1997), in support of their claim for medical monitoring expenses. In *Doe v. Stamford*, the plaintiff police officer sought compensation for past and future unpaid medical testing and treatment under the Workers' Compensation Act (act) for injuries related to HIV exposure and tuberculosis. Our Supreme Court concluded that the

plaintiff's exposure to an infectious disease constitutes a compensable "injury" under the act. The Court noted that the exposures were sustained in incidents that arose out of and occurred in the course of his employment. Further, the Court stressed the *humanitarian and remedial purposes of the Workers' Compensation Act*. For this reason, the court finds the *Doe v. Stamford* case inapposite to the case at bar.

These plaintiffs are not without a remedy. If and when symptoms of an asbestos-related disease manifest themselves, they can bring a cause of action for their injuries.

Prior to the enactment of [General Statutes Sections 52-577a](#) and [52-577c](#), the statute of limitations applicable to a cause of action based upon a claim of negligent exposure to a substance such as asbestos was Section 52-584. That provision reads, in relevant part, as follows:

Limitation of action for injury to person or property

No action to recover damages for injury to the person ... caused by negligence, or by reckless or wanton misconduct, ... shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of ... (Emphasis added.)

A number of courts have construed the word "injury" in cases in which defendants have moved to dismiss plaintiffs' claims for failure to bring them within the time permitted by the statute. In those cases, the courts held that a cause of action does not accrue until the plaintiff suffers an "actionable harm." The "actionable harm" that would be the "injury" under Connecticut law occurs when the plaintiff discovers or should discover, in the exercise of reasonable care, that he or she has been injured and that the defendant's conduct caused that injury. *Durrett v. Leading Edge Products, Inc.*, 965 F.Supp. 280 (D.Conn.1997). A breach of duty by a defendant, and a causal connection between that defendant's breach of duty and the resulting harm to the plaintiff, are the essential elements of a negligence cause of action. They are, therefore, necessary ingredients for actionable harm which will result in the accrual of the action for limitation purposes. *Catz v. Rubenstein*, 201 Conn. 39, 513 A.2d 98 (1986).

*11 [Sections 52-577a](#) and [52-577c](#) were subsequently enacted by the legislature and are now the operative statutes for asbestos claims based upon product liability and personal

injury caused by exposure. A plaintiff instituting a product liability claim against a product seller must bring suit within “three years from the date when the *injury*, death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered ...” (Emphasis added.) Subsection (e) of Section 52-577a further provides, with respect to asbestos, that “no such action for personal injury ... may be brought by the claimant later than thirty years from the date of last contact with or exposure to asbestos.” Again, “injury” has been construed to be first sustained, for purposes of Connecticut’s statute of limitations, when the party suffers some form of actionable harm. *Durrett, supra*, 283. In *Champagne v. Raybestos-Manhattan, Inc.*, 212 Conn. 509, 526-27, 562 A.2d 1100 (1989), the actionable harm occurred when the asbestos-related disease became symptomatic.

In the present case, the applicable statute of limitations is section 52-577c. That provision reads, in relevant part, as follows:

Limitation of action for damages caused by exposure to a hazardous chemical substance or mixture or hazardous pollutant

(b) Notwithstanding the provisions of sections 52-577 and 52-577a, no action to recover damages for personal injury or property damage caused by exposure to a hazardous chemical substance or mixture or hazardous pollutant released into the environment shall be brought but within two years from the date when the *injury* or damage complained of is discovered or in the exercise of reasonable care should have been discovered. (Emphasis added.)

A cause of action accrues when the “injury” is discovered or should have been discovered, not from the date of the exposure. In construing the term “injury” in Section 52-577c, it is reasonable to conclude it would be given the same judicial interpretation applied to the term “injury” in General Statutes Sections 52-584 and 52-577a.³

³ A superior court decision, *Woodford v. Heritage Village*, 1994 WL 632464 (Conn.Super.), held that the two-year limitation period under this statute begins to run on the date the claimant discovered or should have discovered the injury, not the date the alleged negligent action of the defendant occurred. In *Woodford*, the plaintiff had been sprayed in the face with a pesticide, but nothing was submitted to

show the injuries manifested immediately after her exposure to the pesticide.

Upon manifestation of symptoms causally related to exposure to asbestos, the two-year limitation period under Section 52-577c would begin to run, i.e., a cause of action for actionable injuries accrues at that point in time. If these plaintiffs do manifest symptoms of an asbestos-related disease, they are not without a remedy under the law.

As previously noted, plaintiffs’ amended complaint alleges negligence; reckless and wanton misconduct; and intentional misconduct. The negligence claims against the defendants cannot survive this motion for summary judgment because the plaintiffs have failed to show that they have suffered actionable injuries or a causal connection between the alleged actions of the defendants and harm suffered by the plaintiffs. The causes of action based in reckless and wanton misconduct and intentional misconduct must fail for the same reasons. A legal or proximate causal connection between the conduct of a defendant and the resulting injury to the plaintiff is a necessary element of causes of action in recklessness. *Boehm v. Kish*, 201 Conn. 385, 390, 517 A.2d 624 (1986).

*12 Because there has been no showing that these plaintiffs have suffered compensable harm, there can be no cause of action regardless of whether such conduct could be classified as negligent, reckless or intentional. A breach of a standard of care is immaterial if there are no compensable injuries. *Barrett v. Danbury Hospital*, 232 Conn. 242, 252-53, 654 A.2d 748 (1995). Additionally, “[n]o matter how negligent a party may be, if his act bears no causal relation to the injury, it is not actionable.” *Espósito v. Schiff*, 38 Conn.App. 726, 730, 662 A.2d 1337 (1995); *LaBieniec v. Baker*, 11 Conn.App. 199, 206, 526 A.2d 1341 (1987).

“A plaintiff cannot transform a negligence count into a count for willful and wanton misconduct merely by appending a string of adjectives to allegations that clearly sound in negligence.” *Brown v. Branford*, 12 Conn.App. 106, 110, 529 A.2d 743 (1987). “[Recklessness] is more than negligence, more than gross negligence. (Citation omitted.) ... Willful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. (Citation omitted.) Its characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. (Citations omitted.) Not only the action producing the injury but the resulting injury also must be intentional.” *Dubay v. Irish*, 207 Conn. 518, 532-33, 542 A.2d 711 (1988). Whether conduct amounts to willful, wanton and

1998 WL 910271, 23 Conn. L. Rptr. 589

reckless misconduct becomes strictly a matter of law when the mind of a fair and reasonable man could reach but one conclusion. *Id.*, footnote 10, 534, 542 A.2d 711.

A review of the plaintiffs' amended complaint reveals essentially the same allegations of misconduct for all three causes of action. The court finds that the conduct alleged does not rise to the level of reckless and wanton misconduct or intentional misconduct.

The court finds that the plaintiffs have failed to state a cause of action in negligence, reckless and wanton misconduct or intentional misconduct. The plaintiffs have not established the existence of a material fact that is in issue. Accordingly, the defendants' motion for summary judgment is granted.

All Citations

Not Reported in A.2d, 1998 WL 910271, 23 Conn. L. Rptr. 589

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 10

381 P.3d 596, 2012 WL 5991571

128 Nev. 884

Unpublished Disposition

This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing. Supreme Court of Nevada.

Michael BROCHU and Gabriela Brochu, Husband and Wife, Appellants,

v.

FOOTE ENTERPRISES, INC. d/b/a Foote Brothers Construction, Respondent.

Michael Brochu and Gabriela Brochu, Husband and Wife, Appellants,

v.

Foote Enterprises, Inc. d/b/a Foote Brothers Construction, Respondent.

Nos. 55963, 56086.

|

Nov. 29, 2012.

Synopsis

Background: Homeowners brought action against contractor alleging various tort, contract, and construction defect-based claims after house experienced significant movement and damage following contractor's work on crawlspace. The District Court, Washoe County, [Robert H. Perry, J.](#), entered judgment in favor of contractor and awarded costs. Homeowners appealed.

Holdings: The Supreme Court held that:

[1] substantial evidence supported the district court's conclusion that any alleged negligence by contractor, who performed repair work in home's crawlspace, did not cause the homeowners' damages;

[2] substantial evidence supported the district court's determination that any negligence per se on the part of contractor in failing to obtain permit before cutting post supports in home's crawlspace did not cause the homeowners' damages;

[3] substantial evidence supported the district court's conclusion that the homeowner's comparative negligence precluded recovery;

[4] substantial evidence supported the district court's rejection of the homeowners' negligent misrepresentation claim against contractor;

[5] contractor did not breach contract;

[6] substantial evidence supported the district court's rejection of the homeowners' construction defect claim; and

[7] district court abused its discretion in awarding costs to prevailing contractor for package delivery services, outside reproduction, lodging, air travel, parking, taxi services, and rental car expenses.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (12)

[1] **Negligence** 🔑 Liabilities relating to construction, demolition and repair

Substantial evidence supported the district court's conclusion that any alleged negligence by contractor, who performed repair work in home's crawlspace, did not cause the homeowners' damages from movement of home, because the presence of expanding soils, together with the homeowners' knowing disregard of these soils, caused the homeowners' damages; homeowner admitted at trial that he was aware of and did not investigate the risks posed by these soils prior to closing on home.

[2] **Negligence** 🔑 Liabilities relating to construction, demolition and repair

Substantial evidence supported the district court's determination that any negligence per se on the part of contractor in failing to obtain permit before cutting post supports in home's crawlspace did not cause the homeowners' damages from movement of home, which would have arisen regardless of the application for or issuance of a permit, where the movement was caused by the soil problem underneath the home.

[3] Negligence 🔑 **Contractors**

Contractor did not engage in willful misconduct in failing to obtain permit prior to performing repair work in home's crawlspace for purposes of comparative negligence claim; contractor did not obtain a building permit because, in doing past jobs, the building department assured him that a permit was not required to eliminate earth-to-wood contact on the support posts in crawlspaces, and he did not investigate or analyze structural problems in the home's crawlspace because the homeowners already had a home inspection performed and he was not hired to do so. West's [NRSA 41.141](#).

[4] Negligence 🔑 **Liabilities relating to construction, demolition, and repair**

Substantial evidence supported the district court's conclusion that the homeowners' comparative negligence precluded recovery under their negligence and negligence per se claims against contractor who performed work on home's crawlspace; evidence indicated that homeowner despite having read the home inspector's report and the seller's disclosure form noting the expansive soils under the house, did no further investigation about the dangers posed by the soils.

[5] Fraud 🔑 **Reliance on Representations and Inducement to Act****Fraud** 🔑 **Injury and causation**

Substantial evidence supported the district court's rejection of the homeowners' negligent misrepresentation claim against contractor; homeowners' damages from expansive soils under home did not arise from a reasonable reliance on contractor's representations.

[2 Cases that cite this headnote](#)

[6] Contracts 🔑 **Buildings and Other Works****Contracts** 🔑 **Acts or Omissions Constituting Breach in General**

Contractor who was hired to remedy a termite problem in home's crawlspace did not breach contract or the implied covenant of good faith and fair dealing when home suffered damage due to movement of expansive soils; the contract did not include language that required contractor to investigate or correct the house's support structure.

[8 Cases that cite this headnote](#)

[7] Negligence 🔑 **Liabilities relating to construction, demolition and repair****Negligence** 🔑 **Liabilities relating to construction, demolition and repair**

Substantial evidence supported the district court's rejection of the homeowners' construction defect claim against contractor; evidence indicated that damage to home by expansive soils was not caused by contractor but rather was due to homeowners' own negligence in failing to take action regarding dangers posed to home's support system by soil. West's [NRSA 40.615](#), [40.640](#).

[8] Costs 🔑 **Time for application**

District court did not abuse its discretion in refusing to consider any costs other than those appearing within contractor's original memorandum of costs, where contractor's supplemental memoranda were untimely filed. West's [NRSA 18.110\(1\)](#).

[9] Costs 🔑 **Evidence as to items**

District court did not abuse its discretion in awarding prevailing contractor's costs for filing, e-filing, depositions of opposing party experts, audio and visual equipment, court reporting services, and witness fees; given the court's general knowledge of ordinarily incurred costs and familiarity with the actual proceedings, contractor's memorandum and affidavit provided a sufficient basis upon which the court could determine the actual and reasonable nature of these costs. West's [NRSA 18.005](#).

[10] Costs 🔑 Evidence as to items

District court abused its discretion in awarding costs to prevailing contractor for package delivery services, outside reproduction, lodging, air travel, parking, taxi services, and rental car expenses because the reasonable value of these costs required documentation beyond the contractor's memorandum and accompanying affidavit. West's [NRSA 18.005](#).

[11] Costs 🔑 Service of process

District court did not abuse its discretion in awarding prevailing contractor a reasonable cost for the process server. West's [NRSA 18.005\(7\)](#).

[12] Costs 🔑 Experts

District court did not abuse its discretion in awarding the statutory allowance of \$1,500 for prevailing contractor's expert witness fees because contractor incurred the cost but failed to justify a greater amount by submitting only his memorandum and affidavit. West's [NRSA 18.005\(5\)](#).

Attorneys and Law Firms

[Robert L. Eisenberg](#), Settlement Judge

Richard G. Hill, Chartered

Prince & Keating, LLP

*ORDER AFFIRMING IN PART,
REVERSING IN PART. AND REMANDING*

*1 These are consolidated appeals from a district court judgment in a tort, contract, and constructional defect action and from a post-judgment order awarding costs. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellants Michael and Gabriela Brochu entered into a purchase agreement for a house which had an expedited closing period for tax purposes. Better Homes Inspections (BHI) inspected the house and developed a written report, which informed the Brochus that the house's support system was inadequate. BHI recommended that the Brochus consult a licensed contractor or structural engineer. From a disclosure form executed by the sellers of the house, the Brochus also had notice of expansive soils under the house's support system. After conferring with a handyman and deciding not to hire a structural engineer, the Brochus hired Raymond Foote, a licensed contractor of Foote Enterprises, Inc. (Foote), to work on a portion of the house's crawlspace that did not encompass all of the areas affected by the expansive soils. Without acquiring a permit, Foote performed the work. A few months later, the house experienced significant movement and damage.

The Brochus brought various tort, contract, and construction defect-based claims against Foote. After a bench trial, the district court entered a judgment rejecting all the claims. Then, the district court entered a post-judgment order awarding costs to Foote. The award was based upon a memorandum of costs and an affidavit attesting that the costs were actual and reasonable. The Brochus appeal this judgment and post-judgment order. The primary issues on appeal are whether (1) substantial evidence supports the district court's rejection of the Brochus' negligence and negligence per se claims, (2) substantial evidence supports the district court's rejection of the Brochus' negligent misrepresentation claim, (3) substantial evidence supports the district court's rejection of the Brochus' contract-based claims, (4) substantial evidence supports the district court's rejection of the Brochus' constructional defect claim, and (5) the district court abused its discretion in awarding costs to Foote.

For the reasons set forth below, we affirm the district court's judgment on the tort, contract, and constructional defect claims. We reverse in part and affirm in part the post-judgment order awarding costs. As the parties are familiar with the facts of this case, we do not recount them further except as necessary for our disposition.

Substantial evidence supports the district court's rejection of the Brochus' negligence and negligence per se claims

The Brochus argue that the district court should have ruled in their favor on their negligence and negligence per se claims, contending that the evidence showed that Foote breached its duty of care, Foote committed negligence per se by not

obtaining a building permit before repairing the crawlspace, and the district court improperly determined that comparative negligence barred their negligence-based claims.

Substantial evidence supports the rejection of the negligence claims

*2 Liability under a theory of negligence, or comparative negligence, is a question of fact. *Anderson v. Baltrusaitis*, 113 Nev. 963, 965–67, 944 P.2d 797, 799–800 (1997). Findings of fact and “fact-based conclusions of law ... will not be disturbed if supported by substantial evidence.” *Manwill v. Clark County*, 123 Nev. 238, 241, 162 P.3d 876, 879 (2007); see also *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). “Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion.” *Id.* at 241 n. 4, 120 P.3d 1164, 162 P.3d at 879 n. 4.

To succeed on a negligence claim, one must show a duty of care, a breach of that duty, actual and proximate causation, and damages. *Klasch v. Walgreen Co.*, 127 Nev. —, —, 264 P.3d 1155, 1158 (2011). Causation requires actual and proximate cause. *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001). To show actual cause, “the [plaintiff must] prove that, but for the [defendant's wrongdoing], [the plaintiffs damages] would not have occurred.” *Id.* “[P]roximate cause[] is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which that conduct created.” *Id.*

Substantial evidence reveals a lack of causation between Foote's actions and the Brochus' damages, supporting the district court's rejection of the negligence claim

[1] Here, the evidence supported the determination that factors beyond Foote's control caused the Brochus' damages. Testimony at trial showed that soils under the house were expanding and damaging its support structure and that the perimeter supports had contact with these soils. Even if Foote repaired all of the supports in the crawlspace, the house still would have experienced significant movement. Michael Brochu admitted at trial that, before closing on the house, he became aware of and did not investigate the risks posed by these soils. Hence, the district court could reasonably find that (1) the Brochus would have incurred their damages regardless of Foote's actions, (2) the expansive

soils beneath the house and the Brochus' decision not to investigate the soils before closing on the home proximately caused the damages, and (3) the Brochus' extensive damages were not a reasonably foreseeable consequence of the repairs Foote performed. Therefore, we conclude that substantial evidence supports the district court's conclusion that any alleged negligence by Foote did not cause the Brochus' damages, because the presence of expanding soils, together with the Brochus' knowing disregard of these soils, caused the Brochus' damages.

Substantial evidence revealing a lack of causation between Foote's actions and the Brochus' damages supports the rejection of the negligence per se claim

*3 [2] To prevail under a negligence per se claim, a plaintiff must prove that (1) he or she belongs to a class of persons that a statute is intended to protect, (2) the plaintiff's injuries are the type the statute is intended to prevent, (3) the defendant violated the statute, (4) the violation was the legal cause of the plaintiff's injury, and (5) the plaintiff suffered damages. *Anderson v. Baltrusaitis*, 113 Nev. 963, 965, 944 P.2d 797, 799 (1997). The violation of a building code provision adopted by a local ordinance may support a negligence per se claim. *Vega v. Eastern Courtyard Assocs.*, 117 Nev. 436, 440, 24 P.3d 219, 221 (2001).

Here, the negligence per se claim in this case implicates the 2003 International Residential Code (IRC), which is part of the Reno Municipal Code. IRC section R105.1 provides that “[a]ny owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, ... or to cause any such work to be done, shall first make application to the building official and obtain the required permit.” IRC section R105.2.2 states that a permit is not required for “ordinary repairs to structures,” but “the removal or cutting of any structural beam or load bearing support” is not an ordinary repair.

Regardless of whether Foote's failure to obtain a permit for cutting and removing posts supports a negligence per se claim, the lack of causation between Foote's actions and the Brochus' damages precludes Foote's liability under such a claim.

Any IRC violation did not cause the Brochus' damages. The Brochus argue that if Foote had applied for a permit, information revealed about the expansive soils would have dissuaded them from purchasing the house. This argument lacks merit because the Brochus were aware of

the soil problem and closed escrow anyway. In light of the Brochus' blatant disregard of the problem with the soil, their decision not to hire a structural engineer, and their desire to quickly close escrow, the district court properly found that the Brochus would have incurred the damages even if Foote applied for a permit. Accordingly, we conclude that substantial evidence supports the district court's determination that any negligence per se on the part of Foote did not cause the Brochus' damages, which would have arisen regardless of the application for or issuance of a permit.

Substantial evidence reveals the Brochus' comparative negligence

The Brochus argue that the district court incorrectly determined that, even if Foote was negligent, their comparative negligence barred their recovery because (1) Foote acted willfully, such that comparative negligence was not a viable defense; (2) Foote's lack of a permit created a presumption of willful misconduct under NRS 624.3011(2), which Foote failed to rebut; and (3) substantial evidence does not reveal that their actions were causally connected to the harm they incurred.

Foote did not engage in willful misconduct

*4 Under NRS 41.141, a plaintiff may recover damages for negligence if "his or her comparative negligence is not greater than that of the defendant." *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 189–90, 18 P.3d 317, 322 (2001). A plaintiff's "mere negligence ... will not constitute a defense to [a defendant's] wanton or willful misconduct." *Davies v. Butler*, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979). "Wil[l]ful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible results." *Id.* at 769, 602 P.2d at 609 (emphasis omitted). Under NRS 624.3011(2), "[i]f a contractor performs construction without obtaining any necessary building permit, there is a rebuttable presumption that the contractor willfully and deliberately violated the building laws."

[3] Here, testimony revealed that Foote did not obtain a building permit because, in doing past jobs, the building department assured Foote that a permit was not required to eliminate earth-to-wood contact on the support posts in crawlspaces. Foote did not investigate or analyze structural problems in the house's crawlspace because the Brochus already had a home inspection performed and Foote was not hired to do so. Thus, viewing this testimony in the

light most favorable to Foote, the evidence does not suggest willfulness. *See Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) ("This court is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party."). The testimony also rebutted NRS 624.3011(2)'s presumption of willfulness. Hence, we conclude that substantial evidence supports the district court's finding that Foote did not engage in willful misconduct.

The Brochus' own negligence caused their damages

[4] "Comparative negligence applies only to conduct that proximately contributes to an injury's causation, and not to subsequent acts that merely aggravate the injury or its consequences." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 859, 124 P.3d 530, 546 (2005). "Thus, '[t]he plaintiff's negligence is a legally contributing cause of his harm if, but only if, it is a substantial factor in bringing about his harm.'" *Id.* (quoting *Restatement (Second) of Torts § 465(1)* (1965)). In the constructional defect context, when a homeowner plays "a role in planning and construction ... the extent of the comparative negligence defense may be expanded to include the owner's participation in either the planning or construction and whether such participation caused any damage." *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1437, 148 P.3d 710, 715–16 (2006).

Here, there was ample evidence of the Brochus' sophistication regarding real estate transactions, knowing disregard of the house's problems, and desire to close quickly on the house despite those problems. Michael Brochu testified that he was formerly a licensed real estate agent and had engaged in numerous real estate transactions. He testified that he had purchased 15 to 20 properties in Nevada, owned 11 rental properties, and repaired plumbing, roofing, framing, concrete, and crawlspace issues on those properties. He also testified that he knew about the house's structural issues before closing on the house and that he needed to close escrow on the house quickly to avoid tax liabilities. Despite having read the BHI report and the seller's disclosure form noting the expansive soils under the house, he did no further investigation about the dangers posed by the soils. Given this evidence, the district court could reasonably find that the Brochus knew of the structural issues and closed on the house anyway, thereby directly and substantially causing their own damages. Thus, we conclude that substantial evidence supports the district court's conclusion that the Brochus' comparative negligence precluded recovery under their negligence and negligence per se claims, since the evidence substantially revealed that

381 P.3d 596, 2012 WL 5991571

Foote did not engage in willful misconduct and the Brochus' negligence caused their damages.

Substantial evidence supports the district court's rejection of the Brochus' negligent misrepresentation claim

*5 [5] The Brochus argue that the district court erred when it rejected their negligent misrepresentation claim. This court has described the tort of negligent misrepresentation as follows:

“One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”

Barmettler v. Reno Air, Inc., 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) (quoting *Restatement (Second) of Torts* § 552(1) (1965)). “[P]roof of reliance” is required to prevail on a claim for negligent misrepresentation. *Bill Stremmel Mtrs. v. First Nat'l Bank*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978)).

The evidence established that the Brochus knew of the various issues with the house and closed escrow despite those issues. Hence, the district court could logically find that the Brochus' decision to close escrow did not arise from any reasonable reliance on Foote's representations. We therefore conclude that substantial evidence supports the district court's rejection of the Brochus' negligent misrepresentation claim by showing that the Brochus' damages did not arise from a reasonable reliance on Foote's representations.

Substantial evidence supports the district court's rejection of the Brochus' contract-based claims

The Brochus contend that the district court should have ruled in their favor on their breach of contract and breach of the implied covenant of good faith and fair dealing claims.

Whether a contract was breached is a question of fact, and the district court's decision on the issue must be upheld unless clearly erroneous and not supported by substantial evidence. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

To prove a breach of contract, the plaintiff must show an existing valid agreement with the defendant, the defendant's material breach, and damages. *See Saini v. International Game Technology*, 434 F.Supp.2d 913, 919–20 (D.Nev.2006); *see also Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). “[A]ll contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other.” *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007).

[6] Here, the evidence does not evince a material breach of the contract or a breach of the implied covenant of good faith and fair dealing but revealed a contract in which Foote agreed to perform a limited amount of work, unrelated to the support or stabilization of the home, within a limited area of the house. The contract and the testimony of Raymond Foote, Michael Brochu, and Mock revealed that the purpose of Foote's work was to remedy a termite issue and eliminate earth-to-wood contact on three or four posts within a specific section of the house's crawlspace. The contract did not include language that required Foote to investigate or correct the house's support structure. The limited scope of Foote's contractual obligation rebuts the Brochus' argument that Foote breached the covenant of good faith and fair dealing by not disclosing or diagnosing the house's structural issues. The services agreed upon did not impose on Foote a duty to disclose or diagnose the house's structural issues. Hence, the district court could rationally find that Foote did not act arbitrarily or unfairly to the Brochus' disadvantage.

*6 Consequently, we conclude that substantial evidence supports the district court's rejection of the Brochus' contract-based claims.¹

¹ In asserting the merits of their contract-based claims, the Brochus cite to authorities outside of this jurisdiction that provide for a contractor's implied warranty to disclose the defects that he or she knows, or reasonably should have known, when working on a project. *See Lewis v. Anchorage Asphalt Paving Co.*, 535 P.2d 1188, 1195 (Alaska 1975); *Three Way, Inc. v. Burton Enterprises*,

Inc., 177 P.3d 219, 227–28 (Wyo.2008). However, these authorities also reveal that the scope of this warranty is limited by the scope of services contracted for. *See Lewis*, 535 P.2d at 1196 (“The scope of these warranties, however, is directly related to the scope of the duties and obligations imposed on the parties by their contract.”); *Three Way, Inc.*, 177 P.3d at 227–28 (articulating the warranty to disclose defects in relationship to how those defects undermine the work contracted for). Here, any potential warranty to disclose defects was limited by the scope of this contract. The contract limited Foote's services and the area of the home that was worked upon. Hence, the contract did not implicate the discovery or disclosure of the house's structural defects. Accordingly, we maintain that substantial evidence supports the district court's finding that the scope of Foote's work was unrelated to correcting structural issues of the house, such that it did not err in determining that Foote lacked a duty to disclose or diagnose the house's structural issues.

Substantial evidence supports the district court's rejection of the Brochus' NRS 40.615 constructional defect claim

[7] The Brochus contend that the district court should have ruled in their favor on their NRS 40.615 constructional defect claim.

NRS 40.615 defines constructional defect as

a defect in the design, construction, manufacture, repair or landscaping of a new residence, [or] of an alteration of or addition to an existing residence, ...

1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances;
2. Which proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is affixed;
3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or
4. Which presents an unreasonable risk of injury to a person or property.

NRS 40.640 provides that “[i]n a claim to recover damages resulting from a constructional defect, a contractor ... is not liable for any damages caused by ... [t]he acts or omissions of a person other than the contractor or the contractor's agent, employee or subcontractor.” (Emphasis added.)

Here, the evidence supports the district court's determination that Foote did not cause the Brochus' damages, but rather the Brochus caused their own damages. Though it did not specifically cite NRS 40.640 in its judgment, the district court correctly applied the concept contained therein in concluding that the Brochus failed to prove Foote's liability under NRS 40.615. Accordingly, we conclude that substantial evidence supports the district court's rejection of the Brochus' NRS 40.615 construction defect claim by revealing that the Brochus' acts proximately caused their damages.

The district court did not abuse its discretion in awarding costs that it could not discern as actually incurred and reasonable from the memorandum and affidavit

The Brochus assert that the district court abused its discretion in awarding costs to Foote because Foote failed to provide sufficient supporting documentation beyond the memorandum of costs and affidavit.

We review the district court's award of costs for an abuse of discretion. *Village Builders 96 v. U.S. Laboratories*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).

The district court did not abuse its discretion in only considering costs appearing within Foote's timely filed memo

To recover costs, the prevailing party must file the statutorily required memorandum of costs within five days after the entry of judgment. NRS 18.110(1).

[8] Here, the district court appropriately refused to consider any costs other than those appearing in Foote's original memorandum of costs. Although Foote submitted the original memorandum within five days of the judgment, and subsequently submitted two untimely filed supplemental memoranda with documentation regarding costs in its response to a motion to retax, the five-day time limit in NRS 18.110(1) allowed the district court to reject the two untimely filed supplemental memoranda. Thus, we conclude that the district court did not abuse its discretion in refusing to consider any costs other than those appearing within Foote's original memorandum of costs.

The district court did not abuse its discretion in awarding costs that it could discern as actually incurred and reasonable from the memorandum and affidavit

*7 A prevailing party is entitled to recover litigation costs in certain cases. NRS 18.020. Costs include: (1) fees for witnesses, depositions, and expert witnesses; (2) expenses for service of process, photocopies, long distance phone calls, and postage; (3) travel and lodging expenses arising from depositions or discovery; and (4) any “reasonable and necessary” expenses arising from the action. NRS 18.005(2), (4), (5), (7), (12)-(15), (17). In order to recover costs, the prevailing party must provide “a memorandum of the items of the costs in the action or proceeding, which ... must be verified by ... the party's attorney ..., stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.” NRS 18.110(1).

These costs must be “actual and reasonable, ‘rather than a reasonable estimate or calculation of such costs.’” *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385–86 (1998) (quoting *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994)).

Demonstrating that a cost was actually incurred often requires documentation. See *Village Builders*, 121 Nev. at 277–28, 112 P.3d at 1093 (“[D]ocumentation is precisely what is required under Nevada law to ensure that the costs awarded are only those costs actually incurred.”); *Gibellini*, 110 Nev. at 1205–06, 885 P.2d at 543 (reversing part of an order awarding costs not documented to be actual and remanding for a determination of actual costs incurred).

The district court has discretion to determine if an actually incurred cost was reasonable. *Village Builders*, 121 Nev. at 278, 112 P.3d at 1093. Determining necessity and reasonableness may require detailed documents, such as itemizations. See *Berosini*, 114 Nev. at 1353, 971 P.2d at 386 (determining that a prevailing party was not entitled to costs for photocopies, long distance phone calls, and juror fees where the party failed to give documentation or itemizations necessary to determine reasonableness and necessity). But specific documentation alone does not always suffice to show a cost to be reasonable or necessary. See *id.* at 1352–53, 971 P.2d at 386 (concluding that the submission of itemized costs for investigative fees did not justify the recovery of such costs, because the itemization did not reveal reasonableness or necessity); see also *Gilman v. State Bd. of Vet. Med.*

Exam'rs, 120 Nev. 263, 273–74, 89 P.3d 1000, 1007 (2004) (determining that the itemization of investigative fees alone did not suffice to show reasonableness or necessity). Hence, the nature, extent, and specificity of the documentation required to prove an actual and reasonable cost depends upon the court's ability to make this finding from the circumstances and the materials presented by the prevailing party.

Here, the question is whether Foote's original memorandum of costs, and the affidavit in which counsel declared the costs to be actual and reasonable, were sufficient to allow the district court to determine if the costs were actual and reasonable.

The district court did not abuse its discretion in awarding ordinarily incurred and reasonable costs

*8 [9] The district court did not abuse its discretion in awarding costs for filing, e-filing, depositions of opposing party experts, audio and visual equipment, court reporting services, and witness fees. Given the court's general knowledge of ordinarily incurred costs and familiarity with the actual proceedings, Foote's memorandum and affidavit provided a sufficient basis upon which the court could determine the actual and reasonable nature of these costs.

As standard fees, the district court did not need additional documentation to determine that the filing fees were actual and reasonable.

Foote's memorandum and affidavit, although rather generic in nature, were adequate for the district court to discern that the costs for deposing the plaintiffs' experts, court reporting services, renting audio and visual equipment, and engaging the services of a mediator were actual and reasonable. It is well known that a party deposes the opposing party's expert witnesses and that experts charge for their time during deposition. Since the Brochus had two expert witnesses testify at trial, the district court could deduce that Foote actually incurred the costs for deposing them. These costs appeared reasonable and necessary in a trial that required expert testimony. The district court thus correctly determined that the costs related to court reporting services were reasonable. Similarly, expenses for audio and visual equipment used during trial to present certain evidence can readily be deemed reasonable with little other explanation. Finally, the record reveals that the parties used mediation services, thereby actually incurring this cost. The record suggests that the district court assessed and determined that the amounts for those costs were reasonable. Hence, the court appropriately

awarded these costs without needing documentation beyond the memorandum and affidavit.

Foote's original memorandum and affidavit provided enough information to determine that the \$30 witness fees were reasonable, and thus the district court appropriately awarded these fees. Given the reasonable amount attributed to these witness fees, the district court appropriately awarded a reasonable cost of \$30 for Kirby Fischer's witness fees as well.

Accordingly, we conclude that the district court did not abuse its discretion in awarding costs for filing, e-filing, depositions of opposing party experts, audio and visual equipment, court reporting services, mediation services, and witness fees because Foote's memorandum and affidavit adequately supported the district court's determination that Foote actually and reasonably incurred these costs.

The district court abused its discretion in awarding costs that required more documentation

[10] Here, the reasonableness of the costs attributed to UPS services, outside reproductions, lodging, air travel, parking, taxi services, rental car fees, long distance phone calls, postage, and photocopies depended upon the circumstances, such as the time, nature, extent, and value of such services. Determining such circumstances required additional documentation beyond the memorandum and affidavit. Hence, we conclude that the district court abused its discretion in awarding costs for UPS services, outside reproduction, lodging, air travel, parking, taxi services, and rental car expenses, and that it appropriately denied the costs for long distance phone calls, postage, and photocopies, because the reasonable value of these costs required documentation beyond the memorandum and accompanying affidavit.

The district court did not abuse its discretion in awarding a reasonable cost for the process server

*9 [11] NRS 18.005(7) provides that a district court can award costs for “[t]he fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.”

Here, the district court appropriately awarded Foote a lesser amount than it requested for a process server. In doing so, the district court implied that such costs were necessary costs under NRS 18.005(7). The district court awarded this lesser amount upon finding that Foote's requested cost exceeded the

standard fee charged within the community. Consequently, it awarded an amount based on the typical rate for a process server in that community, thereby reducing the award to \$50.00 for each of the ten subpoenas served.² Accordingly, we conclude that the district court did not abuse its discretion in awarding a reasonable cost for the necessarily incurred expenses of the process server.

2 When determining reasonable attorney fees, courts often reference community standards, also referred to as market rates. See *Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir.1998) (“When a fee is set by a court ..., the object is to set it at a level that will approximate what the market would set.”). Hence, the use of this principle in determining the reasonableness of costs was similarly appropriate.

The district court did not abuse its discretion in determining a reasonable award for expert witness fees

NRS 18.005(5) provides that costs can be awarded for:

Reasonable fees of not more than five expert witnesses in an amount of not more than \$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

[12] Here, the memorandum and affidavit offered enough information for the district court to determine that Foote incurred the expert witness fees, but failed to justify the amount Foote requested. Since this case required review and presentation of complicated issues, Foote necessarily sought the assistance of an expert. But the amount paid to the expert exceeded the statutory allowance of \$1,500. Since Foote did not submit additional documentation to support an award exceeding the statutory allowance, the district court appropriately reduced the award to \$1,500. Thus, we conclude that the district court did not abuse its discretion in awarding the statutory allowance of \$1,500 for Foote's expert witness fees because Foote incurred the cost but failed to justify a greater amount by submitting only the memorandum and affidavit.

381 P.3d 596, 2012 WL 5991571

Calculation of costs

On remand, the district court is directed to recalculate the award of costs, consistent with this order.

For the foregoing reasons,³ we

³ We have considered the Brochus' remaining arguments and conclude that they are without merit.

ORDER the judgment of the district court AFFIRMED (Docket No. 55963) and ORDER the post-judgment order awarding costs AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter for further proceedings consistent with this order. (Docket No. 56086).

All Citations

128 Nev. 884, 381 P.3d 596 (Table), 2012 WL 5991571

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 11

2018 WL 10638396

2018 WL 10638396

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Hampshire.

Kevin BROWN, et al.

v.

SAINT-GOBAIN PERFORMANCE

PLASTICS CORP., et al.

Civil No. 16-cv-242-JL

|

Signed 12/06/2018

Attorneys and Law Firms

John A. Yanchunis, Morgan and Moran Complex Litigation Group, Tampa, FL, [Kevin Scott Hannon](#), Hannon Law Firm LLC, Denver, CO, [Paul M. DeCarolis](#), Gottesman & Hollis PA, Nashua, NH, [Finis E. Williams, III](#), Williams Law Office, Concord, NH, for Kevin Brown, et al.

Bruce W. Felmly, Jeremy T. Walker, McLane Middleton, Manchester, NH, [Douglas E. Fleming, III](#), Pro Hac Vice, [Lincoln D. Wilson](#), Pro Hac Vice, [Mark Cheffo](#), Pro Hac Vice, [Paul A. LaFata](#), [Rachel B. Passaretti Wu](#), Pro Hac Vice, [Sheila L. Birnbaum](#), Pro Hac Vice, [Bert L. Wolff](#), Pro Hac Vice, [Emily L. Van Tuyl](#), Pro Hac Vice, [Marina Schwarz](#), Pro Hac Vice, Dechert LLP, New York, NY, [Nicholas F. Casolaro](#), Cleveland Waters & Bass PA, Concord, NH, [Stefanie A. Tubbs](#), Pro Hac Vice, Dechert LLP, Philadelphia, PA, for Saint-Gobain Performance Plastics Corp., et al.

ORDER ON MOTION FOR STAY

Joseph N. Laplante, United States District Judge

*1 The plaintiffs in this proposed class action move for a stay of the court's order that they produce a limited selection of their medical records on or before December 7, 2018. They do so because, despite representing that they would make that production during a telephone conference on November 21, 2018, they have now petitioned the First Circuit Court of Appeals for a writ of mandamus, arguing that this court exceeded its authority in ordering that production.¹

1

See Petition (doc. no. 160-1).

Because the court recognizes the importance of the privilege that the plaintiffs have asserted in this case, it grants the plaintiffs' motion. At the same time, plaintiffs' counsel's actions before this court have raised some concerns and the court makes the following observations.

Background. Plaintiffs have raised a "medical monitoring" claim -- that is, they seek to have defendants pay for medical monitoring for potential complications arising from exposure to chemicals released by Saint-Gobain's manufacturing plant. Neither New Hampshire's legislature nor its Supreme Court has recognized medical monitoring as a cause of action or an available form of relief. As the court has informed the parties on several occasions, it is inclined to certify a question to the New Hampshire Supreme Court concerning the availability of a medical monitoring claim and its elements. This court has, however, consistently indicated its inclination to certify that question on a more developed factual record and in connection with summary judgment.

Plaintiffs seek certification before they produce any medical records. They do so because, depending on how New Hampshire formulates the elements of any medical monitoring claims it may recognize, the plaintiffs' medical records may not be at issue in this case. And if the records are not at issue, the privilege would protect them from production. See [Desclos v. S. New Hampshire Med. Ctr.](#), 153 N.H. 607, 611 (2006).

In the meantime, both the court and the parties have some guidance as to what elements New Hampshire may recognize. For example, the plaintiffs moved for class certification and the court ordered production of medical records relying on the elements of a medical monitoring claim as outlined by the Hillsborough County Superior Court in [Hermens v. Textiles Coated Inc.](#), No. 216-2017-cv-524, -525, slip. op. at 9-12 (N.H. Super. Ct., Hillsborough Cnty. N. March 16, 2018) (Brown, J.) (citing [Bower v. Westinghouse Elec. Corp.](#), 522 S.E.2d 424, 432-33 (W. Va. 1999)). Under that conception of the medical monitoring claim, the plaintiffs have put their records at issue.² Like every court that had addressed a motion to compel medical records in a medical monitoring case as of the date of its order, this court ordered their production under an appropriate protective order.³

2

Order of Oct. 10, 2018 (doc. no. 143) at 3-5.

2018 WL 10638396

³ Id. at 5.

Again, the court takes no issue with the plaintiffs' assertion of privilege and, accordingly, grants the present motion in part. It does, however, take issue with plaintiffs' counsel's approach to this discovery dispute, which has now been pending for almost five months, since July 13, 2018, and has, as a result, significantly delayed this litigation.

***2 Plaintiffs' representations.** The defendants requested a broad range of the plaintiffs' medical records as related to the plaintiffs' claims for medical monitoring.⁴ The court denied the plaintiffs' request for a protective order, but ordered a limited production -- specifically, the records of each plaintiff's primary physician for the period between January 2000 and the present, the plaintiffs' workers' compensation records (if any), and identification (but not records) of other medical providers, medications, and employment history.⁵ By agreement of the parties, the plaintiffs were to produce those records by November 16, 2018.⁶

⁴ See Mot. for Protective Order Appendix A (doc. no. 125-2) at 4.

⁵ Order of Oct. 10, 2018 (doc. no. 143) at 6.

⁶ Proposed Discovery Plan (doc. no. 145) at 1 (characterizing discovery deadline as an "[a]greed [u]pon" date); Order of Nov. 5, 2018 (doc. no. 150) at 4 (adopting the parties' agreed-upon deadline).

The plaintiffs never moved for reconsideration of that order. Nor did they inform the court or the defendants that they would not or could not comply with that order. Without any pre-deadline explanation to either the court or defense counsel, they simply failed to comply.

On a telephone conference requested the next week by the defendants, the plaintiffs explained that they had unilaterally disregarded the deadline because (1) an agreed-to protective order had not entered until November 19, though the parties had filed it on November 6;⁷ (2) certain of the plaintiffs had moved for reconsideration of the court's latest scheduling order, which adopted the plaintiffs' proposed schedule in large part, seeking earlier certification of the question to the New Hampshire Supreme Court;⁸ and (3) one plaintiff refused to produce certain medical records related to a traumatic injury, even to his or her counsel.⁹ None of these issues warranted unilateral disregard of the court's order.

If any of them prevented the plaintiffs from making their production, they ought to have raised the issue and sought relief.

⁷ Tr. of Nov. 21 Telephone Conf. (doc. no. 158) at 12.

⁸ Id.

⁹ Id. at 13-14.

Most importantly, however, plaintiffs' counsel gave no indication during that telephone conference that the plaintiffs would do anything but comply with the court's order with respect to the remaining medical records. Indeed, they agreed to the December 7 production date, which afforded them a full week after they estimated the records would be available.¹⁰ Plaintiffs' counsel represented that they were "not going to hold off until December 7th. The situation we work out is to produce the records. If they came earlier and we're going to produce them, we'll produce them."¹¹ They never indicated during the call that the plaintiffs either (1) contested the court's authority to order production or (2) would seek further review of that order, as they have now done.

¹⁰ Id. at 41-45.

¹¹ Id. at 45.

Hermens elements. In moving for class certification, the plaintiffs relied on the elements of the medical monitoring claim adopted by Judge Brown in Hermens.¹² The court, likewise, relied on those elements in concluding that the plaintiffs put their medical records at issue in this action.¹³ In seeking a protective order against production of those records, the plaintiffs invoked a different set of elements -- those adopted by the Supreme Courts of Pennsylvania in Redland Soccer Club v. Dep't of the Army, 696 A.2d 137, 145-46 (Pa. 1997) and Nevada in Sadler v. PacifiCare of Nev., Inc., 340 P.3d 1264, 1265-66 (Nev. 2014).

¹² Memo. in Supp. of Mot. for Class Cert. (doc. no. 121-1) at 31; Plaintiffs' Class Cert. Ex. 34 (doc. no. 122-34).

¹³ Order of Oct. 10, 2018 (doc. no. 143) at 3-5.

***3** While the plaintiffs' medical records may not be at issue in a medical monitoring claim in those states, which require the plaintiffs to "demonstrate that the medical monitoring at issue is something greater than would be recommended as a

matter of general health care for the public at large,” [Sadler](#), 340 P.3d at 1271, courts relying on the elements set forth by the Superior Court in [Hermens](#) have ordered production of those records, see [Ballard v. Union Carbide Corp.](#), No. 2:11-CV-00366, 2012 WL 2089511, at *4 (S.D. W. Va. June 8, 2012). In this case, the plaintiffs moved for class certification based on the [Hermens](#) elements. This court, accordingly, concluded that the plaintiffs have put their medical records at issue and ordered their production.¹⁴ And, further, it allowed that the parties will be afforded an opportunity to conduct additional discovery as necessary if the New Hampshire Supreme Court adopts different elements.¹⁵

¹⁴ Order of Oct. 10, 2018 (doc. no. 143) at 4-5.

¹⁵ See Order of Nov. 29, 2018 (doc. no. 157) at 2-3.

Though the plaintiffs will have an opportunity to argue that New Hampshire ought to adopt different elements, if it adopts the claim at all, to the extent that they seek class certification based on the elements set forth in [Hermens](#), they are subject to discovery based on those same elements.

Conclusion. On balance, the relevant factors, see [Hilton v. Braunskill](#), 481 U.S. 770, 776 (1987), may weigh

against further delaying this litigation over a five-month-old discovery dispute in which this court has now twice ordered the production of documents without any request for reconsideration from the plaintiffs. In light of the privilege-related issues raised by the plaintiffs, however, the court GRANTS their motion to stay their production deadline pending resolution of the plaintiffs’ petition.¹⁶ If the Court of Appeals denies the plaintiffs’ petition, plaintiffs shall produce the ordered records within **72 hours** of that order. Plaintiffs should not anticipate any further continuances of that deadline.

¹⁶ Document no. 159.

The court further recognizes that this stay may impact the defendants’ ability to comply with their upcoming expert- and class-certification-related deadlines, and will entertain appropriate requests for relief as those deadlines approach.

SO ORDERED.

All Citations

Slip Copy, 2018 WL 10638396

TAB 12

797 Fed.Appx. 247

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1. United States Court of Appeals, Sixth Circuit.

James A. BUNN, dba Bunn
Trucking, Plaintiff-Appellant,
v.

NAVISTAR, INC., dba International
Used Truck Center, Defendant-Appellee.

No. 19-5406

|

FILED January 07, 2020

Synopsis

Background: Owner of trucking business brought a products liability action against manufacturer of heavy-duty trucks asserting breach of express and implied warranties of merchantability, intentional misrepresentation, and violations of the Tennessee Consumer Protection Act (TCPA), after second-hand trucks purchased from manufacturer's dealership required extensive repair. Manufacturer removed action to federal court on the basis of diversity jurisdiction. The United States District Court for the Middle District of Tennessee, [Eli J. Richardson, J., 2019 WL 333552](#) and [2019 WL 1233849](#), granted manufacturer's motion to dismiss for failure to state a claim and denied owner's motion to alter or amend judgment. Owner appealed.

Holdings: The Court of Appeals, [Clay](#), Circuit Judge, held that:

[1] under Tennessee law, owner failed to plausibly allege that manufacturer was notified of its alleged breach of express and implied warranties, as required by breach of warranty statute, and

[2] district court did not abuse its discretion by denying owner's motion to alter or amend judgment on TCPA claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion to Alter or Amend Judgment.

West Headnotes (3)

[1] Sales 🔑 Particular actions and claims

Under Tennessee law, owner of trucking company was required to plead facts giving rise to a plausible inference that manufacturer of heavy-duty trucks was notified of its breach of express and implied warranties of merchantability, as required by breach of warranty statute, in order for his products liability action to survive manufacturer's motion to dismiss. [Tenn. Code Ann. § 47-2-607\(3\)](#).

[2] Sales 🔑 Mode and Sufficiency of Notice

Under Tennessee law, owner of trucking company failed to plausibly allege that manufacturer of heavy-duty trucks was notified of its alleged breach of express and implied warranties of merchantability when owner notified it that second-hand trucks he purchased were in need of repair, as required to state a claim under breach of warranty statute; written warranty evidenced parties' shared understanding that repair might have been necessary at some point, and owner's notice to manufacturer did not claim a breach and open the way for settlement through negotiation. [Tenn. Code Ann. § 47-2-607\(3\)](#).

[3] Federal Civil Procedure 🔑 Grounds and objections

District court did not abuse its discretion by denying owner of trucking business's motion to alter or amend judgment, which dismissed his Tennessee Consumer Protection Act (TCPA) claim against manufacturer of heavy-duty trucks, based on his trial counsel's misunderstanding of the Federal Rules; owner's trial counsel mistakenly believed that a case management conference was required prior to filing a motion to amend the complaint on the TCPA claim,

and trial counsel's misunderstanding was not the type of "manifest injustice" at which a motion to alter or amend judgment could be directed. [Tenn. Code Ann. § 47-18-101 et seq.](#); [Fed. R. Civ. P. 59\(e\)](#).

***248** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Attorneys and Law Firms

[Terry Andrew Fann](#), Steven Chase Fann, Waldron, Fann & Parsley, Murfreesboro, TN, for Plaintiff - Appellant

[Jeffrey S. Patterson](#), Senior Litigation Attorney, Hatline, Dacus, Barger & Dreyer, Dallas, TX, [Paul J. Krog](#), Leader, Bulso & Nolan, Nashville, TN, for Defendant - Appellee

Before: [CLAY](#), [STRANCH](#), and [MURPHY](#), Circuit Judges.

OPINION

[CLAY](#), Circuit Judge.

Plaintiff Bunn Trucking appeals the dismissal of his breach of express warranty and breach of implied warranty of merchantability claims against Defendant Navistar in this products-liability lawsuit. Plaintiff also appeals the denial of his Rule 59(e) motion to alter or amend the district court's judgment. For the reasons set forth below, we **AFFIRM** the decisions of the district court.

I. BACKGROUND

A. Factual Background

Plaintiff is a sole proprietor doing business as Bunn Trucking. Defendant Navistar is a manufacturer of heavy-duty trucks. On June 13, 2018, Plaintiff, represented by counsel, initiated this products-liability action against Defendant in Tennessee state court, alleging the following facts.

On April 19, 2017, Plaintiff purchased two second-hand trucks from Defendant's dealership. One truck had 183,864 miles on it at the time of purchase ("Truck 1"), and the other truck had 141,229 miles on it at ***249** the time of

purchase ("Truck 2"). Plaintiff purchased a written warranty for each truck, with each warranty covering the respective truck for 24 months or 200,000 miles. At the time of the purchase, Defendant's agents warranted that the trucks were free from defects and in perfect working order. Defendant assured Plaintiff that the trucks were suitable to perform the duties for which they were manufactured. Upon purchasing the written warranty, Defendant assured Plaintiff that Navistar technicians would be readily available to make any necessary repairs. However, shortly after making the purchase, Plaintiff began to experience numerous shortcomings with both trucks. For example, within three months of purchase, Truck 1 required a complete engine replacement and was out of service for two weeks. After the engine was replaced, Truck 1 continued to have problems and, since the date of purchase, was out of service for a total of nine months. Within four months of purchase, Truck 2 required a complete engine replacement. After the engine was replaced, Truck 2 continued to have problems and, since the date of purchase, was out of service for a total of eight months.

According to Plaintiff, the issues with the trucks included "(a) repeated instances of check engine lights illuminating; (b) fuel pump failure; (c) sensor 'shortage' issues; (d) 'knocking' in the engine requiring replacement; (e) excessive 'smoke' and hissing of the engine requiring replacement; (f) gasket replacement; (g) clogged hoses; (h) A/C blower and compressor failure; (i) complete engine failure; (j) other failures that prevented the Trucks from operating as warranted." R. 1-1, Pg. ID 9. Plaintiff alleged that he "repeatedly notified Defendant of the defects related to the trucks, but Defendants [sic] failed to make repairs sufficient to correct the defects." *Id.* at Pg. ID 10. Due to Defendant's inability or unwillingness to obtain necessary parts, Plaintiff experienced extensive delays for several months in getting the trucks repaired. Plaintiff lost a "substantial amount of income" due to the trucks' unreliability and the downtime required for repairs. *Id.* at Pg. ID 9. Specifically, Plaintiff lost contracts with his client, Kochlogistics, worth approximately \$133,645.00 between April 22, 2017 and June 1, 2018. Plaintiff stated that "[u]pon information and belief, Defendant became aware trucks sold to Plaintiff were inadequate for public distribution." *Id.* at Pg. ID 10.

B. Procedural History

In construing his own complaint in his favor, Plaintiff asserted the following causes of action: (1) breach of express warranty; (2) breach of implied warranty of merchantability; (3) breach of implied warranty of fitness for a particular purpose; (4)

intentional misrepresentation (fraud); and (5) two counts of violating the Tennessee Consumer Protection Act (“TCPA”), Tenn. Code Ann. § 47-18-104(b)(7).

Defendant removed the action to federal court on the basis of diversity jurisdiction. Defendant then moved to dismiss the action pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim upon which relief may be granted. First, Defendant argued that Plaintiff’s claims for breach of express and implied warranties should be dismissed because Plaintiff failed to allege that the trucks were defective at the time they were delivered and for failure to provide pre-suit notice of the breach, as required by Tennessee law. Next, Defendant argued that Plaintiff’s fraud claim should be dismissed under the economic loss doctrine and because Plaintiff failed to comply with the heightened pleading requirements of Rule 9(b). Defendant then argued that Plaintiff’s first *250 TCPA count should be dismissed because the TCPA provision that Defendant allegedly violated only applies to “goods” that are obtained for use by an individual “primarily for personal, family, or household purposes,” a category which clearly did not encompass the heavy-duty trucks used in Plaintiff’s business. R. 8, Pg. ID 47–48 (quoting [Tenn. Code Ann. § 47-18-103\(8\)](#)). Lastly, Defendant moved to dismiss Plaintiff’s second TCPA count for failure to comply with the heightened pleading requirements of Rule 9(b).

In his response to Defendant’s motion to dismiss, Plaintiff conceded that the economic loss doctrine barred his intentional misrepresentation claim and “aver[red] that Paragraph Nos. 38-43 of the Complaint should be stricken.” R. 12, Pg. ID 168. Plaintiff also conceded that his first TCPA claim was inapplicable to the action and “aver[red] that Paragraph 45(a) of the Complaint should be stricken.” *Id.* With regards to his second TCPA claim, Plaintiff stated that, “[a]s it pertains to the Plaintiff’s allegations contained in Paragraph 45(b) of the Complaint, Plaintiff will be filing a Motion to Amend pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#) for the purpose of pleading, with sufficient particularity, Defendant’s violation of the Tennessee Consumer Protection Act as set forth in Paragraph 45(b) of the Complaint.” *Id.* at Pg. ID 169. In addition, Plaintiff clarified that he was not suing on the basis of the written warranty that he had purchased from Defendant, but rather on the basis of statements allegedly made by Defendant’s agents at the time of purchase.

Plaintiff did not at any time amend his complaint as a matter of course under [Federal Rule of Civil Procedure 15\(a\)\(1\)](#). *See Fed. R. Civ. P. 15(a)(1)*. And, Plaintiff did not at any time obtain Defendant’s written consent to amend his complaint or otherwise file a motion seeking leave of the court to amend the complaint in order to bolster his second TCPA claim. *See Fed. R. Civ. P. 15(a)(2)*.

On January 25, 2019, the district court entered a judgment granting Defendant’s motion to dismiss in its entirety. The district court reasoned that Plaintiff’s breach of express warranty and breach of implied warranty of merchantability claims should be dismissed because Plaintiff failed to plausibly allege that Defendant’s alleged warranties were false at the time they were made. The district court dismissed Plaintiff’s implied warranty of fitness for a particular purpose claim, finding that “Plaintiff’s stated ‘particular purpose’ is really an ordinary purpose—using heavy-duty trucks for a commercial trucking business—and not a particular purpose capable of supporting his claim.” R. 28, Pg. ID 234. Lastly, the court dismissed Plaintiff’s second TCPA claim, finding that in the “approximately eight months after Plaintiff’s response was filed ... Plaintiff has not filed a motion to amend the TCPA claim,” and the claim, as pleaded in the original complaint, did not plausibly allege any basis on which relief could be granted. *Id.* at Pg. ID 236.

Following the district court’s dismissal, Plaintiff filed a motion to alter or amend the judgment pursuant to [Federal Rule of Civil Procedure 59\(e\)](#). Plaintiff’s ground for moving to reopen the judgment was Plaintiff’s counsel’s mistaken impression that a complaint could not be amended prior to the initial case management conference. After Defendant filed a response to Plaintiff’s motion, the district court entered an order denying Plaintiff’s [Rule 59\(e\)](#) motion on March 15, 2019. The district court found Plaintiff’s argument “nonsensical” because nothing in either the Federal Rules or Local Rules impairs Plaintiff’s ability to amend his complaint as *251 of right or seek leave to do so prior to the initial case management conference. R. 35, Pg. ID 261–62.

On April 9, 2019, Plaintiff filed a notice of appeal as to the district court’s order denying his [Rule 59\(e\)](#) motion. On April 15, 2019, Plaintiff filed a timely Amended Notice of Appeal clarifying that he appeals both the district court’s January 25, 2019 judgment dismissing the action, and the district court’s March 15, 2019 order denying his [Rule 59\(e\)](#) motion.

II. STANDARD OF REVIEW

We review *de novo* a district court's grant of a motion to dismiss. *Majestic Bldg. Maint., Inc. v. Huntington Bancshares, Inc.*, 864 F.3d 455, 458 (6th Cir. 2017). In doing so, we may affirm the district court's decision on any ground that is supported by the record. *La. Sch. Emps.' Ret. Sys. v. Ernst & Young, LLP*, 622 F.3d 471, 477 (6th Cir. 2010). A motion to dismiss is properly granted if the plaintiff has "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); see also Fed. R. Civ. P. 8(a)(2). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* To evaluate a complaint's sufficiency, courts in this circuit follow three steps. "First, the court must accept all of the plaintiff's factual allegations as true.... Second, the court must draw all reasonable inferences in the plaintiff's favor.... And third, the court must take all of those facts and inferences and determine whether they plausibly give rise to an entitlement to relief." *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (citations omitted).

III. ANALYSIS

A. Implied Warranty of Fitness for a Particular Purpose & Plaintiff's First TCPA Claim

As a preliminary matter, Plaintiff does not challenge the district court's dismissal of his implied warranty of fitness for a particular purpose claim or the dismissal of his first TCPA claim (*i.e.*, that alleged in Paragraph 45(a) of the complaint) in his briefs before this Court. And, Plaintiff's counsel acknowledged at oral argument that Plaintiff is not appealing the dismissal of his implied warranty of fitness for a particular purpose claim. Therefore, we consider those arguments waived and affirm the district court's dismissal of those claims. See, e.g., *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) ("[Plaintiff's] failure to raise an argument in his appellate brief constitutes a waiver of the argument on appeal.").

B. Breach of Express Warranty & the Implied Warranty of Merchantability

Plaintiff contends that the district court erred by dismissing its breach of express warranty and breach of implied warranty of merchantability claims under Rule 12(b)(6). The elements for breach of express warranty in Tennessee are: "(1) the seller made an affirmation of fact intending to induce the buyer to purchase the goods; (2) the buyer was, in fact, induced by the seller's acts; and (3) the affirmation *252 of fact was false regardless of the seller's knowledge of the falsity or intention to create a warranty." *Jones v. WFM-Wo, Inc.*, 265 F. Supp. 3d 775, 781 (M.D. Tenn. 2017) (quoting *Smith v. TimberPro Inc.*, No. W2016-00757-COA-R3-CV, 2017 WL 943317, at *3 (Tenn. Ct. App. Mar. 9, 2017)); see also Tenn. Code Ann. § 47-2-313. To make out a claim for breach of the implied warranty of merchantability, a plaintiff must show that the seller is a merchant with respect to goods of that kind and that the goods were not fit for the ordinary purposes for which such goods are used at the time they were delivered. *Dan Stern Homes, Inc. v. Designer Floors & Homes, Inc.*, No. M2008-00065-COA-R3-CV, 2009 WL 1910955, at *4 (Tenn. Ct. App. June 30, 2009) (citing Tenn. Code Ann. § 47-2-314). The implied warranty of merchantability applies to second-hand goods. See Tenn. Code Ann. § 47-2-314, cmt. 3; see also *Patton v. McHone*, 822 S.W.2d 608, 616 (Tenn. Ct. App. 1991). The district court dismissed both of Plaintiff's warranty claims, finding that Plaintiff failed to plausibly allege that the warranties were false at the time they were made or that the trucks were not fit for ordinary use at the time they were delivered. We now affirm the district court's decision, although on different grounds. See, e.g., *La. Sch. Emps.' Ret. Sys.*, 622 F.3d at 477.

In the court below, Defendant moved to dismiss, in part, on the ground that Plaintiff failed to adequately plead notice as required by Tennessee Code Annotated § 47-2-607(3). Section 47-2-607(3) of the Tennessee Code is Tennessee's version of section 2-607(3) of the Uniform Commercial Code. It provides in part that "[w]here a tender has been accepted ... the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Tenn. Code Ann. § 47-2-607(3). Similarly, the damages provision for breach of warranty provides that "[w]here the buyer has accepted goods and given notification (§ 47-2-607(3)) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable."

Tenn. Code Ann. § 47-2-714 (emphasis added). According to Tennessee courts, “[n]otification pursuant to Tenn. Code Ann. § 47-2-607 is an essential ingredient for an action for damages.” *Carmichael & Carmichael, Inc. v. Nicholstone Companies, Inc.*, No. 01-A-01-9104-CV00148, 1992 WL 172404, at *6 (Tenn. Ct. App. July 24, 1992). “The purpose of giving notice of breach is to allow the breaching party to cure the breach and thereby avoid the necessity of litigating the matter in court.” *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011); see also Tenn. Code Ann. § 47-2-607(3), cmt. 4.

In determining whether Plaintiff’s claims should be dismissed for failure to comply with § 47-2-607(3), this Court must answer two questions. First, was Plaintiff required to plead notice in his complaint (that is, was he required to plead facts that would plausibly satisfy § 47-2-607’s notice requirement)? And, if so, what type of notice was required under the statute? Was it enough for Plaintiff to allege that he notified Defendant of the various defects with the trucks, or was he required to notify Defendant that those defects, in Plaintiff’s view, amounted to a breach of warranty?

[1] We answer the first question in the affirmative based solely on Plaintiff’s litigation conduct. Plaintiff has never argued, either to this Court or to the district court, that his warranty claims are not subject to the Tennessee notice statute. In fact, *253 Plaintiff concedes in his briefs before this Court that his claims are governed by § 47-2-607(3). And, Plaintiff conceded at oral argument that his complaint was required to contain an adequate inference of notice pursuant to § 47-2-607(3). In other words, Plaintiff has never argued that failure to satisfy § 47-2-607(3) should be raised as an affirmative defense, and instead concedes that satisfaction of the statute is a condition precedent to suit in Tennessee. Therefore, although some state courts have treated similar notice requirements as affirmative defenses rather than elements of the claim that must be pled, compare, e.g., *Reid v. Eckerd’s Drugs, Inc.*, 40 N.C.App. 476, 253 S.E.2d 344, 347, 350 (1979) (affirmative defense), with, e.g., *Stamper Black Hills Gold Jewelry, Inc. v. Souther*, 414 N.W.2d 601, 604 (N.D. 1987) (element), we find that Plaintiff has forfeited any such argument in this case.¹ Thus, for purposes of this appeal and in line with Plaintiff’s litigation conduct, we conclude that Plaintiff was required to plead facts giving rise to a plausible inference of notice in compliance with § 47-2-607(3).

1 While Tennessee courts have yet to resolve this question, other courts interpreting Tennessee law have dismissed warranty claims for failure to adequately plead notice under Tenn. Code Ann. § 47-2-607(3). See, e.g., *Siriano v. Goodman Mfg. Co.*, No. 2:14-cv-1131, 2015 WL 12748033, at *7–8 (S.D. Ohio Aug. 18, 2015); *Rysewyk v. Sears Holdings Corp.*, No. 15-cv-4519, 2015 WL 9259886, at *4 (N.D. Ill. Dec. 18, 2015); see also *Alvarez v. Chevron Corp.*, 656 F.3d 925, 931–32 (9th Cir. 2011) (“The district court properly dismissed these common law claims because Plaintiffs failed to provide Defendants with reasonable notice.”) (applying Cal. Com. Code § 2607(3)(A)). In any event, we do not decide in this case whether Tennessee courts would consider notice as a condition precedent to suit because Plaintiff has forfeited any argument to the contrary.

[2] Next, we must determine whether Plaintiff’s allegations in his complaint satisfy that requirement. For the reasons that follow, we find that they do not. Plaintiff argues that he sufficiently pled notice, either because the complaint itself constituted sufficient notice according to the Middle District of Tennessee’s holding in a personal-injury case, *Smith v. Pfizer*, 688 F. Supp. 2d 735 (M.D. Tenn. 2010), or because his “allegations of major repairs ... satisfy the requirement under Tennessee law regarding notice.” Appellant Br. at 16. We find each of these arguments unavailing.

In *Smith v. Pfizer*, the district court held that “a personal injury plaintiff can give notice by filing suit” and, thus, does not have to allege any pre-suit notification of breach to satisfy § 47-2-607(3). 688 F. Supp. 2d at 750. However, the court expressly distinguished commercial cases: “As envisioned by Tenn. Code Ann. § 47-2-607(3)(a), a seller of goods with timely notice that they are nonconforming may inspect the goods ... and then cure the defects or preserve evidence that no breach occurred.” *Id.* at 750–51 (quoting *Duffy Tool & Stamping v. Bosch Auto. Motor Sys. Corp.*, No. M1997-00144-COA-R3-CV, 2000 WL 122225, at *3 (Tenn. Ct. App. Feb. 1, 2000)). But, the court stated, “notice serves a different purpose in personal injury cases.” *Id.* at 751. Unlike in a commercial case, opportunity to cure in a personal injury case has no significance “because the defect has already caused the harm and the seller can do nothing to remedy the situation that has already occurred.” *Id.* (quoting Lary Lawrence, 6 Lawrence’s Anderson on the Uniform Commercial Code § 2–607:7 (3d. ed. 2009)). This is

a commercial case, and under current Tennessee law, *Pfizer* is thus inapplicable.

*254 Next, we must determine whether Plaintiff's allegations that he notified Defendant of the defects is sufficient to plausibly allege that he put Defendant on notice of an alleged breach under § 47-2-607(3). This is a more difficult question. Plaintiff argues that this Court should adopt a relaxed view of how Tennessee courts would interpret § 47-2-607(3)'s notice requirement. In Plaintiff's view, his allegation that he told Defendant about certain defects with the trucks was enough to adequately plead notice under § 47-2-607(3). In response, Defendant asks this Court to find that Tennessee courts would adhere to the traditional, stricter reading of notice statutes such as § 47-2-607(3) whereby it is not enough for a buyer to notify a seller simply of problems with a good; instead, the buyer must notify the seller that, in the buyer's view, the problems rise to the level of a breach. Defendant points out this Court has historically adhered to the stricter view when interpreting analogous notice statutes. For example, in a line of cases including *Running Springs Associates v. Masonite Corp.*, we analyzed Ohio's identical notice statute. 680 F.2d 469 (6th Cir. 1982). In concluding that the statute requires notice that the problems with the goods rise to the level of breach, rather than mere notice of the defect, this Court cited with approval the oft-quoted language from Judge Learned Hand:

The plaintiff replies that the buyer is not required to give notice of what the seller already knows, but this confuses two quite different things. The notice 'of the breach' required is not of the facts, which the seller presumably knows quite as well as, if not better than, the buyer, but of buyer's claim that they constitute a breach. The purpose of the notice is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.

Id. at 469–70 (quoting *Am. Mfg. Co. v. U.S. Shipping Board E. F. Corp.*, 7 F.2d 565, 566 (2d Cir. 1925)). Relying on this language, we held that Ohio's identical notice statute requires a buyer to put a seller on notice that "it was considered to be

in breach" and not simply that the buyer "was experiencing difficulties with the goods." *Id.* at 470 (quoting *K & M Joint Venture v. Smith Int'l, Inc.*, 669 F.2d 1106, 1113 (6th Cir. 1982)); accord *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 587 F.2d 813, 825 (6th Cir. 1978). But see *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 537 N.E.2d 624, 638 (1989) (rejecting the strict reading of the Ohio notice statute in favor of the more relaxed view).

Tennessee courts have not recently spoken to this issue. And, although Tennessee may eventually articulate a different interpretation of its notice statute, at this time, we think it appropriate to assume that Tennessee courts would adhere to the traditional view that plaintiffs must allege that they provided notice of a breach (*i.e.*, that the defendant will be asked to meet a claim for damages) in commercial cases such as this. That interpretation is supported by the plain language of the statute. See *Tenn. Code Ann. § 47-2-607(3)* ("Where a tender has been accepted ... the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." (emphasis added)). Our view is further informed by early Tennessee case law.

In *Wildman Manufacturing Co. v. Davenport Hosiery Mills*, 147 Tenn. 551, 249 S.W. 984 (1923), the Supreme Court of Tennessee considered what type of notice was required under the notice provision of *255 the Uniform Sales Act of 1919 (the predecessor of UCC § 2-607).² The defendant-seller in *Wildman* had consistently failed to deliver machines on time to the buyer. *Id.* at 987. The buyer, in turn, repeatedly sent letters notifying the seller of the problems with the delivery delays, but did not notify the seller of its intention to make a claim for damages. *Id.* at 988–91. After reviewing several cases holding that the buyer is required to put the seller on notice of a breach under the Uniform Sales Act (*i.e.*, to put the seller on notice that the buyer intends to seek a claim for damages), the Tennessee Supreme Court found that many of the buyer's letters to the seller in *Wildman* did not constitute sufficient notice under the Act. *Id.* at 993. For example, regarding the buyer's first letter to the seller, the court stated that "[w]hile this letter is full of complaints, and refers to the broken promises of the [seller], we see nothing here indicating an intention to claim damages for breach of contract." *Id.* at 989. The court adopted the chancellor's view that "a claim for damages, and not merely a complaint or announcement of trouble, was necessary" under the Act. *Id.* at 992. That is, the Tennessee Supreme Court held that it wasn't until the buyer

put the seller on notice that it intended to make a claim for damages that the notice provision of the Act was satisfied. *Id.* at 993.

2 The relevant provision of the Uniform Sales Act required that “if, after acceptance of the goods, the buyer fail[s] to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor.” *Wildman*, 249 S.W. at 986 (quoting Uniform Sales Act, § 49 (1919).)

Wildman’s holding aligns with our holding in *Running Springs*, and with the traditional view and the plain language of the notice statutes. Moreover, this interpretation is especially applicable in this case where Plaintiff purchased a written warranty, which evidenced the parties’ shared understanding that the second-hand trucks may need repairs at some point. Because Plaintiff and Navistar mutually anticipated that the trucks may need repairs at some point, it seems particularly unlikely that Plaintiff’s request for repairs would put Navistar on notice that the transaction is claimed to involve a breach under § 47-2-607(3). *Cf. Tenn. Code Ann. § 47-2-607*, cmt. 4 (“The notification which saves the buyer’s rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.”).

For these reasons, we find that Plaintiff was required to plead that he put Navistar on notice that the transaction was “claimed to involve a breach, and thus open[] the way for normal settlement through negotiation” under current Tennessee law. *Id.* Because Plaintiff’s complaint does not contain such allegations, the district court properly dismissed the breach of express warranty and breach of implied warranty of merchantability claims for failure to state a claim under Rule 12(b)(6).³

3 In the district court and on appeal, Defendant further argues that Plaintiff’s express warranty claim should be dismissed because Plaintiff failed to plausibly allege that Defendant made any affirmations of fact beyond mere puffery. Navistar also argues that Plaintiff failed to plausibly allege facts from which the district court could infer causation and damages for each of his warranty claims. The district court declined to reach the

merits of Defendant’s causation and damages arguments because of other grounds for granting Navistar’s motion to dismiss. Because we find that Plaintiff’s claims were insufficiently pled with regards to notice, we likewise do not address these issues.

*256 C. Plaintiff’s Rule 59(e) Motion

“We generally review a denial of a motion to alter or amend the judgment under Rule 59(e) for abuse of discretion.” *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007) (quoting *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 554 (6th Cir. 1998)). However, if the district court’s denial of a Rule 59(e) motion is based on erroneous legal doctrine, then this Court employs a *de novo* standard of review. *Id.* In the present case, the district court did not base its denial of Plaintiff’s Rule 59(e) motion on an erroneous legal doctrine such that *de novo* review would apply, and Plaintiff concedes on appeal that this Court should review the district court’s decision for abuse of discretion.

“In this circuit, a district court may alter a judgment under Rule 59 based on (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice.” *Nolfe v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 551–52 (6th Cir. 2012) (citing *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010)). This standard vests “considerable discretion” in the district court. *Leisure Caviar*, 616 F.3d at 615. When deciding whether to grant a Rule 59(e) motion, a district court must consider the “interest of protecting the finality of judgments and the expeditious termination of litigation.” *Id.* at 615–16 (quoting *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002)). Otherwise, “plaintiffs could use the court as a sounding board to discover holes in their arguments, then ‘reopen the case by amending their complaint to take account of the court’s decision.’ ” *Id.* at 616 (quoting *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983)). Therefore, unlike in the context of Federal Rule of Civil Procedure 15(a), “[a] claimant who seeks to amend a complaint *after* losing the case must provide a compelling explanation to the district court for granting the motion.” *Id.* at 617. With this standard in mind, we find that the district court did not abuse its discretion by denying Plaintiff’s Rule 59(e) motion to alter or amend the judgment. We address two preliminary issues.

[3] First, Plaintiff moved to alter the district court’s judgment only as to his second TCPA claim, which was originally

pleaded in Paragraph 45(b) of his complaint. Accordingly, the district court limited its analysis to whether it should alter its dismissal of Plaintiff's second TCPA claim only. On appeal, Plaintiff does not challenge the district court's interpretation of his [Rule 59\(e\)](#) motion as applying only to his second TCPA claim. Therefore, we confine our review of Plaintiff's [Rule 59\(e\)](#) motion to his second TCPA claim as well.

Next, Plaintiff appears to argue that this Court should remand to the district court to provide Plaintiff an opportunity to amend his TCPA claim pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#), regardless of this Court's review of Plaintiff's [Rule 59\(e\)](#) motion. This argument is without merit. First, Plaintiff's counsel acknowledges in his brief that "[i]t is undisputed that the Plaintiff's Complaint, as written, may not contain sufficient allegations to state a plausible claim for relief as to the *service-related* cause of action presented in Paragraph 45(b). An amendment would be required to survive the Defendant's Motion to Dismiss as it relates to this cause of action." Br. for Appellant at 37. Plaintiff then proceeds to argue why such an amendment should be allowed under [Federal Rule of Civil Procedure 15\(a\)\(2\)](#), arguing in particular that there would be no undue delay or undue prejudice to Defendant.

Plaintiff's argument misses the mark because Plaintiff never filed a motion to amend his complaint either as of right or *257 with leave of court in the district court. In his response in opposition to Defendant's motion to dismiss, Plaintiff stated "[a]s it pertains to the Plaintiff's allegations contained in Paragraph 45(b) of the Complaint, Plaintiff will be filing a Motion to Amend pursuant to Federal Rule of Procedure 15(a)(2) for the purpose of pleading, with sufficient particularity, Defendant's violation of the Tennessee Consumer Protection Act as set forth in Paragraph 45(b) of the Complaint." R. 12, Pg. ID 169. In the same response, Plaintiff requested that "as it pertains to the allegations set forth in Paragraph 45(b), Plaintiff be permitted to Amend the Complaint *upon proper motion* pursuant to [Federal Rule of Civil Procedure 15\(a\)\(2\)](#)." *Id.* (emphasis added). But, Plaintiff never filed a proper motion to amend his complaint, and this Court has repeatedly held that "a bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought ... does not constitute a motion within the contemplation of [Rule 15\(a\)](#)." *La. Sch. Emps.' Ret. Sys.*, 622 F.3d at 486 (quoting *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir. 2004), *abrogated on other grounds*, *Frank v. Dana Corp.*, 646 F.3d 954, 961 (6th Cir. 2011)). For example, in *Kuyat v. BioMimetic*

Therapeutics, Inc., 747 F.3d 435, 444 (6th Cir. 2014), we found that "[b]oth because the plaintiffs did not present an adequate motion and because they did not attach a copy of their amended complaint, the district court did not abuse its discretion in refusing to allow the plaintiffs to amend their complaint based on the final sentence of the plaintiffs' memorandum in opposition." Therefore, the district court did not abuse its discretion in this case by failing to rule on a motion that was never before it. To the extent that we consider remanding the case to provide Plaintiff with an opportunity to amend his second TCPA claim, we do so by reviewing the district court's denial of Plaintiff's [Rule 59\(e\)](#) motion only, rather than on any alleged failure of the district court to grant leave to amend under [Rule 15](#). For the reasons that follow, we find that the district court did not abuse its discretion by denying Plaintiff's [Rule 59\(e\)](#) motion.

In his [Rule 59\(e\)](#) motion, Plaintiff sought to reopen the district court's judgment on his TCPA claim because of Plaintiff's counsel's mistaken impression "that a case management conference was required prior to filing his motion to amend." R. 31, Pg. ID 242. Plaintiff argued that Plaintiff's counsel misunderstood when he was able to seek leave to amend the complaint under the Local Rules and the Federal Rules of Civil Procedure. The district court correctly found that Plaintiff's counsel's misunderstanding of the procedural rules did not satisfy any of the requisite conditions for granting a [Rule 59\(e\)](#) motion. The court stated:

Plaintiff's argument is nonsensical. The Federal Rules of Civil of Procedure do not state that a party must wait to seek leave to amend a complaint until an initial case management conference. In fact, they allow just the opposite. Under [Rule 15\(a\)\(1\)\(B\)](#), a party may amend its pleading "as a matter of course if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under [Rule 12\(b\)](#), (e), or (f), whichever is earlier." Therefore, Plaintiff did not even need to seek leave but instead could have directly responded to Defendant's motion to dismiss with an amended complaint. In addition, under [Rule 15\(a\)\(2\)](#), a party can amend its pleading with the opposing party's written consent or the court's leave. [Rule 15\(a\)\(2\)](#) does not say that a party must wait until after an initial case *258 management conference to move for such relief. Nothing in the Local Rules impairs Plaintiff's right to amend his complaint or seek leave to do so before the initial case management conference. Nor could it. "[L]ocal rules may not displace the Federal Rules

of Civil Procedure.” *Wilson v. City of Zanesville*, 954 F.2d 349, 352 (6th Cir. 1992).

R. 35, Pg. ID 261–62. The district court concluded that “[b]ecause Plaintiff—through a proper understanding of the Federal Rules of Civil Procedure—could have easily avoided the outcome in this case ... a manifest injustice has not occurred.” *Id.* at Pg. ID 262.

We agree with the district court. Trial counsel’s misunderstanding of the Federal Rules is not the type of “manifest injustice” at which [Rule 59\(e\)](#) is directed. This Court has repeatedly held that trial counsel’s strategic mistakes do not justify reopening a judgment. *See, e.g., Michigan Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017); *GenCorp, Inc. v. Am. Int’l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999); *see also Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213, 217 (D.C. Cir. 2018) (“[M]anifest injustice ‘does not exist where ... a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered.’”) (citation omitted). These holdings appropriately apply to

counsel’s misunderstanding of the Federal Rules where the language of the Rules was plain. *See Fed. R. Civ. P. 15(a)(1)* (“A party may amend its pleading once as a matter of course within ... 21 days after service of a motion under [Rule 12\(b\), \(e\), or \(f\)](#)....”). Therefore, we hold that the district court did not abuse its discretion by denying Plaintiff’s [Rule 59\(e\)](#) motion to alter or amend the judgment on his TCPA claim based on his trial counsel’s misunderstanding of the Federal Rules.

IV. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court’s judgment granting Defendant’s motion to dismiss, and **AFFIRM** the district court’s order denying Plaintiff’s [Rule 59\(e\)](#) motion to alter or amend the judgment as to his TCPA claim.

All Citations

797 Fed.Appx. 247, 100 UCC Rep.Serv.2d 1301

TAB 13

2018 WL 5808805

2018 WL 5808805

Only the Westlaw citation is currently available.
United States District Court, D. Utah.

Alejandro CALLEGARI, Individually and on
Behalf of All Others Similarly Situated, Plaintiff,

v.

BLENDTEC, INC., Defendant.

Case No. 2:18-cv-308-DB

Signed 11/06/2018

Attorneys and Law Firms

Bonner C. Walsh, Walsh PLLC, Grangeville, ID, Jon V. Harper, M. Denise Dalton, Harper Law PLC, Salt Lake City, UT, Jon M. Herskowitz, Baron & Herskowitz, Miami, FL, for Plaintiff.

Milo Steven Marsden, Kristen E. Olsen, Dorsey & Whitney LLP, Salt Lake City, UT, for Defendant.

MEMORANDUM DECISION AND ORDER

Dee Benson, United States District Judge

*1 Before the court is Defendant's Motion to Dismiss pursuant to [Rules 9\(b\)](#) and [12\(b\)\(6\)](#) of the [Federal Rules of Civil Procedure](#). (Dkt. No. 17.) The Motion has been fully briefed by the parties, and the court has considered the facts and arguments set forth in those filings. Pursuant to civil rule 7-1(f) of the United States District Court for the District of Utah Rules of Practice, the Court elects to determine the motion on the basis of the written memoranda and finds that oral argument would not be helpful or necessary. [DUCivR 7-1\(f\)](#).

FACTS

The court, as it must, accepts all well-pleaded factual allegations in the Complaint as true for purposes of Defendant's motion. *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009).

Defendant Blendtec, Inc. ("Blendtec") sells a series of blenders, which it markets under its Blendtec

trademark. (Complaint, Dkt. No. 2, ¶ 2.) On its website, marketing materials, and product packaging, Blendtec makes representations about the "horsepower"—or "HP"—of its blenders. (*Id.* ¶¶ 3-4.) Blendtec claims the horsepower of each blender falls between 3.0 and 3.8 HP. (*Id.* ¶ 3.)

Prior to filing the Complaint, Plaintiff retained electrical and mechanical engineers to conduct power tests on Blendtec's blenders in their laboratories. (*Id.* ¶ 22.) None of the blenders tested by Plaintiff's consultants exceeded more than 25% of the power output claimed by Blendtec. (*Id.* ¶ 23.)

The named Plaintiff, Mr. Callegari, purchased a "Blendtec Classic 475 120v Blender" "online" in July of 2017. (*Id.* ¶ 10.) Mr. Callegari relied on Blendtec's horsepower representations when making the purchase. (*Id.*) Upon using the blender, Mr. Callegari believed, based on his observations, that the blender was under-powered as compared to the horsepower claims made by Blendtec. (*Id.*) Had Mr. Callegari known that the blender was not as powerful as advertised, he would not have purchased it, or would not have paid as much for it as he did. (*Id.*)

Plaintiff brought this suit on behalf of himself and similarly-situated purchasers of Blendtec blenders. (*Id.* ¶ 1.) In his first cause of action, Plaintiff alleged that Blendtec misrepresented the "performance characteristics", "standard", and "grade" of its blenders, in violation of the Utah Consumer Sales Practices Act ("UCSPA"). (*Id.* ¶¶ 38-47.) In his second cause of action, Plaintiff alleged that Blendtec's horsepower representations were express warranties, which Blendtec breached pursuant to [U.C.A. §§ 70A-2-313](#) and [70A-2A-210](#). (*Id.* ¶¶ 48-53.) In his third cause of action, Plaintiff alleged that Blendtec's blenders did not conform to the representations on their packaging, thus breaching the implied warranty of merchantability pursuant to [U.C.A. §§ 70A-2-314](#) and [70A-2A-212](#). (*Id.* ¶¶ 54-61.) In his fourth cause of action, Plaintiff alleged a violation of the Magnuson-Moss Warranty Act, [15 U.S.C. § 2301 et seq.](#), premised on Blendtec's breach of express written warranties. (*Id.* ¶¶ 62-68.) In his fifth and sixth causes of action, Plaintiff alleged a breach of express and implied warranty, presumably pursuant to common law principles. (*Id.* ¶¶ 69-76.)

DISCUSSION

*2 "The court's function on a [Rule 12\(b\)\(6\)](#) motion is not to weigh potential evidence that the parties might present at trial,

2018 WL 5808805

but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted). Under Rule 12(b)(6), the court must accept all well-pleaded allegations in the Amended Complaint as true and view those allegations in the light most favorable to the nonmoving party. *Stidham v. Peace Officer Standards Training*, 265 F.3d 1144, 1149 (10th Cir. 2001) (quoting *Sutton v. Utah Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999)).

The Court must limit its consideration to the four corners of the Complaint, and any documents attached thereto, and any external documents that are referenced in the Complaint and whose accuracy is not in dispute. *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Plausibility, in the context of a motion to dismiss, constitutes facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In most civil actions, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). However, where a UCSPA claim "arises out of allegations of deception, false misrepresentations and omissions," it is subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). See *Jackson v. Philip Morris Inc.*, 46 F.Supp.2d 1217, 1222 (D. Utah 1998). Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud, and must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Wood v. World Wide Ass'n of Specialty Programs and Schools, Inc.*, 2007 WL 1295994, at *1 (D. Utah April 30, 2007).

First Cause of Action: Violation of UCSPA

Defendant first seeks to dismiss Plaintiff's claim for damages under the UCSPA, arguing that the claim does not meet the statutory requirements for pleading a class action for damages

under the statute and that Plaintiff has failed to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). (Dkt. No. 17.)

1. UCSPA Class Action Pleading Requirements

The UCSPA states that a consumer may bring a class action for damages only under limited circumstances. Plaintiff relies on the provision of the UCSPA allowing class action claims for damages "caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based" *Utah Code Ann. § 13-11-19(4)(a)*. Plaintiff asserts that the rule "adopted by the enforcing authority under Subsection 13-11-8(2)" relevant here is found in the *Utah Administrative Code R152-11-3*. (Dkt. No. 18.) That Rule, entitled "Bait Advertising/Unavailability of Goods," reads as follows:

*3 B. It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to offer to sell consumer commodities when the offer is not a bona fide effort to sell the advertised consumer commodities. An offer is not bona fide if:

(1) A supplier uses a statement or illustration in any advertisement which would create in the mind of a reasonable consumer a false impression of the grade, quality, quantity, make, value, model, year, size, color, usability, or origin of the consumer commodities offered or which otherwise misrepresents the consumer commodities in such a manner that, on subsequent disclosure or discovery of the true facts, the consumer is diverted from the advertised consumer commodities to other consumer commodities. An offer is not bona fide, even though the true facts are made known to the consumer before he views the advertised consumer commodities, if the first contact or interview is secured by deception.

UAC R152-11-3.

Plaintiff did not include any reference to R152-11-3 in his Complaint. Plaintiff alleged that he was offered a "powerfully advanced" blender with a horsepower between 3.0 and 3.8 HP, but that when he tested the blender, it fell far short of the horsepower claims on the product's packaging and Blendtec's website. (Compl. ¶ 3.) Plaintiff also alleged that Defendant misrepresented the "performance characteristics", "standard", and "grade" of its blenders. (*Id.* ¶ 45.) However,

2018 WL 5808805

Plaintiff did not allege that he was diverted from the product advertised by Blendtec to some other product. He only stated that he would not have purchased the product, or would have paid less for it, had he known that the blender was not as powerful as advertised. (*Id.* ¶ 10.)

R152-11-3 is a prohibition against bait and switch advertising tactics. It is labeled as such, and it requires that a consumer be “diverted from the advertised consumer commodities to other consumer commodities” for a seller’s conduct to violate the rule. Plaintiff did not allege bait and switch tactics in his Complaint, nor does he provide any additional facts in his briefing to show that a bait and switch occurred. Plaintiff alleged false advertising, which he believes caused damages to a class of consumers. But the facts alleged by Plaintiff do not constitute the bait and switch advertising tactics prohibited by R152-11-3.

Plaintiff has also failed to plead or provide to the court any other applicable rule that Blendtec may have violated. Accordingly, Plaintiff has failed to plead damages “caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority” required to bring a class action for damages under the UCSPA. Plaintiff has not alleged or relied upon any of the other limited circumstances allowing a plaintiff to bring a class action for damages under the UCSPA. Thus, Plaintiff has not met the requirements for pleading a class action for damages under the UCSPA.

Having so decided, the court must now determine whether the class action pleading requirements of the UCSPA are preempted by Rule 23 of the Federal Rules of Civil Procedure. In *Shady Grove Orthopedic Assoc., P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010), the Supreme Court issued a plurality opinion addressing the applicability of a federal rule in a diversity suit where a potentially conflicting state rule exists. The two-step analysis set forth by the concurrence requires the court to first determine “whether the scope of the federal rule is ‘sufficiently broad’ to ‘control the issue’ before the court, ‘thereby leaving no room for the operation’ of seemingly conflicting state law.” *Shady Grove*, 559 U.S. at 421, 130 S.Ct. 1431. “When conducting this analysis, the Federal Rules should be given their plain meaning.” *Racher v. Westlake Nursing Home Ltd. P’ship*, 871 F.3d 1152, 1162-63 (10th Cir. 2017). The court must “consider whether the rule can reasonably be interpreted to avoid [abridging, enlarging, or modifying a state substantive right].” *Shady Grove*, 559 U.S. at 422-23, 130 S.Ct. 1431. “There is a conflict only if there

is a ‘direct collision’ between federal and state law—one that is ‘unavoidable.’ ” *Racher*, 871 F.3d 1163 (citations omitted). “If the state and federal rules ‘can exist side by side, ... each controlling its own intended sphere of coverage,’ there is no conflict.” *Id.*

*4 Here, the court finds no conflict between Federal Rule of Civil Procedure 23 and Utah Code Ann. § 13-11-19(4)(a). The language of Rule 23 may be read to be permissive: “a class action *may* be maintained....” Fed. R. Civ. Proc. 23 (emphasis added); See *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prods. Liab. Litig.*, 288 F.Supp.3d 1087, 1254-55 (D.N.M. 2017). Rule 23 does not explicitly set forth exclusive procedural requirements for maintaining a class action. Accordingly, in light of the court’s directive to avoid collision where possible, Rule 23 and § 13-11-19(4)(a) are not in direct conflict and may be enforced side by side.

Having found no direct conflict between the state and federal rules, the court need not proceed under the *Shady Grove* analysis and must instead proceed under the doctrine set forth in *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). See *Racher*, 871 F.3d at 1163. “In diversity cases, the *Erie* doctrine instructs that federal courts must apply state substantive law and federal procedural law.” *Id.* at 1162. To determine whether a state law is substantive or procedural, the court “must decide whether applying the law will significantly affect the outcome of the litigation.” *Id.* at 1164. A substantive state law “bears on a State-created right vitally and not merely formally or negligibly,” or “intimately affect[s] recovery or non-recovery.” *Id.* Even “applicable burdens, defenses, and limitations” may be substantive where “state law creates a cause of action [and] defines the scope of that cause of action.” *Id.* at 1164-65.

Here, the court finds that pleading a violation of a rule as described in the UCSPA in order to maintain a class action for damages is substantive law under the *Erie* doctrine. Allowing class actions for damages to proceed without first requiring a showing that the alleged misconduct was “an act or practice specified as violating [the UCSPA] by a rule adopted by the enforcing authority” would dramatically expand the scope of class actions allowed under the UCSPA. In many cases, the availability of a class action mechanism significantly affects recovery or non-recovery as a practical matter. Furthermore, the state legislature specifically set forth the rights and remedies available under the UCSPA and the limited circumstances under which a class action for damages would be allowed. “Failing to enforce such

attendant attributes of a state law would lead to different measures of the substantive rights enforced in state and federal courts, contrary to *Erie*'s command. The result would be an 'inequitable administration' of the law." *Racher*, 871 F.3d at 1165 (citations omitted).

Because the requirement that a plaintiff allege "an act or practice specified as violating [the UCSPA] by a rule adopted by the enforcing authority" is a substantive state law, it must be enforced in this case in order to avoid inequitable administration of the law. Accordingly, Plaintiff's class action claim for damages under the UCSPA is dismissed for failure to plead "an act or practice specified as violating [the UCSPA] by a rule adopted by the enforcing authority."

2. Rule 9(a) Pleading Requirements

Even assuming that Plaintiff could satisfy the UCSPA requirements for pleading a class action for damages, Plaintiff's UCSPA claims would nevertheless fail for failure to comply with *Federal Rule of Civil Procedure 9(b)*. When a Complaint "alleges the kind of misrepresentations, omissions, or other deceptions covered by the term 'fraud' in its broadest dimension," it must satisfy the heightened pleading requirements of *Rule 9(b)*. *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982); see also *Goodwin v. Hole No. 4, LLC*, No. 2:06-cv-00679, 2006 U.S. Dist. LEXIS 86157 at *24, 2006 WL 3327990 at *7 (D. Utah Nov. 15, 2006)(Cassell, P.) ("Allegations of deception under the UCSPA fall within *Rule 9(b)*'s requirement of pleading with particularity."). Plaintiff here alleges that Defendant deceived consumers by making misrepresentations on packaging and on its website about the horsepower of its blenders. His pleading must, therefore, meet the heightened pleading standard of *Rule 9(b)*.

*5 *Rule 9(b)* requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. "At a minimum, *Rule 9(b)* requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud, and must set forth the time, place, and contents of the false representation, the identity of the party making the representations and the consequences thereof." *Wood v. World Wide Ass'n of Specialty Programs and Schools, Inc.*, 2007 WL 1295994, at *1 (D. Utah April 30, 2007) (Stewart, J.) (internal quotation marks omitted).

Here, Plaintiff alleged that Blendtec made representations that the "horsepower"—or "HP"—of its blenders fell between 3.0 and 3.8 HP, on "its product packaging, in its point of sale and marketing materials, and on Blendtec's website." (*Id.* ¶¶ 3-4.) Plaintiff also alleged that those horsepower representations were false, based on his testing of "Blendtec's Blenders." (*Id.* ¶ 6.) The named Plaintiff, Mr. Callegari, purchased a "Blendtec Classic 475 120v Blender" online" in July of 2017. (*Id.* ¶ 10.) Plaintiff alleged that "the product packaging of each and every Blendtec Blender" includes "specific 'Peak HP' claims" and that Mr. Callegari "relied on the representations on the Blender's packaging and on Blendtec's website about the Blender's horsepower" when making his blender purchase. (*Id.* ¶¶ 10, 15.) Plaintiff further alleged that "[h]ad Mr. Callegari known that the horsepower representations were false and that the Blender was not as powerful as advertised and represented, he would not have purchased the Blender or paid as much as he did for it." (*Id.*)

The Complaint did not identify where Mr. Callegari purchased his blender (other than that it was an "online" purchase) or where he observed the allegedly false statements prior to the purchase (only that "each and every" blender package contained horsepower representations). Plaintiff also failed to allege any specific misrepresentations made about the blender Mr. Callegari purchased—the Blendtec Classic 475 120v Blender. Although the Complaint included photographs of the packaging of some Blendtec blenders, they are devoid of any specific reference to the Blendtec Classic 475 120v Blender. (*See id.* ¶ 15.) Dates and times of the allegedly misleading statements at issue are also absent from the Complaint—other than the inclusion of a general allegation that Mr. Callegari purchased his blender "in July of 2017." (*Id.* ¶ 10.)

Plaintiff's broad assertions regarding the packaging and advertisements of Defendant's products generally are insufficient to satisfy *Rule 9(b)*. The Complaint did not specifically set forth the "who, what, when, where and how" of Mr. Callegari's purchase, or of any specific blender. Rather, Plaintiff made general statements regarding Defendant's advertising practices with respect to all of its blenders. Such generalizations are insufficient to satisfy the heightened pleading standards of *Rule 9*. Accordingly, even assuming that Plaintiff could satisfy the class action pleading requirements of the UCSPA, his UCSPA claim is properly dismissed for failure to satisfy *Rule 9(b)*.

2018 WL 5808805

Second and Third Causes of Action: Breach of Warranty under the Utah UCC

Defendant next seeks to dismiss Plaintiff's Breach of Express and Implied Warranty Claims under the Utah Uniform Commercial Code ("Utah UCC") for failure to comply with the notice requirements of the statute. (Dkt. No. 17 at 10-12.) The Utah UCC provides that "[w]here a tender has been accepted ... the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." [Utah Code Ann. § 70A-2-607\(3\)\(a\)](#). Thus, "a buyer's ability to recover damages for a seller's breach, when the goods have been accepted, is limited by the notification requirements of § 70A-2-607(3)." *Salt Lake City Corp. v. Kasler Corp.*, 855 F.Supp. 1560, 1567 (D. Utah 1994); *c.f. Mawhinney v. Jensen*, 120 Utah 142, 154, 232 P.2d 769, 776 (Utah 1951) ("timely notice is a vital condition precedent to an action for breach of warranty.").

*6 The Complaint made no mention of [§ 70A-2-607](#). Plaintiff argues, however, that the notice requirements have been satisfied because "Blendtec had both actual knowledge of the falsity of its horsepower representations and had, at a minimum, reason to know that its horsepower claims were greatly inflated." (Dkt. No. 18 at 10-11.) Plaintiff has provided no case law to support his position that knowledge of the falsity of statements is sufficient to satisfy the notice requirements of [§ 70A-2-607](#).

Rather, in support of this argument, Plaintiff cites to [Utah Code Ann. § 70A-1a-202](#), which states that "a person has 'notice' of a fact if the person (a) has actual knowledge of it; (b) has received a notice or notification of it; or (c) from all the facts and circumstances known to the person at the time in question, has reasons to know that it exists." While Plaintiff has correctly identified a general statement of law regarding notice in the state of Utah, the more specific language of [§ 70A-2-607](#) precludes its application. [Section 70A-2-607](#) requires that "the buyer must ... notify the seller of breach or be barred from any remedy." [Utah Code Ann. § 70A-2-607\(3\)\(a\)](#) (emphasis added). [Section 70A-2-607](#) places an affirmative burden on a would-be plaintiff prior to his filing suit, rather than merely requiring that a defendant be on notice of a breach.

Plaintiff has not alleged that he gave Defendant notice of the alleged breach of express or implied warranty. Accordingly,

Plaintiff's claims for breach of express and implied warranty under the Utah UCC are dismissed for failure to comply with the notice requirements of [Utah Code Ann. § 70A-2-607\(3\)\(a\)](#).

Fifth and Sixth Causes of Action: Breach of Express and Implied Warranty

Defendant next moves to dismiss Plaintiff's fifth and sixth causes of action for breach of common law express and implied warranties. The Utah UCC was enacted to "simplify, clarify, and modernize the law governing commercial transactions" as well as to "make uniform the law among the various jurisdictions." [Utah Code Ann. § 70A-1a-103](#). Principles of law or equity in place prior to its enactment remain intact "unless displaced by the particular provisions" of the Utah UCC. *Id.* The Utah UCC specifically addresses express and implied warranties. See [Utah Code Ann. §§ 70A-2-313; 70A-2A-210; 70A-2-314; 70A-2A-212](#). Plaintiff has not provided the court with any basis or support upon which to find that those particular provisions do not displace any prior common law claims for breach of express or implied warranty that might otherwise apply here. Accordingly, the court finds that the common law breach of warranty claims pled by Plaintiff are barred by the Utah UCC.

Fourth Cause of Action: Breach of Warranty under the Magnuson-Moss Warranty Act

Finally, Plaintiff's fourth cause of action is a claim of breach of warranty pursuant to the Magnuson-Moss Warranty Act ("MMWA"). Plaintiff concedes that this claim is dependent upon a valid state law warranty claim. See *Spence v. Basic Research*, No. 2:16-CV-925-CW, 2018 WL 1997310, at *5 (D. Utah Apr. 27, 2018). Because the court has dismissed Plaintiff's breach of warranty claims, Plaintiff's MMWA must be dismissed as well.

CONCLUSION

For the reasons articulated in this Memorandum Decision and Order, Defendant's Motion to Dismiss is hereby GRANTED.

All Citations

Not Reported in Fed. Supp., 2018 WL 5808805

TAB 14

2009 WL 10688141

2009 WL 10688141

Only the Westlaw citation is currently available.

United States District Court, N.D.
Alabama, Northwestern Division.

COMMUNITY SPIRIT BANK, Plaintiff,

v.

FIDELITY NATIONAL TITLE INSURANCE
COMPANY OF NEW YORK and
Prince Brothers, Inc., Defendants.

Civil Action No. CV-09-S-430-NW

Signed 06/22/2009

Attorneys and Law Firms

Jeffrey L. Bowling, Bedford Rogers & Bowling PC,
Russellville, AL, for Plaintiff.

James A. Bradford, Marcus R. Chatterton, Balch & Bingham
LLP, Birmingham, AL, for Defendants.

MEMORANDUM OPINION AND ORDER

DUDLEY H. BOWEN, United States District Judge Sitting
by Designation

*1 Plaintiff, Community Spirit Bank, commenced this action in the Circuit Court of Franklin County, Alabama, on January 26, 2009, asserting claims of breach of contract and unjust enrichment.¹ Plaintiff named Fidelity National Title Insurance Company of New York ("Fidelity") and Prince Brothers, Inc. ("Prince Brothers") as defendants in the case. Fidelity removed the action to this court on March 4, 2009, based solely on its allegation that diversity jurisdiction exists in the federal court.² In the notice of removal, Fidelity asserted that Prince Brothers, which is a resident of the State of Alabama, was fraudulently joined as a defendant.

¹ See doc. no. 1 (Notice of removal), Ex. 1 (Complaint).

² *Id.*

Plaintiff filed a motion to remand this action to state court on April 3, 2009, contesting Fidelity's assertion that Prince Brothers was fraudulently joined.³

³ See doc. no. 5.

I. STANDARD OF REVIEW

Federal district courts are " 'empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution,' and which have been entrusted to them by a jurisdictional grant authorized by Congress." *University of South Alabama v. The American Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999) (quoting *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994)); see also, e.g., *Morrison v. Allstate Indemnity Co.*, 228 F.3d 1255, 1260-61 (11th Cir. 2000) ("Federal courts have limited subject matter jurisdiction, or in other words, they have the power to decide only certain types of cases.") (citing *University of South Alabama*, 168 F.3d at 409-10). Accordingly, removal statutes must be construed narrowly, and "all uncertainties as to removal jurisdiction are to be resolved in favor of remand." *Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001) (citing *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994)).

II. BACKGROUND

At the time of the incidents giving rise to this lawsuit, plaintiff was a state bank with its principal place of business in Red Bay, Alabama.⁴ Fidelity was a title insurance company with its primary place of business in New York.⁵ Prince Brothers was an authorized agent of Fidelity with its principal place of business in Russellville, Alabama.⁶

⁴ See doc. no. 1 (Notice of removal), Ex. 1 (Complaint), at 1, ¶ 1.

⁵ *Id.*, Ex. 1 at 1, ¶ 2.

⁶ *Id.*, Ex. 1 at 1, ¶ 3.

Plaintiff alleges that in or around July 1998, it requested that Prince Brothers issue a title insurance policy to insure a first mortgage lien on certain real property in Franklin County, Alabama, that would secure a construction loan it planned to issue.⁷ Plaintiff characterizes Prince Brothers as an authorized agent for Fidelity and asserts that Prince Brothers, acting as an agent for Fidelity, subsequently issued a commitment for title insurance.⁸ Plaintiff further alleges

that “[a]t the closing of the construction loan, Prince Brothers, Inc., was paid a premium for the Commitment, whereupon Prince Brothers, Inc., as an agent for Fidelity National, issued its title insurance policy....”⁹

⁷ *Id.*, Ex. 1 at 2, ¶ 2.

⁸ *Id.*

⁹ *Id.*, Ex. 1 at 4, ¶ 14.

*2 This action arises from plaintiff's claims that Prince Brothers and Fidelity breached the title insurance policy and received unjust enrichment from their alleged failure to defend plaintiff in a prior lawsuit related to the real property covered by the title insurance policy.

III. DISCUSSION

Jurisdiction under 28 U.S.C. § 1332 requires “complete diversity”—the citizenship of every plaintiff must be diverse from the citizenship of every defendant. *See, e.g., Palmer v. Hospital Authority of Randolph County*, 22 F.3d 1559, 1564 (11th Cir. 1994) (citing *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267, 2 L.Ed. 435 (1806)); *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006) (“When a defendant removes a case to federal court on diversity grounds, a court must remand the matter back to state court if any of the properly joined parties in interest are citizens of the state in which the suit was filed.”). An action may nevertheless be removable if the joinder of non-diverse parties is deemed to have been “fraudulent”: *i.e.*, for the purpose of defeating federal jurisdiction. *See, e.g., Wilson v. Republic Iron and Steel Co.*, 257 U.S. 92, 97 (1921) (holding that a diverse defendant's “right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy”).

The filing of a frivolous or other illegitimate claim against a non-diverse defendant is characterized as “fraudulent joinder,” and a district court may disregard the citizenship of such defendants. *See Florence v. Crescent Resources, LLC*, 484 F.3d 1293, 1297 (11th Cir. 2007) (“if a defendant shows that ‘there is no possibility the plaintiff can establish a cause of action against the resident defendant,’ then the plaintiff is said to have fraudulently joined the non-diverse defendant.”) (quoting *Henderson*, 454 F.3d at 1281). The doctrine of fraudulent joinder thus is an exception to the requirement that parties must be completely diverse, and provides that

an action may be removed from state court, despite a lack of complete diversity of citizenship among the parties, if the plaintiff's joinder of a non-diverse party was fraudulent. *See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998).

Traditionally, courts have deemed a joinder to be “fraudulent” in two situations: “The first is when there is no possibility that the plaintiff can prove a cause of action against the resident (non-diverse) defendant.... The second is when there is outright fraud in the plaintiff's pleading of jurisdictional facts.” *Triggs*, 154 F.3d at 1287; *see also, e.g., Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1380 (11th Cir. 1998) (“In a removal case alleging fraudulent joinder, the removing party has the burden of proving either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.”) (quoting *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997)). The Eleventh Circuit also has identified a third type of fraudulent joinder: when “a diverse defendant is joined with a nondiverse defendant as to whom there is no joint, several or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the nondiverse defendant.” *Triggs*, 154 F.3d at 1287 (citing *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *overruled on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000)).

*3 Fidelity relies only on the first ground to support its allegation of fraudulent joinder: *i.e.*, that there is no possibility plaintiffs can establish a cause of action against the resident defendant, Prince Brothers. Under this standard,

“[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.” *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983), *superceded by statute on other grounds as stated in Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989). “The plaintiff need not have a winning case against the allegedly fraudulent defendant; he need only have a *possibility* of stating a valid cause of action in order for the joinder to be legitimate.” *Triggs*, 154 F.3d at 1287 (emphasis in original).

Tillman v. R.J. Reynolds Tobacco, 253 F.3d 1302, 1305 (11th Cir. 2001) (*per curiam*) (emphasis in original) (affirming district court's dismissal of five individual defendants who

had been employed by R.J. Reynolds in the promotion, advertising, and sale of cigarettes within Alabama as fraudulently joined for purpose of defeating diversity jurisdiction).

The burden of proving fraudulent joinder rests with the removing defendant. See *Crowe*, 113 F.3d at 1538. The claim must be supported by clear and convincing evidence. *Parks v. New York Times*, 308 F.2d 474, 478 (5th Cir. 1962).¹⁰ When determining whether a defendant has been fraudulently joined, the court must examine the plaintiff's pleadings on the date the notice of removal was filed,¹¹ although it also may consider affidavits and deposition testimony submitted by the parties. See, e.g., *Pacheco de Perez*, 139 F.3d at 1380. However, “the jurisdictional inquiry ‘must not subsume substantive determination.’ ... When considering a motion for remand, federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.” *Crowe*, 113 F.3d at 1538 (citing *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548-49 (5th Cir. Unit A 1981)). Further, as with a Rule 56 motion for summary judgment, courts must evaluate all the evidence in the light most favorable to the plaintiff—the party opposing removal—resolving any uncertainties about the applicable laws in the plaintiff's favor. See *Pacheco de Perez*, 139 F.3d at 1380.

¹⁰ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

¹¹ As in all other issues concerning removal, “[j]urisdictional facts are assessed on the basis of plaintiff's complaint *as of the time of removal*.” *Burns v. Windsor Insurance Co.*, 31 F.3d 1092, 1097 n.13 (11th Cir. 1994) (emphasis in original) (citations omitted); see also, e.g., *Coker*, 709 F.2d at 1440 (“Removability should be determined ‘according to the plaintiff's pleading at the time of the petition for removal.’ ”) (citations omitted); *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1561 (11th Cir. 1989) (same).

It follows from the foregoing propositions that a defendant's burden when seeking to establish fraudulent joinder is a heavy one: “[w]here a plaintiff states *even a colorable claim* against the resident defendant, joinder is proper and the case should be remanded to state court.” *Id.* (emphasis supplied) (citing

Crowe, 113 F.3d at 1538); see also *Florence*, 484 F.3d at 1299 (“if there is any possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint, the federal court cannot find that joinder of the resident defendant was fraudulent, and remand is necessary.”).

*4 Applying the foregoing principles, this court concludes that plaintiff fails to state possible causes of action for breach of contract and unjust enrichment against non-diverse defendant Prince Brothers.

A. Breach of Contract

In order to state a claim for breach of contract under Alabama law, plaintiff must establish the “ ‘(1) a valid contract binding the parties; (2) the plaintiffs' performance under the contract; (3) the defendant's nonperformance; and (4) resulting damages.’ ” *Ex parte Jackson County Bd. of Educ.*, 4 So. 3d 1099, 1103 (Ala. 2008) (quoting *Reynolds Metals Co. v. Hill*, 825 So. 2d 100, 105-06 (Ala. 2002)). Plaintiff and Fidelity agree that Alabama law does not impose contract obligations upon an agent who contracts on behalf of a disclosed principal. Stated another way, Alabama law is well established that if an agent successfully binds a principal in contract, the agent is not liable unless there is a clear intention to add or impose his personal liability. See *Ricwil, Inc. v. S.L. Pappas & Co.*, 599 So. 2d 1126, 1129 (Ala. 1992) (“The general rule in Alabama concerning liability of an agent for the breach of contract entered on behalf of a disclosed principal is that the agent binds either the principal or himself to the contract, but not both.”) (quoting *Shirley v. Lin*, 548 So. 2d 1329, 1333 (Ala. 1989)); *Sealy v. McElroy*, 288 Ala. 93, 104, 257 So. 2d 340, 350 (1972) (“An agent is presumed to intend to bind his principal only and to incur no personal liability and unless an intention to substitute or superadd his personal liability for or to that of his principal is clearly shown, he will not be bound in his individual capacity.”).

Here, plaintiff argues that a state court could find that Prince Brothers was a party to the subject title insurance policy because the title commitment was countersigned by Larry Prince of Prince Brothers as an “Authorized Signature” and all of the documents contain the corporate seals of both Prince Brothers and Fidelity. Plaintiff contends that “[t]here is no indication that Prince Brothers is signing in a mere agency capacity” for Fidelity.¹² This argument fails because in its complaint plaintiff alleges that “Prince Brothers, Inc., as an agent for Fidelity National, issued its title insurance policy,”

2009 WL 10688141

and under Alabama law an agent need not intentionally opt out of its agency capacity to avoid personal liability.¹³ See *Mobile Ins., Inc. v. Smith*, 441 So. 2d 894, 897 (Ala. 1983) (“Where a complaint declares on a contract as made with the plaintiff by one of the defendants as the agent of another defendant, it states no cause of action against the agent defendant.”) (quoting *Gillis v. White*, 214 Ala. 22, 106 So. 166 (1925)). Likewise, the insurance policy does not indicate that Prince Brothers intended to substitute its personal liability for that of Fidelity.

¹² Doc. no. 5 at 3.

¹³ In its complaint, plaintiff identified Prince Brothers as Fidelity's “authorized agent” more than seven times. See e.g., doc. no. 1, Ex. 1 at 1-2 (“Fidelity National does business through its authorized agent in Franklin County, Alabama”) and (“Prince Brothers, Inc. acted as an authorized agent for Fidelity National.”)

B. Unjust Enrichment

*5 Plaintiff also contends that its claim of unjust enrichment states a viable cause of action against Prince Brothers. Plaintiff asserts that it is universal procedure in the title insurance industry for the issuing agent to retain a substantial portion of the title insurance premium paid by the insured owner or mortgagee, and that because no costs, attorneys' fees, or expenses were paid on behalf of plaintiff in defending its title in a prior lawsuit, Prince Brothers was unjustly enriched by its retention of a portion of the premium.

This court concludes that plaintiff fails to state a possible cause of action for unjust enrichment against Prince Brothers because under Alabama law unjust enrichment is an equitable remedy available only when no remedy at law exists and, in this case, plaintiff has a legal remedy under its breach of contract claim against Fidelity. The Alabama Supreme Court has described unjust enrichment as “an old *equitable* remedy permitting the court in equity and good conscience to disallow one to be unjustly enriched at the expense of another.” *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So. 2d 1111, 1123 (Ala. 2003) (quoting *Battles v. Atchison*, 545 So. 2d 814, 815 (Ala. Civ. App. 1989) (emphasis original)). As an equitable remedy, unjust enrichment is available only where there is no adequate remedy at law. See *Northern Assur. Co. of America v. Bayside Marine Const., Inc.*, No. 08-222-KD-B, 2009 WL 151023, at

*4 (S.D. Ala. Jan. 20, 2009) (“Alabama law makes clear that unjust enrichment is an equitable remedy only to be invoked where there is no available remedy at law.”) (citing *Mantiply v. Mantiply*, 951 So. 2d 638, 654-55 (Ala. 2006) (“[w]hen an express contract exists, an argument based on a *quantum meruit* recovery in regard to an implied contract fails.”) (quoting *Brannan & Guy, P.C. v. City of Montgomery*, 828 So. 2d 914, 921 (Ala. 2002)); *Teleprompter of Mobile, Inc. v. Bayou Cable TV*, 428 So. 2d 17, 20 (Ala. 1983) (“an injunction, like any other equitable remedy, will only issue where there is no adequate remedy at law”) (citing *Watts v. Victory*, 333 So. 2d 560 (Ala. 1976))); *American Family Care, Inc. v. Irwin*, 571 So. 2d 1053, 1061 (Ala. 1990) (“Equity is a system of remedies that evolved to redress wrongs that were not recognized by or adequately righted by the common law.”).

Because plaintiff's claim of unjust enrichment against Prince Brothers arises from an alleged breach of the title insurance policy (failure to defend), an adequate remedy at law for damages exists under plaintiff's breach of contract claims against Fidelity. See *Northern Assurance Co. of America*, No. 08-222-KD-B, 2009 WL 151023, at *4-5 (holding that unjust enrichment claims based on plaintiff's receipt of benefits of the insurance premiums were precluded because an adequate remedy at law for damages existed under claims of breach of contract and bad faith denial of coverage); *Pearson's Pharmacy, Inc. v. Express Scripts, Inc.*, 505 F. Supp. 2d 1272, 1278 (M.D. Ala. 2007) (dismissing an unjust enrichment claim because plaintiff had an adequate remedy at law for damages under a theory of breach of contract).

IV. CONCLUSION

In summary, this court finds that plaintiff has failed to bring a possible cause of action against non-diverse defendant Prince Brothers under the circumstances alleged in its complaint. Accordingly, Prince Brothers was fraudulently joined and, all claims against it are DISMISSED with prejudice. Plaintiff's motion to remand is DENIED.

DONE this 22nd day of June, 2009.

All Citations

Not Reported in Fed. Supp., 2009 WL 10688141

2009 WL 10688141

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 15

2018 WL 2744976

2018 WL 2744976

Only the Westlaw citation is currently available.
United States District Court, D. Rhode Island.

DANIELE INTERNATIONAL, INC., Plaintiff,

v.

SABRA DIPPING COMPANY, LLC, Defendant.

C.A. No. 17-499 WES

|

Signed 06/07/2018

Attorneys and Law Firms

Brenna Anatone Force, Richard R. Beretta, Jr., Geoffrey W. Millsom, Adler Pollock & Sheehan PC, Providence, RI, for Plaintiff.

Luana DiSarra Scavone, Litchfield Cavo, LLP, Lynnfield, MA, Samuel A. Kennedy-Smith, Audrey L. Bradley, Litchfield Cavo, LLP, Providence, RI, Nicholas J. Parolisi, Jr., Pro Hac Vice, Litchfield Cavo, LLP, Chicago, IL, for Defendant.

MEMORANDUM AND ORDER

WILLIAM E. SMITH, Chief Judge

I. Introduction

*1 Plaintiff Daniele International, Inc. (“Plaintiff” or “Daniele”) contracted with Defendant Sabra Dipping Company, LLC (“Defendant” or “Sabra”) for Sabra to provide hummus to be included in Daniele’s Sabra Party Platter Select (“party platter”). The deal went bad because the hummus went bad (it was allegedly infested with *Listeria*, which tainted the entire platter). As a result, Daniele brings a multi-count state-law Complaint (ECF No. 1); Sabra moves to dismiss (ECF No. 10) Daniele’s claims for strict products liability (Count III), common law indemnification (Count VII), tortious interference with contractual relations (Count VIII), tortious interference with business expectancy (Count IX), and negligent misrepresentation (Count X).

In a hearing on April 4, 2018, the Court denied Sabra’s Motion with respect to Count VII, dismissed Counts VIII and IX, and took under advisement Counts III and X. This Memorandum and Order addresses Counts III and X.

II. Background¹

¹ Because this is a motion to dismiss and the Court “assume[s] the truth of all well-pleaded facts and indulge[s] all reasonable inferences therefrom that fit the Plaintiff’s stated theory of liability,” [Arruda v. Sears, Roebuck & Co.](#), 310 F.3d 13, 18 (1st Cir. 2002), this section describes the facts as Daniele alleges them.

Since 1945, Daniele has produced and distributed premium gourmet specialty foods, “buil[ding] a reputation for quality.” (Pl.’s Compl. (“Compl.”) ¶¶ 6, 9, ECF No. 1.) This quality was called into doubt when Sabra allegedly provided *Listeria*-infested hummus to be included in Daniele’s party platter. (*Id.* ¶¶ 29–30.)

In 2016, Daniele and Sabra agreed that Sabra would provide Daniele packages of hummus to be incorporated into its party platter, which Daniele packaged and distributed. (*Id.* ¶ 11.) In connection with the parties’ agreement, Sabra effectuated a Product Guaranty and Indemnification Agreement, through which it promised to provide untainted products fit for their forecasted purpose. (*Id.* ¶¶ 12–13.) Moreover, with respect to any potential product recalls, Sabra promised to accept back any faulty products for a full refund. (*Id.* ¶ 14.)

In October 2016, the United States Food and Drug Administration (“FDA”) inspected Sabra’s manufacturing facility in Colonial Heights, Virginia. (*Id.* ¶ 23.) This inspection revealed that the facility was contaminated by the presence of *Listeria monocytogenes*, a substance harmful to humans if ingested. (*Id.* ¶ 24.) On November 19, 2016, the FDA directed that Sabra recall various hummus products manufactured before November 8, 2016, in light of the presence of *Listeria*; on November 23, 2016, the FDA’s directive (“2016 Recall”) was updated to include the party platter. (*Id.* ¶¶ 29–30.) The November 23 update recalled the entire party platter due to the risk that the *Listeria*-infested hummus may have cross-contaminated the other party-platter products. (*Id.* ¶ 30.) The 2016 Recall was extensively publicized by national media outlets – outlets that also assigned Daniele a role in the *Listeria* outbreak. (*Id.* ¶¶ 30–32.)

*2 Daniele contends that it has lost a considerable investment (more than \$750,000) in preparing for the party platter “production line” – money that it would not have spent, and equipment that it would not have purchased, but for the party platter’s production. (*Id.* ¶¶ 16–20.) For instance,

2018 WL 2744976

Daniele purchased two meat-slicing machines, which were only useful in producing the party platter. (*Id.* ¶ 17.) In addition, because of the 2016 Recall, Daniele was faced with substantial expenses including back charges from retailers who had received party platters and returned them. (*Id.* ¶ 33.) Sabra's recalled hummus also forced Daniele to discontinue making its party platters altogether, which, in turn, left Daniele with substantial inventory that it had no use for, as well as twenty employees that it had to let go. (*Id.* ¶¶ 34–36.)

III. Legal Standard

In assessing a motion to dismiss under [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), “the district court must ‘accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff’s favor, and determine whether the complaint, so read, limns facts sufficient to justify recovery on any cognizable theory.’ ” [Rivera v. Centro Medico de Turabo, Inc.](#), 575 F.3d 10, 15 (1st Cir. 2009) (quoting [LaChapelle v. Berkshire Life Ins. Co.](#), 142 F.3d 507, 508 (1st Cir. 1998)). To overcome a motion to dismiss, a complaint must possess “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570 (2007)).

IV. Discussion

Sabra moves to dismiss Daniele’s strict-products liability (Count III) and negligent-misrepresentation (Count X) claims. While Sabra’s argument may have merit, it is too early to tell.

Sabra’s principal attack on both of Daniele’s claims is grounded in the “economic-loss doctrine.” Under Rhode Island law, this doctrine provides that, “a plaintiff is precluded from recovering purely economic losses in a negligence cause of action.” [Boston Inv. Property #1 State v. E.W. Burman, Inc.](#), 658 A.2d 515, 517 (R.I. 1995). Notably, the Rhode Island Supreme Court has not answered whether it would apply that doctrine to claims sounding in either strict-products liability or negligent misrepresentation. But as this Court has said before, “it is simply too early in the litigation cycle to determine whether the economic loss doctrine precludes Plaintiff’s claim[s,]” and the Court need not venture a guess

on how the Rhode Island Supreme Court would opine. [See Lang Pharma Nutrition, Inc. v. Aenova Holding GmbH](#), No. 16–371 S, 2017 WL 3327572, at *4 (D.R.I. Aug. 3, 2017); [see also Sheet Metal Workers Local No. 20 Welfare & Benefit Fund v. CVS Health Corp.](#), 221 F. Supp. 3d 227, 237–38 (D.R.I. 2016). “The bottom line is that ... the economic loss doctrine does not bar [Plaintiff’s] claims at this stage. It may well come out in discovery that the only basis for the claims is in contract, in which case this could be revisited at summary judgment.” [Sheet Metal Workers](#), 221 F. Supp. 3d at 238.

Although too early to tell, it is possible that the economic-loss doctrine is inapposite to the strict-products-liability claim because, as Daniele argues, that doctrine only prohibits economic losses for harm to the defective product itself; here, Daniele alleges, the infested hummus tainted other contents of the party platter (i.e., meats and cheeses). But it is premature to test Sabra’s response that “both the hummus and the meats and cheeses are component parts of a single product – the Party Platter.” (Def.’s Reply 1–2, ECF No. 15.); [see, e.g., Starline Windows Inc. v. Quanex Bldg. Prods. Corp.](#), No. 3:15–cv–01282, 2016 WL 3144060, at *3 (S.D. Cal. June 6, 2016) (“[T]he issue of whether a component part is distinct from the larger product is a fact intensive inquiry inappropriate for resolution on a motion to dismiss.”); [Digby Adler Grp., LLC v. Mercedes-Benz U.S.A., LLC](#), No. 14–cv–02349–TEH, 2015 WL 1548872, at *8 (N.D. Cal. Apr. 7, 2015) (“[A]t this early stage of the proceedings, the Court will not bar Plaintiff’s claim under the economic loss rule absent sufficient factual development.”); [KB Home v. Superior Court](#), 5 Cal. Rptr. 3d 587, 597 (Cal. Ct. App. 2003) (“Resolution of [determining what the product at issue is], however, should be left to the trier of fact.” (citations and quotations omitted.)). Accordingly, Sabra’s arguments for dismissal must be denied.

V. Conclusion

*3 For the reasons outlined above, Sabra’s Motion (ECF No. 10) is DENIED with respect to Counts III and X.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 2744976

TAB 16

2014 WL 3868022

Only the Westlaw citation is currently available.

United States District Court, D. South
Carolina, Spartanburg Division.Jay EASLER, individually and as class
representative of others similarly situated, Plaintiff,

v.

HOECHST CELANESE CORPORATION, HNA
Holdings, Inc., CNA Holdings, Inc., Hercules,
Inc., Ashland, Inc., Hystron Fibers, Inc., Messer
Greishiem, Inc., Arteva Specialties S.a.r.l. d/b/
a "KoSo," Johns Manville Corporation, INVISTA
S.a.r.l. d/b/a "Invista," Teijin Monofilament U.S.,
Inc., [Teijin Holdings USA, Inc.](#), Auriga Polymers
Inc., [Indorama Ventures USA, Inc.](#), Defendants.

Civil Action No. 7:14-00048-TMC.

|
Signed Aug. 5, 2014.**Attorneys and Law Firms**[Richard A. Harpootlian](#), Richard A. Harpootlian Law Office,
[Graham Lee Newman](#), Chappell Smith and Arden, [Herbert W.](#)
[Louthian](#), [Herbert W. Louthian, Jr.](#), Louthian and Louthian,
Columbia, SC, for Plaintiff.[Brian Thomas Stansbury](#), Akerman LLP, Washington, DC,
[Scott Andrew McMillin](#), Kirkland and Ellis LLP, [Stephen](#)
[Andrew Swedlow](#), Quinn Emanuel Urquhart and Sullivan,
Chicago, IL, [Weston Adams, III](#), McAngus Goudelock and
Courie, [Newman Jackson Smith](#), [Wendy Wilkie Parker](#),
Nelson Mullins Riley and Scarborough, Columbia, SC,
[Grenville Delorme Morgan, Jr.](#), Mcangus Goudelock and
Courie, Greenville, SC, [Benjamin A. Johnson](#), Robinson
Bradshaw and Hinson, Rock Hill, SC, [Christopher David](#)
[Smith](#), Thompson and Knight LLP, Austin, TX, [Jonathan](#)
[Burton Shoebotham](#), [Rick Anthony Raven](#), Thompson and
Knight LLP, Houston, TX, [Kevin A. Dunlap](#), Parker Poe
Adams and Bernstein, Spartanburg, SC, [Steven D. Weber](#),
Parker Poe Adams and Bernstein, Charlotte, NC, [G. Mark](#)
[Phillips](#), Nelson Mullins Riley and Scarborough, [Ben A.](#)
[Hagood, Jr.](#), Moore and Van Allen, Charleston, SC, for
Defendants.**ORDER**[TIMOTHY M. CAIN](#), District Judge.

*1 The plaintiff, Jay Easler ("Easler"), brought this suit against the above named defendants for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, private nuisance, public nuisance, and negligence. Before the court are several motions to dismiss. (ECF Nos. 18, 20, 21, 22, 23, 24.) The parties have fully briefed these motions and the court does not see a need for oral argument. *See* Local Civil Rule 7.08, DSC. For the reasons that follow, the motions to dismiss are denied.¹

¹ This excludes Ashland, Inc.'s, motion to dismiss. In his omnibus response to the motions to dismiss, Easler stipulates to dismissing Ashland, Inc., as a defendant. (ECF No. 48, p. 26.) Accordingly, Ashland, Inc.'s, motion to dismiss (ECF No. 21) is now MOOT.

I. BACKGROUND

Easler lives in a small community in South Carolina's upstate called Cannon's Campground. Cannon's Campground is located close to several water sources, including the Pacolet River, Cherokee Creek, and what the parties refer to as "Polluted Creek," an unnamed tributary of the Pacolet River. Just north of Cannon's Campground is an industrial site that, according to the complaint, has been operational since 1966. Easler alleges that the defendants, Hoechst Celanese Corporation, HNA Holdings, Inc., and CNA Holdings, Inc. (collectively "Hoechst"); Hercules, Inc. ("Hercules"); Ashland, Inc. ("Ashland"); Hystron Fibers, Inc. ("Hystron"); Messer Greishiem, Inc.; Arteva Specialties S.a.r.l. d/b/a "KoSa" ("Arteva"); Johns Manville Corporation ("Johns Manville"); INVISTA S.a.r.l. d/b/a "Invista" ("Invista"); Teijin Monofilament U.S., Inc.; Teijin Holdings, USA, Inc.; Auriga Polymers Inc. ("Auriga"); and Indorama Ventures USA, Inc. ("Indorama"), are previous or current owners or operators of the site or are otherwise responsible for damages resulting from toxic waste entering surrounding surface waters and the groundwater.

Based on the defendants' alleged responsibility for the contamination, Easler has brought the following causes of

action on behalf of himself and the Cannon's Campground community²: (1) RCRA injunctive relief under § 6972, specifically (a) cessation of all activities contributing to the contamination of the groundwater and surface water in the Cannon's Campground community, (b) commencement of a comprehensive and diligent program of delineation and remediation of existing contamination, and (c) institution of community medical monitoring; and (2) state causes of action for (a) public nuisance, (b) private nuisance, and (c) negligence.

² Easler brings this case as a proposed class action. As a motion for class certification is not yet before the court, the court will reserve judgment as to the class allegations in the complaint.

The majority of the defendants have moved to dismiss Easler's complaint, raising various grounds.³ Hoechst has moved to dismiss the complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) and South Carolina Rule of Civil Procedure 12(b)(6). (ECF No. 18.) In its motion, Hoechst asserts that the court should dismiss (1) Easler's RCRA claims because (a) Easler has failed to properly plead imminent and substantial danger to health or the environment and (b) medical monitoring is not available as a remedy under RCRA and (2) Easler's state law claims because (a) Easler has not pled damages to or interference with his property and (b) those claims are barred by South Carolina's statute of limitations. Hoechst also raises a question as to Easler's standing to bring this suit and, specifically, whether he has suffered an injury in fact. Hercules, Invista, Arteva, Auriga, Indorama, and Johns Manville have joined in Hoechst's motion. (See ECF Nos. 20, 22, 23, 24.)

³ The docket reflects that Easler voluntarily dismissed Teijin Monofilament US, Inc., and Teijin Holdings USA, Inc., on January 27, 2014. (See ECF No. 6.) In addition, although both appear on Easler's list of defendants for service (ECF No. 4–1), the docket does not indicate that Hystron Fibers, Inc., or Messer Greishiem, Inc., has accepted service of the complaint or appeared in this case.

*2 In addition to joining in Hoechst's motion, Hercules and Johns Manville have asserted independent grounds for dismissal. Both Hercules and Johns Manville contend that Easler has not alleged enough facts regarding their conduct or contribution to the alleged contamination to state claims under

RCRA or state law. Johns Manville also asserts that Easler did not provide sufficient notice under 42 U.S.C. § 6972.

II. LEGAL STANDARD

Under the federal rules, each pleading must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim should be dismissed when the complaint fails to allege facts upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). When considering a motion to dismiss, the court should “accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff.” *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir.1993). However, “the pleading standard ... demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Thus, the rules require more than “labels and conclusions,” “a formulaic recitation of the elements of a cause of action,” or “naked assertions devoid of further factual enhancement.” *Id.* at 678.

In sum, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). And, for a claim to have facial plausibility, the plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556).

III. DISCUSSION

A. Standing⁴

⁴ The court recognizes that the majority of cases cited in this section, if not all of them, were claims brought under the Clean Water Act's (“CWA”) citizen suit provision, rather than under RCRA. However, like they have for the CWA's citizen suit provision, courts have interpreted the RCRA's provision for citizen enforcement to grant standing to the full extent allowed under Article III. See, e.g., *Maine People's Alliance and Natural Res. Def. Council v. Mallinckrodt, Inc.*,

471 F.3d 277, 283 (1st Cir.2006) (“Because there is nothing in RCRA’s text or history that suggests a congressional intent to erect statutory standing barriers beyond those imposed by Article III of the Constitution ..., we focus on what is essential to establish Article III standing.”). Thus, under either act, the court analyzes standing pursuant to Article III’s requirements.

Before addressing the adequacy of Easler’s complaint, the court must first determine whether Easler has standing to bring this suit. Article III of the Constitution restricts federal courts to the adjudication of cases and controversies. The standing doctrine upholds this restriction by “ensur[ing] that a plaintiff has a personal stake in the outcome of a dispute, and that judicial resolution of the dispute is appropriate.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 287, 396 (4th Cir.2011) (“*Gaston II*”). Thus, “[t]o meet the constitutional requirement for standing, a plaintiff must prove that: 1) he or she suffered an ‘injury in fact’ that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision.” *Id.*

However, “[i]n the environmental litigation context, the standing requirements are not onerous.” *American Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir.2003). Rather, “[i]f the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and adjudication of his rights.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 155 (4th Cir.2000) (“*Gaston I*”).

*3 Here, the defendants have voiced concerns about Easler’s assertion of an injury in fact. “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). Further, “[t]he Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III requirements.” *Gaston I*, 204 F.3d at 160; see e.g., *Babbitt v. United Farm Workers Nat’l Unions*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (“one does not have to await the consummation of threatened injury to obtain preventative

relief. If the injury is certainly impending that is enough.”); *Covington v. Jefferson Cnty.*, 358 F.3d 626, 638–39 (9th Cir.2004) (landowners who lived across from county landfill satisfied Article III injury-in-fact requirement by showing the risks RCRA sought to minimize threatened their enjoyment of life and security of home if landfill not operated as required by RCRA). Thus, “[c]itizens may ... rely on circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution to prove both injury in fact and traceability.” *Id.* at 163.

That is exactly what Easler has done here. While Easler’s property itself has not yet tested positive for contamination, the complaint painstakingly details exactly the type of circumstantial evidence discussed in *Gaston I*. After describing the exact location of Easler’s property in relation and proximity to the site, the complaint spends the next fifty-eight pages outlining the site’s history of pollution, including the exact chemicals discharged and where those chemicals have been found in the surrounding area over the thirty-one years since the site has been operational. The clear presumption from the complaint’s allegations is that over the years, the contamination from the site has migrated and continues to migrate toward Cannon’s Campground and Easler’s property. Further, the complaint alleges that the contamination has reached Polluted Creek, which directly abuts Easler’s property, and that a monitoring well on land adjacent to Easler’s tested positive for bedrock contamination. In addition, Easler alleges that, should the contamination reach his property, his well will be unusable and his property will diminish in value. In light of the circumstantial evidence presented, the court finds that Easler has shown an injury in fact fairly traceable to contamination from the site that could be redressed by granting the relief sought in this case.

B. Statute of Limitations

In addition to challenging Easler’s standing, the defendants assert that his state law claims are barred by South Carolina’s three year statute of limitations for injuries to person or property. See S.C.Code Ann. § 15–3–350(3), (5). “[A] motion to dismiss filed under Federal Rule of [Civil] Procedure 12(b) (6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff’s claim is time-barred.” *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir.2007). However, a court may address a statute of limitations defense in a motion to dismiss “in the relatively rare circumstances where facts sufficient to rule on [the defense] are alleged in the

complaint.” *Id.* The defendants believe this is one of those rare occasions.

*4 In support of this argument, the defendants point specifically to paragraph 108 of the complaint. That paragraph alleges, in its entirety:

The residents of the Cannon's Campground community were unaware of any of the details discussed in this notice until November 16, 2010. On that date, WSPA-TV reporter Chris Cato—an employee of the Spartanburg, South Carolina CBS affiliate—began airing a series of reports entitled “Shadow of Sickness” related to [cancer](#) rates in the community and the possible relation to pollution emanating from the Site. “Shadow of Sickness” was a five-part series that aired intermittently through May of 2011.

(Compl., ECF No. 1, p. 50, ¶ 108.) Thus, according to the defendants, if the residents of Cannons Campground, including Easler, became aware of the potential violations discussed in the complaint on November 6, 2010, then they had until November 6, 2013, to file a complaint and this complaint was not filed until January 7, 2014.

However, the court does not agree that the complaint presents all of the facts necessary to decide the defendants' statute of limitations defense. For instance, the complaint does not describe the content of each part of the series. And, the description it does give—that the series addressed [cancer](#) rates in the community—shows that the report did not directly relate to the claims at issue in this case. The complaint also does not state when or if Easler viewed the series or if the series should have informed him that pollution potentially threatened his property. In sum, despite defendants' assertion, stating that the “residents of the Cannon's Campground community were unaware of *any* of the details” in the complaint until November 16, 2010, is not equivalent to stating that on November 16, 2010, the residents of Cannon's Campground became aware of enough details alleged in the complaint to trigger the statute of limitations. Accordingly,

the court will not address the potential statute of limitations issue at this juncture.

C. RCRA Claims

“RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). RCRA's primary purpose is to “reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize the present and future threat to human health and the environment.’” *Id.* (quoting 42 U.S.C. § 6902(b)). To help further that purpose, RCRA contains a citizen suit provision, which provides that “any person may commence a civil action on his own behalf ... against any person ..., including any past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed to or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B).

*5 The defendants raise two primary challenges to Easler's claims under RCRA: (1) that he has not properly pled an imminent and substantial danger to health or the environment and (2) that his claim for medical monitoring is not an available remedy under the RCRA.

1. Imminent and Substantial Danger to Health or the Environment

The majority of courts that have addressed RCRA's imminent and substantial endangerment language have found that it creates a broad standard, “which is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes.” *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir.1991) (emphasis in original); see also *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir.2009) (“We have indicated that the ‘imminent and substantial endangerment’ standard is a broad one.”); *Mallinckrodt*, 471 F.3d at 288 (noting that “at least four of our sister circuits have construed [§ 6972(a)(1)(B)] expansively” and that “all four courts have emphasized the preeminence of the word ‘may’ in defining the degree of risk needed to support [§ 6972(a)(1)(B)s] liability standard”). However, the plain language of

the act still requires a plaintiff to show an “imminent” and “substantial” “endangerment.”

In its motion to dismiss, Hoechst collapses its standing argument into its assertion that Easler has not properly pled an imminent and substantial danger to health or the environment. Specifically, Hoechst avers that because Easler does not allege an injury in fact, he “does not have standing to assert a claim for imminent and substantial danger.” (Hoechst Mot. to Dismiss, ECF No. 18–1, p. 10 .)

The court agrees that Article III's injury in fact requirement and RCRA's imminent and substantial danger standard rely on almost identical considerations. Much like an injury in fact for environmental plaintiffs, “a finding that an activity may present an imminent and substantial harm does not require actual harm.” *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir.1994) (citing *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir.1984)). Rather, “[t]he RCRA provision implies that there must be a threat which is present now, although the impact of the threat may not be felt until later. Also, endangerment must be substantial and serious, and there must be some necessity for the action.” *Id.* (emphasis in original).

Thus, as the court has already found that the complaint sufficiently pleads a present threat of a serious harm to Easler and his property for standing purposes, it also finds that the complaint has presented sufficient evidence of an imminent and substantial danger to health or the environment to state a claim under RCRA.

2. Medical Monitoring

In addition, the defendants contend that Easler's claim for medical monitoring must fail because medical monitoring is not a recognized remedy under RCRA. Easler pleads his request for medical monitoring as a cause of action under RCRA for injunctive relief. Specifically, the complaint states: “Because of the long term exposure of the members of the community to numerous hazardous materials due to the actions of the defendants, it is necessary for the Court to establish a court-administered community medical monitoring program through which members of the proposed class may receive periodic health screening for illnesses caused by the hazardous materials identified within this complaint.” (Compl., ECF No. 1, p. 86, ¶ 192.) The defendants contend that this cause of action is really a claim for future damages wrapped in equitable relief's clothing. The question for this court, then, is whether medical monitoring

is the type of remedial injunctive relief RCRA envisions.⁵ After a review of relevant statutory and case law, the court concludes that, like many in law, it depends.

⁵ The court notes that if Easler intended to plead medical monitoring as a state law claim, this claim would fail because South Carolina has yet to recognize a cause of action for medical monitoring. See *Rosmer v. Pfizer, Inc.*, No. CIV. A. 9:99–2280–18RB, 2001 WL 34010613, *5 (D.S.C. March 30, 2001).

*6 The RCRA authorizes a court to “restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), [or] to order such person to take such other action as may be necessary.” 42 U.S.C. § 6972(a). Thus, “a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, *i.e.*, one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, *i.e.*, one that ‘restrains’ a responsible party from further violating RCRA.” *Meghrig*, 516 U.S. at 485.

A number of courts have considered the appropriateness of ordering defendants to implement or support some sort of medical monitoring program in response to a release of environmental contaminants potentially harmful to human health. As the defendants note, the most relevant case here is *Werlein v. United States*, 746 F.Supp. 887 (D.Minn.1990), vacated in part on other grounds, *Werlein v. United States*, 793 F.Supp. 898 (D.Minn.1992). In *Werlein*, like here, the plaintiffs requested medical monitoring as a form of injunctive relief under RCRA. The proposed program required the defendants to pay a lump sum of cash into a fund, and that persons eligible for medical monitoring use that pot of cash to obtain reimbursement costs incurred as the result of medical screening examinations. The court made short work of the plaintiffs' claim, finding that “[p]ayment of cash by one party to reimburse other parties for costs incurred is not injunctive relief.” *Id.* at 895.

In *Werlein*, the court also carefully distinguished the plaintiffs' proposed medical monitoring fund from one approved by the Northern District of California in *Barth v. Firestone Tire & Rubber Co.*, 661 F.Supp. 193 (N.D.Cal.1987). In the court's view, the two funds differed in their purpose and degree of necessity. *Barth* involved a group of plaintiffs exposed

to benzene, a toxin about which not much was known at the time the case was filed, and the proposed fund “would provide for a Medical Monitoring Program which will gather and forward to treating physicians information relating to the diagnosis and treatment of diseases which may result from the plaintiff’s exposure to toxins.” *Barth*, 661 F.Supp. at 203. In response to the plaintiffs’ reliance on *Barth*, the court in *Werlein* conceded that “[i]n a case where a number of persons are exposed to a toxin about which little is known, and it is necessary to gather and share information regarding diagnosis and treatment through screening, the Court would consider framing a medical monitoring and information sharing program as injunctive relief.” *Werlein*, 746 F.Supp. at 895. But, because the consequences of exposure to the toxin at issue in *Werlein* were well-documented, the court reasoned that the proposed fund would merely screen for early signs of those consequences, and thus could not be authorized as injunctive relief under RCRA. *Id.*

*7 After reviewing these cases and others, the Western District of New York concluded that “[a] court-administered fund which goes beyond payment of the costs of monitoring an individual plaintiff’s health to establish pooled resources for the early detection and advances in treatment of the disease is injunctive in nature rather than ‘predominantly money damages.’” *Gibbs v. E.I. DuPont de Nemours & Co., Inc.*, 876 F.Supp. 475, 481 (W.D.N.Y.1995).

The court finds that this view comports with RCRA’s purpose and its grant of expansive equitable authority to the courts to carry out that purpose. *See U.S. v. Waste Indus., Inc.*, 734 F.2d 159, 163–66 (4th Cir.1984); *U.S. v. Price*, 688 F.2d 204, 210–12 (3rd Cir.1982). However, in this order, the court finds only that Easler’s claim for medical monitoring is not subject to summary dismissal. The court offers no opinion at this point in the litigation as to whether it will withstand future scrutiny or prove an appropriate remedy on the facts presented in the case of RCRA liability.⁶

⁶ In addition, the defendants assert that the Fourth Circuit has already resolved this issue by stating that “[a] claim for medical surveillance costs is simply a claim for future damages.” *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir.1991). Much like the program proposed in *Werlein*, the medical surveillance in *Ball* would have required the defendants to cover the costs of periodic medical examinations designed to monitor the plaintiffs’ health and facilitate early detection of

disease caused by the plaintiffs’ exposure to toxic chemicals. However, the primary question before the Fourth Circuit in *Ball* was whether, under West Virginia or Virginia common law, the plaintiffs could recover the reasonable value of future medical expenses where they failed to show any present, physical injury. Thus, the court does not find that *Ball* is dispositive of the relevant question in this case—whether medical monitoring can be a proper form of injunctive relief.

D. State Law Claims

In addition to his RCRA claims, Easler has brought three state law causes of action: (1) public nuisance, (2) private nuisance, and (3) negligence. The defendants move to dismiss all three causes of action because Easler has failed to allege any damage to or interference with his property.

“A nuisance is ‘anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property.’” *Strong v. Winn–Dixie Stores, Inc.*, 240 S.C. 244, 125 S.E.2d 628, 632 (S.C.1962) (quoting *State v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 884, 889 (S.C.1909)). In addition, “[a] private person may bring a private civil suit for a public nuisance only if he suffered a special injury to his real or personal property.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846, 852 (S.C.2014). “A special injury is ‘individual or specific damage in addition to that suffered by the public’ and must be ‘of a special character, distinct and different from the injuries suffered by the public generally.’” *Id.* (internal citations omitted). And, to state a viable claim for negligence, a landowner must plead some damage to his property. *See Ravan v. Greenville Cnty.*, 315 S.C. 447, 434 S.E.2d 296, 307 (S.C.Ct.App.1993).

“A well-known principle of property law is that property consists of a bundle of rights.” *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 747 S.E.2d 468, 474–75 (S.C.2013). For owners of land abutting a body of water, that bundle of rights includes a “special right[],” “distinct from those rights that may be enjoyed by the public at large,” to make reasonable use of the water surrounding their property. *White’s Mill Colony Inc. v. Williams*, 363 S.C. 117, 609 S.E.2d 811, 817 (S.C.Ct.App.2005). Further, a landowner’s interest in use and enjoyment of his property includes an interest in being free “from discomfort and annoyance while using [his] lands.” *Babb*, 747 S.E.2d at 473 (quoting *Restatement (Second) of Torts* § 821D (1979)). Damage to or interference with any of

these rights may constitute tort damages under a nuisance or negligence theory.

*8 The defendants assert that Easler has not successfully pled interference with his property rights because his complaint does not state specifically that he uses the stream next to or the groundwater under his property. In addition, relying on one sentence in one Fourth Circuit opinion, the defendants assert that Easler's state law claims cannot survive because he has not identified enough contamination on his property to rise to the level of toxicological concern. And, without any of these additional bases, the defendants claim Easler cannot rely on alleged diminution of property value.

The court finds these arguments unavailing, especially at the motion to dismiss stage. In deciding this motion, the court is tasked with evaluating the plausibility of Easler's claims, not their precise factual nature, and must construe the allegations and all reasonable inferences therefrom in a light favorable to Easler. With this in mind, the court finds that Easler has sufficiently pled that the surface and ground water next to and possibly under his property is sufficiently contaminated to plausibly interfere with his property rights.

In addition, the court does not find *In re Wildewood Litig.*, 52 F.3d 499 (4th Cir.1995), either controlling or persuasive at this point in the litigation. The court decided *In re Wildewood*, after a motion for summary judgment and the presentation of expert testimony on contamination and diminution of property value. As nuisance and negligence claims are both fact-intensive inquiries, the court is not convinced to discard these claims based on the somewhat similar facts of another case without further factual development of the record in this matter.

E. Hercules

In addition to joining in Hoechst's motion to dismiss, Hercules has moved separately for the court to dismiss all claims against it. Hercules asserts that Easler's RCRA claims fail as to Hercules because the complaint does not allege that Hercules has contributed to waste disposal on the site. Further, because the complaint does not allege wrongful conduct by Hercules, Easler's state law claims must fail. And, in particular, Easler's nuisance claims fail because the complaint does not allege that Hercules had control of the property at the time the alleged nuisance was created. In addition, Hercules contends that it cannot be subject to a mandatory injunction to cease activities or conduct remediation on a property it has not had any relation to in forty years.

According to the complaint, on September 30, 1965, Hercules sought permission to dispose of industrial wastewater from the site into the Pacolet River. Then, in 1966, Hercules constructed a dimethyl terephthalate ("DMT") production facility on the southeastern part of the property. On May 22, 1970, Hercules sold a portion of the site to Hyston Fibers, Inc. Sometime thereafter, but in the "early 1970s," American Hoechst Corporation purchased the site and constructed a fiber production area. In 1978, American Hoechst Corporation ceased all on-site DMT production and partially dismantled the DMT facility. On November 13, 2008, Ashland, Inc., acquired Hercules. Those are the only allegations in the complaint directly pertaining to Hercules.

*9 Thus, Hercules asserts that the complaint does not specify the when, where, what, or how of Hercules's contribution to hazardous waste at the site. The court disagrees. While the complaint does not contain additional allegations regarding Hercules itself, it does clearly allege that a portion of the contamination stemmed from Hercules's DMT plant, even after it was deactivated and partially disassembled. The court finds that these allegations are enough to sustain Easler's claims against Hercules at the motion to dismiss stage. In addition, having found that Easler has sufficiently pled that Hercules may have contributed to the disposal of waste at the site, the court finds that, if proven, the court would have authority under RCRA to enjoin Hercules in some way. The exact parameters or necessity of that injunction are not properly before the court at this time.

F. Johns Manville

Like Hercules, Johns Manville moves to dismiss Easler's claims against it on the grounds that the complaint does not tie any of Johns Manville's alleged conduct to any of the alleged wrongs. In addition, Johns Manville asserts that Easler is barred from bringing RCRA claims against it because he failed to provide sufficient notice under 42 U.S.C. § 6972 and 40 C.F.R. § 254.3.

With regard to Johns Manville, the complaint alleges that: (1) "[d]uring or about 2000, KoSa sold a portion of the Site to Johns Manville Corporation" and (2) "Johns Manville discharges wastewater into the Site's wastewater treatment plant to the present day." (Compl., ECF No. 1, ¶ 12.) In addition, while the complaint acknowledges that the site is subject to an NPDES permit and DHEC regulation, it also alleges multiple violations of the NPDES permit. In particular, the complaint alleges at least one violation

201WL 3 87©7022

resulting directly from the wastewater treatment facility only three years after Johns Manville allegedly acquired a portion of the site from KoSa and began discharging its wastewater there. (*See* ECF No. 1, ¶¶ 89–90.) The court finds that the complaint alleges sufficient facts on which to base Easler's RCRA and state law claims against Johns Manville.

Likewise, the court finds that Easler's pre-suit notice satisfied the relevant statutory and regulatory conditions. Pursuant to 40 C.F.R. § 254.3, the notice

shall include sufficient information to permit the recipient to identify ... the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 254.3(a). Here, Easler's pre-suit notice, just like the complaint, alleged that Johns Manville owned a portion of

the property and discharged wastewater there. Thus, it clearly alleged the conduct constituting the claimed violation. In addition, the notice alleges that the identified alleged conduct has taken place from 2000 to the present. And, although the notice did not attempt to connect each defendant to each contaminant, it did include a list of the contaminants on which Easler intended to base his suit. The court concludes that Easler's notice included sufficient information regarding the basis for his intent to sue Johns Manville.

IV. CONCLUSION

***10** For the forgoing reasons, the defendants' motions to dismiss (ECF Nos. 18, 20, 21, 22, 23, 24) are DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 3868022

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 17

2020 WL 2218858

Only the Westlaw citation is currently available.
United States District Court, D. Vermont.

James EHLERS, on behalf of himself and
all others similarly situated, Plaintiff,

v.

BEN & JERRY'S HOMEMADE INC., and Conopco
Inc. d/b/a Unilever United States, Defendants.

Case No. 2:19-cv-00194

Signed 05/07/2020

Attorneys and Law Firms

Jay Shooster, Esq., Pro Hac Vice, Kim Richman, Esq., Pro Hac Vice, Richman Law Group, New York, NY, Joshua L. Simonds, Esq., The Burlington Law Practice, PLLC, Burlington, VT, for Plaintiff.

Buffy J. Mims, Esq., Pro Hac Vice, Shook, Hardy & Bacon L.L.P., Washington, DC, James P. Muehlberger, Esq., Pro Hac Vice, Shook, Hardy & Bacon L.L.P., Kansas City, MO, Walter E. Judge, Jr., Esq., Downs Rachlin Martin PLLC, Burlington, VT, for Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Christina Reiss, District Judge

*1 Plaintiff James Ehlers brings this action on behalf of a proposed class of similarly situated individuals against Ben & Jerry's Homemade Inc., ("Ben & Jerry's") and Conopco Inc., d/b/a Unilever United States ("Unilever" and collectively, "Defendants") alleging that Defendants' statements on Ben & Jerry's ice cream cartons and website that Ben & Jerry's sources dairy products from "happy cows" on "Caring Dairy" farms are materially misleading. Plaintiff alleges three causes of action against Defendants: violation of the Vermont Consumer Protection Act ("VCPA"), 9 V.S.A. §§ 2451-2480g (Count I); breach of an express warranty (Count II); and unjust enrichment (Count III). In addition to compensatory damages, Plaintiff seeks injunctive relief.

Pending before the court is Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed on January 13,

2020, in which Defendants argue that the description of cows as "happy" is a nonactionable opinion statement; that the alleged misrepresentation on Ben & Jerry's website regarding Caring Dairy standards is not misleading or material; that Plaintiff fails to state plausible claims for breach of an express warranty or unjust enrichment; and that Plaintiff does not have standing to pursue injunctive relief on behalf of himself or the proposed class. (Doc. 9.) On February 12, 2020, Plaintiff filed an opposition. Defendants filed a reply on February 26, 2020, at which time the court took the pending motion under advisement.

Plaintiff is represented by Kim Richman, Esq., Jay Shooster, Esq., and Joshua L. Simonds, Esq. Defendants are represented by Walter E. Judge, Jr., Esq., James P. Muehlberger, Esq., and Buffy J. Mims, Esq.

I. Allegations in the Complaint.

Plaintiff is a resident of Winooski, Vermont who purchases a variety of Ben & Jerry's ice creams from a Shaw's supermarket in Colchester, Vermont. Ben & Jerry's is an ice cream manufacturer incorporated in Vermont with its principal place of business in Burlington, Vermont and is a wholly owned subsidiary of Unilever, which is a New York corporation with its principal place of business in Englewood Cliffs, New Jersey. Plaintiff alleges that the court has subject matter jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA") because the proposed class involves more than 100 members, because there is diversity of citizenship between Plaintiff and Unilever, and because the amount in controversy exceeds the sum of \$5,000,000.

Ben & Jerry's was founded in 1978 in Burlington, Vermont by Ben Cohen and Jerry Greenfield. Plaintiff asserts that Ben & Jerry's rose to prominence in the 1980s and 1990s as a socially conscious, Vermont-based company which attracted consumers due to "the brand and all that it represented[.]" (Doc. 1 at 1, ¶ 2.) Plaintiff further alleges that Ben & Jerry's "reputation for being socially and environmentally conscious" was a "valuable and significant component of Unilever's acquisition of the brand[.]" *Id.* at 2, ¶ 4. Even though Mr. Cohen and Mr. Greenfield are no longer involved in the day-to-day management of Ben & Jerry's, Plaintiff asserts that Unilever "continues to capitalize" on Ben & Jerry's goodwill and reputation. *Id.* at 2, ¶ 6.

*2 Plaintiff alleges that in the "past several years," Unilever has breached consumers' trust by representing on Ben & Jerry's ice cream packaging and website that Ben & Jerry's

products are “sourced exclusively from ‘happy cows’ on Vermont dairies that participate in a special, humane ‘Caring Dairy’ program.” *Id.* at 2, ¶ 7. This representation is allegedly material to consumers who choose to purchase Ben & Jerry’s products and who view Ben & Jerry’s as a socially conscious, independent Vermont company. In reality, however, Plaintiff asserts that only a percentage of the milk used in Ben & Jerry’s products is sourced from the Caring Dairy program, while the remainder comes from mass-production dairy operations, purportedly “exactly what consumers who choose Ben & Jerry’s Products would like to avoid.” *Id.* at 2-3, ¶ 8.

Ben & Jerry’s ice cream packaging, signage in its retail locations, and take-away cups “present the Products as made with milk produced by ‘happy cows’ ” and feature cartoon images of happy cows in green fields under blue skies in order to depict “happy animals.” *Id.* at 6, ¶ 25. Plaintiff asserts these representations are prominent on Ben & Jerry’s packaging and therefore necessarily seen by consumers. The text on the back of Ben & Jerry’s cartons of ice cream states in relevant part: “We strive to make the best possible ice cream in the best possible way. We source Non-GMO ingredients, Fairtrade cocoa & sugar, eggs from cage-free hens & milk & cream from happy cows. Learn more at benjerry.com.” (Doc. 1 at 7, ¶ 25.)

The “benjerry.com” website to which the cartons direct consumers explains that “happy cows” are part of the Caring Dairy program, “a unique program that’s helping farmers move toward more sustainable practices on the farm.” *Id.* at 7, ¶ 27 (internal quotation marks and footnote omitted). Plaintiff alleges that these Caring Dairy representations are supported by assurances on the website which promote Ben & Jerry’s “values-led sourcing” as well as its attempts to “reduce the environmental impact of our business.” *Id.* at 7-8, ¶ 28 (internal quotation marks omitted). According to the “Caring Dairy” webpage, Caring Dairy “respects the farmer and their farmworkers, the planet and the cow[.]” *id.* at 9, ¶ 30 (internal quotation marks omitted), and further:

provides our farmers a program for evaluating, implementing and continuously improving sustainable agricultural practices on their farms. Our belief is that the future of dairy farming is to build soil health that includes increased cover crops, alternative tilling practices, rotational

crops and grazing techniques. We also believe that high quality animal care is fundamental to the success of a farm, a well-cared for cow will produce a higher quality milk. And of course the importance of labor that supports the entire farm, from the farmer to the farmworker.

Id. at 9, ¶ 31 (footnote omitted).

Plaintiff asserts that “[u]ntil recently, and during the class period, Unilever’s Ben & Jerry’s website—the address of which is displayed to explain the ‘happy cows’ representation—told consumers that the ‘Caring Dairy’ program is ‘required for all farmers.’ ” *Id.* at 8, ¶ 29. At the time, a webpage titled “Caring Dairy Standards” stated:

Basic standards for being a Caring Dairy farmer (required for all farmers)

The basic standards are specific to Cow Care, Planet Stewardship, and the Farmer & Farm Worker. In order to be a Caring Dairy farmer, all these standards must be met. All farms will undergo a third[-]party verification by Where Food Comes From, to evaluate how each farm is meeting the required Standards. For a farm to be considered a Caring Dairy farm, they must meet the Basic Standards for participation. From there, farms can strive for Silver or Gold level recognition and receive[] a larger compensation for their achievement.

(Doc. 1 at 8, ¶ 29.) Plaintiff concedes that Unilever “appears to have removed this representation” after a non-profit organization filed a lawsuit against Ben & Jerry’s in the District of Columbia Superior Court, alleging the phrase constituted a misrepresentation. *Id.*

*3 Plaintiff alleges that Defendants’ statements are “offered to explain the ‘happy cows’ of [Ben & Jerry’s] Products’ packaging” and are intended to project to consumers an “image of animal husbandry” that is more environmentally friendly than typical mass dairy production. *Id.* at 10, ¶ 34. Plaintiff asserts that when purchasing Ben & Jerry’s products, he relied on these representations, as well as a “Caring Dairy” video on the website, which he understood to mean that the Ben & Jerry’s ice cream he purchased was made with milk and cream “sourced exclusively from these ‘happy cows’ on ‘Caring Dairy’ farms.” *Id.* at 4, ¶ 16.

In contrast to “what Unilever has told consumers,” *id.* at 5, ¶ 24, Ben & Jerry’s products are allegedly sourced from a mixture of Caring Dairy farms and mass-production facilities, including through a dairy cooperative in St. Albans, Vermont that has more than 360 members. As of January of 2017, Plaintiff alleges only ninety members, or less than twenty-five percent, were verified Caring Dairy farms. When processing the milk, St. Albans does not distinguish between the Caring Dairy farms and the mass-production facilities so that a “large percentage” of the milk and cream used in Ben & Jerry’s products is thus allegedly sourced from the mass-production farms. *Id.* at 11, ¶ 40. Because the mass-production facilities allegedly employ “intensive cow confinement practices and extensive antibiotic use,” Defendants’ use of milk and cream from sources other than Caring Dairies allegedly constitutes a material omission. (Doc. 1 at 11, ¶ 41.)

Plaintiff further contends that Unilever knew that reasonable consumers relied on its representations and intended for consumers to purchase Ben & Jerry’s products when they “might otherwise purchase a competing ice cream product,” *id.* at 13, ¶ 50, and further knew consumers would pay more for products that were represented as socially responsible, thereby increasing the sales of Ben & Jerry’s products while decreasing the sales of competitor products. Unilever has thus allegedly “profited enormously to the detriment of consumers from its falsely marketed products and its carefully orchestrated image for the Ben & Jerry’s brand.” *Id.* at ¶ 52.

According to the Complaint, Unilever “continues to conceal and suppress the true nature, identity, source, and method of production of the Ben & Jerry’s Products.” *Id.* at ¶ 54. As a result, Plaintiff argues that he and the proposed class will continue to suffer injury because they “can no longer rely on the truth and accuracy of Ben & Jerry’s Products” and are “prevented from making a meaningful and informed choice” as they continue to purchase “deceptively labeled and packaged Products sold at prices above their true market value.” *Id.* at 14, ¶ 57. Plaintiff requests “an injunction against Defendants’ unlawful and deceptive acts and practices, and requiring that Defendants remove and refrain from making representations on the Ben & Jerry’s Products’ packaging or elsewhere that the milk and cream in the Products originates from ‘happy cows’ on ‘Caring Dairy’ farms[.]” *Id.* at 21, ¶ E.

II. Whether the Court May Consider Documents External to the Complaint.

*4 Both parties cite to documents in their briefs that are neither cited in nor attached to the Complaint, including statements from sections of Ben & Jerry’s website. In reviewing a complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), a court is generally limited to the facts “contained within the four corners of the complaint[.]” *Goldberg v. Danaher*, 599 F.3d 181, 183 (2d Cir. 2010). A court may, however, also review “any statements or documents incorporated in [the complaint] by reference[] and any document not incorporated but that is, nevertheless, integral to the complaint because the complaint relies heavily upon its terms and effect.” *Yung v. Lee*, 432 F.3d 142, 146 (2d Cir. 2005) (citations and internal quotation marks omitted). To be “integral” to the Complaint, a plaintiff must “rely on the terms and effect of the document in drafting the complaint; mere notice or possession is not enough.” *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 231 (2d Cir. 2016) (internal quotation marks omitted) (emphasis in original) (quoting *Global Network Commc’ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156 (2d Cir. 2006)).

The representations made in Ben & Jerry’s website are integral to the Complaint and provide the factual basis for some of Plaintiff’s claims. The Ben & Jerry’s website, including documents linked therein, are thus properly before the court in adjudicating Defendants’ motion to dismiss. *See id.* at 234 (holding district court properly determined parts of a website were integral to the complaint where the plaintiff “alleges injuries on the basis of the purchases made on Amazon, made possible only via clicking ‘Place your order’ on the Order Page”); *Derbaremdiker v. Applebee’s Int’l, Inc.*, 519 F. App’x 77, 78 (2d Cir. 2013) (considering sweepstakes rules on a website referenced on a receipt because the complaint referred to the rules).

III. Conclusions of Law and Analysis.

A. Standard of Review.

To survive a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs must allege sufficient facts to “nudge[] their claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. “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.” *Iqbal*, 556 U.S. at 678.

The sufficiency of a plaintiff's complaint under Rule 12(b)(6) is evaluated using a "two-pronged approach[.]" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 679). First, the court discounts legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]" *Iqbal*, 556 U.S. at 678. The court is also "not bound to accept as true a legal conclusion couched as a factual allegation[.]" *Id.* (citation omitted). Second, the court considers whether the factual allegations, taken as true, "plausibly give rise to an entitlement to relief." *Id.* at 679. This second step is fact-bound and context-specific, requiring the court "to draw on its judicial experience and common sense." *Id.* The court does not "weigh the evidence" or "evaluate the likelihood" that a plaintiff's claims will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

B. Whether Plaintiff Plausibly Pleads a VCPA Claim (Count I).

Because this court sits in diversity, it applies Vermont's substantive law. See *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."). The VCPA prohibits "unfair or deceptive acts or practices in commerce[.]" 9 V.S.A. § 2453(a). To plead a plausible claim for relief under the VCPA, Plaintiff must allege that he "contract[ed] for goods or services in reliance upon false or fraudulent representations or practices prohibited by [§] 2453" or "sustain[ed] damages or injury as a result of any false or fraudulent representations or practices prohibited by [§] 2453[.]" *Glassford v. Dufresne & Assocs., P.C.*, 2015 VT 77, ¶ 30, 199 Vt. 422, 438, 124 A.3d 822, 833 (quoting 9 V.S.A. § 2461(b)).

*5 A deceptive act or practice is: (1) "a representation, practice[, or] omission likely to mislead" a consumer; (2) that the consumer "interpreted ... reasonably under the circumstances"; and (3) that has "material" misleading effects which are "likely to affect [the consumer's] conduct or decision with regard to a product." *Vastano v. Killington Valley Real Estate*, 2007 VT 33, ¶ 8, 182 Vt. 550, 551, 929 A.2d 720, 722 (quoting *Greene v. Stevens Gas Serv.*, 2004 VT 67, ¶ 15, 177 Vt. 90, 97, 858 A.2d 238, 244). "Misrepresentations involving facts are actionable while those involving opinions are not." *Otis-Wisher v. Fletcher Allen Health Care, Inc.*, 951 F. Supp. 2d 592, 603 (D. Vt. 2013), *aff'd sub nom. Otis-Wisher v. Medtronic, Inc.*, 616 F. App'x 433 (2d Cir. 2015).

In support of his VCPA claim, Plaintiff alleges that Defendants have engaged in unfair and deceptive acts in commerce by "representing to consumers that the milk and cream in Ben & Jerry's Products is sourced exclusively from 'happy cows' on 'Caring Dairy' farms that meet specific and verifiable criteria" while omitting information about the percentage of milk that originates from mass-production dairy operations. (Doc. 1 at 18, ¶ 102.) Defendants seek dismissal of Plaintiff's VCPA claim for three reasons: (1) "happy cows" constitutes opinion rather than fact; (2) neither Ben & Jerry's ice cream cartons nor its website contains misleading statements regarding "happy cows" or "Caring Dairies"; and (3) a reasonable consumer would not consider the alleged misrepresentations to be material.

1. Whether Plaintiff Plausibly Pleads that the Alleged Misrepresentation Was Misleading.

Plaintiff does not contest that "happy cows" constitutes a non-actionable opinion and asserts that his "true claim" focuses on the website's representation that "'Caring Dairy' standards are required of all farmers whose happy cows supply milk and cream for Ben & Jerry's Products." (Doc. 17 at 10-11) (internal quotation marks omitted). A statement is misleading under the VCPA if it is "likely to mislead a reasonable consumer." *Lofts Essex, LLC v. Strategis Floor & Décor Inc.*, 2019 VT 82, ¶ 32, 224 A.3d 116, 127; see also *Lang McLaughry Spera Real Estate, LLC v. Hinsdale*, 2011 VT 29, ¶ 34, 190 Vt. 1, 17, 35 A.3d 100, 111 ("[T]he standards for consumer fraud are objective to be judged from the standard of a reasonable consumer."). It is "well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer." *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 500 (2d Cir. 2020)¹ (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013)). The Second Circuit has "repeatedly observed that 'in determining whether a reasonable consumer would have been misled by a particular advertisement, context is crucial.'" *Id.* at 501 (quoting *Geffner v. Coca-Cola Co.*, 928 F.3d 198, 200 (2d Cir. 2019)); see also *Jordan v. Nissan N. Am., Inc.*, 2004 VT 27, ¶ 8, 176 Vt. 465, 470, 853 A.2d 40, 44 (holding lower court properly instructed jury on how to determine "whether a representation is deceptive because [it] required the jury to consider the overall impression left by defendants' communications").

¹ In *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 500 (2d Cir. 2020), the Second Circuit applied N.Y. Gen. Bus. L. §§ 349(a) and 350. Like the VCPA, New York law analyzes “deceptive acts” using a “reasonable consumer” standard. *Id.* (citation and internal quotation marks omitted).

*6 Plaintiff identifies the following heading on Ben & Jerry's website as the basis for his VCPA claim: “Basic standards for being a Caring Dairy farmer (required for all farmers)[.]” (Doc. 1 at 8, ¶ 29.) Read in a vacuum, a reasonable consumer might interpret this phrase to mean that Caring Dairy farmer standards apply to all farmers who supply Ben & Jerry's. It may also, however, be interpreted as applying to all farmers who seek to have their farms designated as a “Caring Dairy.” The court need not resolve this conflict because the website as a whole makes it clear that the section, titled “Caring Dairy Standards[.]” sets forth the “basic” standards “to be considered a Caring Dairy farm” as well as the detailed eligibility requirements for “Silver” and “Gold” tier status. (Doc. 9-2 at 2.) A farm “that aspire[s] to achieve these [Silver and Gold] standards” is entitled to certain levels of compensation from Ben & Jerry's. *Id.* at 4. The website includes a chart of the 2016 Caring Dairy farms, noting there were a total of eighty-five “[p]articipating [f]arms[.]” *Id.* at 7. Nothing in the section that follows the phrase “required for all farmers” represents that Ben & Jerry's products are sourced exclusively from Caring Dairy farms.

By focusing on an alleged representation that Ben & Jerry's products are “sourced exclusively from ‘happy cows’ on Vermont dairies that participate in a special, humane ‘Caring Dairy’ program[.]” (Doc. 1 at 2, ¶ 7), Plaintiff bases his claim on a representation that is neither contained on Ben & Jerry's ice cream cartons nor on its website. *See Fink*, 714 F.3d at 742 (“A plaintiff who alleges that he was deceived by an advertisement may not misquote or misleadingly excerpt the language of the advertisement in his pleadings and expect his action to survive a motion to dismiss[.]”). In the absence of this actual statement, the court considers whether it is a reasonable interpretation of the statements that *do* appear on Ben & Jerry's products and website.

The ice cream carton label which Plaintiff asserts leads consumers to the alleged misrepresentation states that: “We strive to make the best possible ice cream in the best possible way. We source Non-GMO ingredients, Fairtrade cocoa & sugar, eggs from cage-free hens & milk & cream from happy cows. Learn more at benjerry.com.” (Doc. 1 at 7, ¶ 25.) Plaintiff identifies no portion of the foregoing statement that is

false. The product labeling directs consumers to “[l]earn more at benjerry.com” rather than to the specific “Caring Dairy Standards” webpage identified by Plaintiff. *Id.*

The benjerry.com website, in turn, describes the Caring Dairy program as one that “participating farms” join “voluntarily[.]” (Doc. 9 at 13); *see also* Doc. 21-5 at 3 (noting “[f]arms join the Caring Dairy program voluntarily, and for their efforts they receive an additional premium on top of their regular milk price”). The “How We Make Ice Cream” webpage states that the St. Albans dairy cooperative is comprised of “hundreds of local farms” (Doc. 21-2 at 4), well in excess of the eighty-five Caring Dairy farms identified on the “Caring Dairy Standards” webpage. In addition, Ben & Jerry's Social and Environmental Assessment Reports (“SEARs”) from 2011 through 2018, which are available by link from the Ben & Jerry's website's homepage, reveal that the number of participating Caring Dairy farms fluctuates each year.²

² The 2014 SEAR Report further states: “From a volume perspective, Caring Dairy™ covers our global production needs but our intention is to have all dairy suppliers that Ben & Jerry's sources from operating under the Caring Dairy™ program in the not-too-distant future.” (Doc. 9 at 14.)

While Plaintiff is correct that reasonable consumers should not be required to search through the website and SEARs to clarify a heading on a webpage, it is equally unreasonable for a consumer to interpret a single phrase in a single heading without reference to the contents of the section that immediately follow the heading. Context is crucial especially where, as here, Plaintiff cannot point to an actual misrepresentation, but instead relies exclusively on his interpretation of a phrase he characterizes as conveying the *impression* that all of Ben & Jerry's products are “sourced exclusively” from “Caring Dairies.”³

³ *See Chufen Chen*, 954 F.3d 492 at 501 (noting “context is crucial” to determine “whether a reasonable consumer would have been misled by a particular advertisement” and drawing on full television commercial to interpret the word “steak” used in commercials) (citation omitted); *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 910, 922-23 (N.D. Ill. 2017) (granting a motion to dismiss claims when consumers could determine the meaning of

the phrase “100% Grated Parmesan Cheese” from reading an ingredients list on the label and noting “even if a statement on a package or advertisement might be ambiguous or unclear in isolation, ‘the presence of a disclaimer or similar clarifying language may defeat a claim of deception’”) (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 742 (2d Cir. 2013)).

*7 It is Plaintiff’s burden to plausibly allege that the Ben & Jerry’s ice cream carton or website contains a statement that “conveys more than one meaning to reasonable consumers and one of those meanings is false[.]” *Lofts Essex, LLC*, 2019 VT 82, at ¶ 34, 224 A.3d at 127 (quoting *Carter v. Gugliuzzi*, 716 A.2d 17, 23 (Vt. 1998)). “[A] representation does not become ‘false and deceptive’ merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.” *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1162 (9th Cir. 2012) (citation and internal quotation marks omitted). Because neither Ben & Jerry’s products nor its website represents that its ingredients are “sourced exclusively” from Caring Dairy farms, Plaintiff’s entire claim is grounded on a single phrase in a single heading on a multipage website which is neither false nor misleading when considered as a whole.

2. Whether Plaintiff Plausibly Pleads that the Alleged Misrepresentation Was Material.

Even if Plaintiff could identify a false or misleading statement, he has failed to adequately plead any misrepresentation is “material.” A misrepresentation is material if it is “likely to affect the consumer’s conduct or decision with regard to a product.” *Greene*, 2004 VT 67, at ¶ 15, 177 Vt. at 97, 858 A.2d at 244 (citation omitted). Materiality is “‘generally measured by an objective standard, premised on what a reasonable person would regard as important in making a decision.’” *PH W. Dover Prop., LLC v. Lalancette Eng’rs*, 2015 VT 48, ¶ 11, 199 Vt. 1, 5, 120 A.3d 1135, 1138 (quoting *Vastano*, 2007 VT 33, at ¶ 9, 182 Vt. at 551, 929 A.2d at 722).

Plaintiff alleges that the misleading impression that all of Ben & Jerry’s milk and cream is sourced exclusively from “happy cows” on “Caring Dairy” farms portrays “Ben & Jerry’s Homemade Inc. as a socially conscious, independent Vermont company” (Doc. 1 at 3, ¶ 9) and “prompt[s] consumers to buy more Ben & Jerry’s Products, and to pay more for them

than they otherwise would.” *Id.* at 3, ¶ 10; *see also id.* at 5, ¶ 21. The Caring Dairy program, however, indisputably encourages the humane treatment of animals, and the Ben & Jerry’s website discloses to consumers that participation in the program is voluntary. Nowhere on either Defendants’ labeling or the website is the representation that Ben & Jerry’s products are “sourced exclusively” from Caring Dairy farms.

Although Plaintiff argues that materiality is a question of fact which should not be resolved on a motion to dismiss unless the misrepresentations “are so obviously unimportant ... that reasonable minds could not differ on the question of their importance[.]” *ECA & Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) (citation omitted), materiality is “a mixed question of law and fact” and is not “immune from analysis at the motion to dismiss stage. Where Plaintiff’s allegations do not, as a matter of law, establish materiality, dismissal is appropriate.” *Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Fin. Holdings Ltd.*, 886 F. Supp. 2d 328, 337 (S.D.N.Y. 2012) (citation and internal quotation marks omitted); *see also ECA*, 553 F.3d at 202 (affirming dismissal of claims on motion to dismiss where plaintiffs did not plead disclosures were material); *Silberstein v. Aetna, Inc.*, 2015 WL 1424058, at *12 (S.D.N.Y. Mar. 26, 2015) (dismissing claims on motion to dismiss where “the vast majority of Plaintiff’s allegations are facially insufficient to state a claim because there is no plausible showing that the misstatements or omissions were material”).

Accepting the facts pled in the Complaint as true, Plaintiff does not plausibly allege reasonable consumers would make their purchasing decisions exclusively based on a single phrase in a single webpage heading contained in a website that a consumer would need to access in advance of or contemporaneously with his or her purchasing decision. Because Plaintiff has failed to plausibly allege the essential elements of a VCPA claim, the court GRANTS Defendants’ motion to dismiss Count I.

C. Whether Plaintiff Plausibly Pleads a Claim for Breach of an Express Warranty (Count II).

*8 Defendants argue that Plaintiff fails to state a claim for breach of an express warranty because Plaintiff has not plausibly alleged a materially misleading factual representation. In addition, Defendants contend that Plaintiff has not plausibly pled that he timely notified Defendants of any breach or that reasonable consumers who purchased Ben

2020 1 W22L8898

& Jerry's ice cream "failed to receive the benefit of their bargain." (Doc. 9 at 19.)

Under Vermont law, an express warranty is created under the following circumstances:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise[;] (b) [a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description[;] [or] (c) [a]ny sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

9A V.S.A. § 2-313(1).

Defendants argue that the alleged misrepresentation is not an affirmation of fact or description of goods that could create an express warranty. The court agrees for the same reasons that it found Plaintiff's VCPA claim not plausible. Under Vermont law, the standard for evaluating the test for an express warranty is an objective one. *See* 9A V.S.A. § 2-313, cmt. 8 (stating to determine whether a warranty is created absent formal language such as "warrant" or "guarantee[.]" "the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain?"). "[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." 9A V.S.A. § 2-313(2).

In this case, Plaintiff alleges Defendants provided written "warranties that the milk and cream in the Ben & Jerry's Products originated exclusively from 'happy cows' on 'Caring Dairy' farms that me[t] verifiable criteria." (Doc. 1 at 20, ¶ 112.) Because that statement is neither contained on Ben & Jerry's labeling nor set forth on its website, it is not the "basis of the bargain" and no reasonable consumer would

believe that statement constitutes a written warranty as to the nature of the goods purchased. *See* 9A V.S.A. § 2-313(1).

Moreover, under Vermont law, "[w]here a tender has been accepted ... the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]" 9A V.S.A. § 2-607(3)(a). Courts have found the failure to plead the condition precedent of notice of breach is grounds for dismissal. *See, e.g., Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 144 (E.D.N.Y. 2018) (dismissing breach of warranty claim where the complaint "makes no allegations and states no facts showing that notice was provided to defendant") (citation omitted); *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 544 (S.D.N.Y. 2013) (dismissing warranty claim for failure to allege timely notice of breach under New York's notice statute, which is similar to Vermont's).

Plaintiff argues that his Complaint serves as notice of the breach of warranty and that timeliness must be determined by a jury. Although "[t]he timeliness of notice under 9A V.S.A. § 2-607(3)(a) is ordinarily a question of fact for the trier[.]" *Agway, Inc. v. Teitscheid*, 472 A.2d 1250, 1253 (Vt. 1984), allowing the Complaint to serve as notice of breach would deprive Defendants of the opportunity to cure their alleged defect or prepare a defense. For this reason, in at least one case, the Vermont Supreme Court has rejected the filing of a complaint as sufficient. *See, e.g., Desilets Granite Co. v. Stone Equalizer Corp.*, 340 A.2d 65, 67 (Vt. 1975) (holding a complaint did not serve as notice of revocation of acceptance where it was filed at the same time as acceptance because "the principal policy behind the rejection notice requirement is to give the seller an opportunity to cure or permit him to assist in minimizing the buyer's losses"); *see also Agway*, 472 A.2d at 1252 (noting remedies for breach of contract and warranty are "predicated upon the notice required in 9A V.S.A. § 2-607(3)"); 18 Williston on Contracts 52:42 (4th ed. 2019) ("Generally, the fact that the buyer has filed an action seeking damages for the breach of warranty has not been regarded as tantamount to the statutory notice since it usually does not give the seller an advance opportunity to collect the evidence needed for a defense[.]").

*9 Even if Plaintiff could plausibly plead a material breach and notice, he has not and cannot plausibly plead that the products he purchased had no value because of the alleged breach of warranty. He must instead plead the difference between the value of the product as represented and the value of what he received. *See* 9A V.S.A. §

2-714(2) (“The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.”). Without plausible allegations of causation and damages, his express warranty claim must fail. See *Centrella v. Ritz-Craft Corp. of Pa., Inc.*, 2017 WL 3720757, at *4 (D. Vt. June 28, 2017) (“[T]o establish a breach of both express and implied warranties, [plaintiffs] must prove proximate cause.”); *Blodgett Supply Co. v. P.F. Jurgs & Co.*, 617 A.2d 123, 127 (Vt. 1992) (“Damages for breach of warranties by sellers of a business should be the ‘loss of the bargain—the difference between the worth of the article as represented and that as actually delivered.’”) (quoting *Coleco Indus., Inc. v. Berman*, 567 F.2d 569, 577 (3d Cir. 1977)).

Because Plaintiff fails to plausibly plead the essential elements of a breach of express warranty claim, the court GRANTS Defendants’ motion to dismiss Count II.

D. Whether Plaintiff Plausibly Pleads a Claim for Unjust Enrichment (Count III).

Defendants seek dismissal of Plaintiff’s unjust enrichment claim because Plaintiff has an adequate remedy at law and fails to state a claim for which relief may be granted. Plaintiff counters that he may plead in the alternative pursuant to Fed. R. Civ. P. 8(d) that he is entitled to recover on his equitable unjust enrichment claim “to whatever extent that [he] is not fully compensated by recovery at law.” (Doc. 17 at 24.)

To state a claim for unjust enrichment under Vermont law, Plaintiff must allege that “(1) a benefit was conferred on defendant; (2) defendant accepted the benefit; and (3) defendant retained the benefit under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value.” *Kellogg v. Shushereba*, 2013 VT 76, ¶ 31, 194 Vt. 446, 463, 82 A.3d 1121, 1133 (quoting *Ctr. v. Mad River Corp.*, 561 A.2d 90, 93 (Vt. 1989)). As an equitable remedy, an unjust enrichment claim lies only when “there is not an adequate remedy at law on the very subject in question.” *Wynkoop v. Stratthaus*, 2016 VT 5, ¶ 50, 201 Vt. 158, 183-84, 136 A.3d 1180, 1196 (Eaton, J., concurring); see also *Moreau v. Sylvester*, 2014 VT 31, ¶ 20, 196 Vt. 183, 193, 95 A.3d 416, 423 (“Equity will not afford relief where there is a plain, adequate, and complete remedy at law.”) (citation and internal quotation marks omitted).

“To be adequate the legal remedy must be able to provide complete relief for the case before the court and must be equally convenient, beneficial, and effective.” *Wynkoop*, 2016 VT 5, at ¶ 18, 201 Vt. at 170, 136 A.3d at 1187. As a result, an unjust enrichment claim is not available “‘where it simply duplicates, or replaces, a conventional contract or tort claim[.]’” *Mansfield Heliflight, Inc. v. Freestream Aircraft USA, Ltd.*, 2019 WL 5081061, at *2 (D. Vt. Oct. 10, 2019) (alteration in original) (quoting *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012)).

“In determining whether a quasi-contract should be implied under an equitable theory of unjust enrichment, the inquiry is whether, in light of the totality of the circumstances, equity and good conscience demand that the defendant return that which the plaintiff seeks to recover.” *Brookside Mem’ls, Inc. v. Barre City*, 702 A.2d 47, 50 (Vt. 1997); see also *Wei Wang v. Shen Jianming*, 2019 WL 3254613, at *8 (D. Vt. July 19, 2019) (“Unjust enrichment is a quasi-contractual theory of liability, by which the law ‘implies a promise to pay when a party receives a benefit and retention of the benefit would be inequitable.’”) (quoting *Brookside Mem’ls, Inc.*, 702 A.2d at 49).

*10 “[I]n the alternative to [his] contract-based claims” (Doc. 1 at 20, ¶ 118), Plaintiff alleges that Defendants have been unjustly enriched through the sale of Ben & Jerry’s products “at the expense of Plaintiff Ehlers and the Class members” as the “intended, direct, and proximate result of Defendants’ conduct[.]” *Id.* at 21, ¶ 119. Therefore, Plaintiff contends “it would be against equity and good conscience to permit Defendants to retain the ill-gotten benefits that they received ... in light of the fact that the Ben & Jerry’s Products they purchased were not what Unilever purported them to be.” *Id.* at 21, ¶ 120. Because Plaintiff’s unjust enrichment claim relies on the same alleged misrepresentations as his other claims, his claim is wholly duplicative. See *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 338 (E.D.N.Y. 2018) (dismissing unjust enrichment claim premised on defendants’ retention of “benefits and monies because the Products were not as represented” as duplicative where the claim was “no different from [the plaintiff’s] claims for false advertising or fraudulent misrepresentation”) (internal quotation marks omitted); *Elkind v. Revlon Consumer Prods. Corp.*, 2015 WL 2344134, at *14 (E.D.N.Y. May 14, 2015) (dismissing unjust enrichment claim for failure to demonstrate how it was “in any way distinct” from deceptive advertising, negligent and intentional misrepresentation, and breach of express warranty claims).

Fed. R. Civ. P. 8(d)(3)'s allowance for pleading in the alternative may, however, save Plaintiff's equitable claim in the event his actions at law are dismissed. See *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016) ("[T]he plaintiff is at liberty to plead different theories, even if they are inconsistent with one another, and the court must accept each sufficiently pleaded theory at face value, without regard to its inconsistency with other parts of the complaint.") (citing Fed. R. Civ. P. 8(d)(3)). " '[T]he most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust.' " *DJ Painting, Inc. v. Baraw Enters., Inc.*, 776 A.2d 413, 417 (Vt. 2001) (quoting *Ray Reilly's Tire Mart, Inc. v. F.P. Elnicki, Inc.*, 537 A.2d 994, 995 (Vt. 1987)). The unjustness inquiry "focuses on the value of the benefit actually conferred upon the defendant." *Id.* at 416 n.2 (quoting *In re Estate of Elliott*, 542 A.2d 282, 285-86 n.2 (Vt. 1988)); see also Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d ("Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth.").

Here, Plaintiff's unjust enrichment claim is predicated on a single phrase in a single heading of a multipage website which does not contain the material misrepresentation Plaintiff cites as the basis of his claim. Although Plaintiff alleges that Unilever "knew and intended that consumers would pay more for products that were represented as humane and/or socially responsible, furthering Unilever's private interest of increasing sales of its Ben & Jerry's Products and decreasing the sales of products that are truthfully marketed by its competitors[.]" (Doc. 1 at 13, ¶ 51), and that "Unilever has profited enormously to the detriment of consumers from its falsely marketed products and its carefully orchestrated image for the Ben & Jerry's brand[.]" *id.* at ¶ 52, Plaintiff does not further claim that the Ben & Jerry's ice cream he purchased had no value, that it would be equitable to allow him to both keep the ice cream and obtain a return of its purchase price, or that Ben & Jerry's does not source at least some of its ingredients in a humane and socially responsible way.

Because Plaintiff does not plausibly plead that "defendant retained [a] benefit [conferred by Plaintiff] under such circumstances that it would be inequitable for defendant not to compensate plaintiff for its value[.]" *Kellogg*, 2013 VT 76, at ¶ 31, 194 Vt. at 463, 82 A.3d at 1133 (citation omitted), Defendants' motion to dismiss Plaintiff's unjust enrichment claim (Count III) is GRANTED.

E. Whether Plaintiff Has Standing to Pursue Injunctive Relief.

Defendants argue that Plaintiff lacks standing to pursue injunctive relief on behalf of himself or the proposed class because the phrase "happy cows" was removed from Ben & Jerry's ice cream cartons "many months ago[.]" (Doc. 9 at 23.) In addition, it appears undisputed that the heading on the Caring Dairy program webpage on Ben & Jerry's website has been revised.

*11 To have standing to pursue injunctive relief, a plaintiff must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' " as the result of the challenged conduct, and "the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (citations omitted). "Although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way." *Nicosia*, 834 F.3d at 239 (citing *DeShawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998)).

Defendants no longer use the term "happy cows" on Ben & Jerry's ice cream cartons, and Plaintiff alleges Unilever "appears to have removed" the website's reference to "required for all farmers" in the "Caring Dairy Standards" webpage heading. (Doc. 1 at 8, ¶ 29.)⁴ As a result, any possibility of future deception of Plaintiff in a similar way to the harm alleged in the Complaint is non-existent. See *Nicosia*, 834 F.3d at 239 (holding plaintiff did not have standing for injunctive relief where the defendant ceased selling the product at issue).

⁴ The heading was revised to read "required for all farmers who participate in the program" in early 2019. (Doc. 9 at 8) (emphasis omitted).

Because Plaintiff does not have standing to pursue injunctive relief on his own behalf, he also cannot pursue injunctive relief on behalf of the proposed class. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) ("[N]amed plaintiffs who represent a class 'must allege and show that they personally have been injured[.]' ") (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)); *Nicosia*, 834 F.3d at 239 ("A plaintiff seeking to represent a class must personally have standing.").

2020 1 W22L8898

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss Plaintiff's request for injunctive relief due to lack of standing.

CONCLUSION

F. Whether to Grant Plaintiff Leave to Amend.

Pursuant to [Fed. R. Civ. P. 15\(a\)](#), courts "should freely give leave" to amend a complaint "when justice so requires." However, "[l]eave may be denied 'for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.' " *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). Plaintiff is hereby GRANTED leave to amend within twenty (20) days of the date of this Opinion and Order consistent with the Federal Rules of Civil Procedure and this court's Local Rules.

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss Plaintiff's claims WITHOUT PREJUDICE. (Doc. 9.) Plaintiff is hereby GRANTED leave to amend within twenty (20) days of the date of this Opinion and Order consistent with the Federal Rules of Civil Procedure and this court's Local Rules.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 2218858

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 18

2015 WL 9462964
United States District Court, N.D. Mississippi,
Aberdeen Division.

Rocky ESTES Plaintiff

v.

LANX, INC., et al. Defendants

CAUSE NO.: 1:14CV052-SA-DAS

Signed December 23, 2015

Attorneys and Law Firms

Duncan L. Lott, Duncan Lott, Attorney, Booneville, MS, for Plaintiff.

Adria H. Jetton, Bradley Witherspoon Smith, Baker Donelson Bearman Caldwell & Berkowitz, PC, Jackson, MS, for Defendant.

MEMORANDUM OPINION

Sharion Aycock, U.S. DISTRICT JUDGE

*1 Plaintiff filed this suit against Lanx, Inc., for negligence, products liability for design defect, products liability for manufacturing defect, breach of express and implied warranties, fraudulent concealment, and negligent misrepresentation. Defendant filed a Motion for Summary Judgment [94] that no genuine disputes of material fact exist as to those claims. After reviewing the record, motion, response, rules, and authorities, the Court finds as follows:

Factual and Procedural Background

In 2011, Rocky Estes underwent spinal fusion surgery wherein the Lanx Telluride Spinal Fixation System was implanted to fuse his L5-S1 vertebrae. Within five months, two pedicle screws fractured. A revision surgery was performed on June 28, 2012, to remove the broken screws and replace the Telluride Spinal Fixation System with new orthopedic hardware.

Estes seeks compensation for injuries, pain and suffering, and his extensive past and future medical treatment on the basis that the pedicle screw was negligently designed or

manufactured, that Lanx breached warranties as to the pedicle screws, and that Lanx failed to obtain FDA clearance for the Telluride System.

Lanx filed a Motion for Summary Judgment on those claims.

Summary Judgment Standard

Summary judgment is warranted under Rule 56(a) of the Federal Rules of Civil Procedure when the evidence reveals no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. The rule “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The party moving for summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Id.* at 323, 106 S. Ct. 2548. The nonmoving party must then “go beyond the pleadings” and “set forth ‘specific facts showing that there is a genuine issue for trial.’ ” *Id.* at 324, 106 S. Ct. 2548 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, “but only when ... both parties have submitted evidence of contradictory facts.” *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Importantly, conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1997); *Little*, 37 F.3d at 1075.

Discussion and Analysis

Plaintiff's causes of action can be summarized into three broader sub-categories: (1) claims concerning the specific pedicle screw and/or spinal fixation system used in Estes' 2011 surgery; (2) claims regarding warranties allegedly made by Lanx; and (3) claims that the Telluride Spinal Fixation

System was improperly placed on the market for sale without proper FDA clearance.

(1) Mississippi Products Liability Act and Negligence

*2 As for the first category, claims centered around the specific medical device used on Estes, the Plaintiff pled these causes of action: negligence, defective design, and manufacturing defect. Lanx contends that Plaintiff cannot sustain a negligence action on the basis that the Mississippi Products Liability Act precludes common law negligence.

a. Design Defect under the MPLA

Defendant contends Plaintiff's MPLA design defect claim should be dismissed as no feasible alternative design has been offered into evidence. Plaintiff failed to respond. The Mississippi Supreme Court has summarized the design defect elements under the MPLA as follows:

The danger presented by the product's design was known or should have been known to the manufacturer [or seller] (i.e., the danger was foreseeable); (2) the product failed to function as expected (as a result of a design characteristic); (3) an alternative design existed that would not impair the product's usefulness or desirability; and (4) the alternative design would have to a reasonable probability prevented the harm.

Phillips 66 Co., 94 So. 3d at 1060 (quoting *Williams v. Bennett*, 921 So. 2d 1269, 1274 (Miss. 2006) (internal quotation marks omitted)). Plaintiff put forth no evidence as to an alternative design. Accordingly, the Court finds that no genuine issue of material fact has been produced as to Plaintiff's design defect claim and that claim is dismissed. See *Gilley v. Protective Life Ins. Co.*, 17 F.3d 775, 781 n.13 (5th Cir. 1994) ("We have held that an argument is waived if the party fails to make the argument in response to summary judgment.").

b. Failure to Warn under the MPLA

For a plaintiff to prevail on a failure-to-warn claim in Mississippi, he must prove by a preponderance of the evidence that at the time the product left the control of the manufacturer, designer, or seller:

- (i) ... The product was defective because it failed to contain adequate warnings or instructions ... ; and
- (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and
- (iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

MISS. CODE ANN. § 11-1-63(a)(i)(2), (ii) (iii). On such a claim, a plaintiff must also prove the following:

- (c)(i) ... [A]t the time the product left the control of the manufacturer, designer[,] or seller, the manufacturer, designer[,] or seller knew or in light of reasonably available knowledge should have known about the danger that caused the damage for which recovery is sought and that the ordinary user or consumer would not realize its dangerous condition[; and]
- (ii) An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates sufficient information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to an ordinary consumer who purchases the product; or in the case of a prescription drug, medical device[,] or other product that is intended to be used only under the supervision of a physician or other licensed professional person, taking into account the characteristics of, and the ordinary knowledge common to, a physician or other licensed professional who prescribes the drug, device[,] or other product.

*3 MISS. CODE ANN. § 11-1-63(c).

Thus, "[a] manufacturer is liable under a failure-to-warn theory if the product 'failed to contain adequate warnings,' the inadequate warnings 'rendered the product unreasonably dangerous to the user or consumer,' and the inadequate warnings 'proximately caused the damages for which recovery is sought.'" *Union Carbide Corp. v. Nix, Jr.*, 142 So. 3d 374, 385 (Miss. 2014). The Fifth Circuit in interpreting Mississippi law has stated:

Under the learned intermediary doctrine, which is codified in the Mississippi Products Liability Act, a manufacturer of a prescription drug has no duty to warn the end user of the drug's possible adverse effects. *Wyeth Labs., Inc. v. Fortenberry*, 530 So. 2d 688 (Miss. 1988). The manufacturer's duty to warn runs only to the prescribing physician, who acts as an intermediary between the manufacturer and the patient. *Id.* The learned intermediary doctrine applies to medical devices as well as prescription drugs. *Moore v. Mem. Hosp. of Gulfport*, 825 So. 2d 658, 662 n.6 (Miss. 2002).

Smith v. Johnson & Johnson, Inc., 483 Fed.Appx. 909, 913-14 (5th Cir. 2012) (per curiam). "In order to make out a case for failure to warn under the learned intermediary doctrine, the plaintiff must establish that the treating physician, or a reasonable physician in the treating physician's position, would not have used the product had he received an adequate warning." *Id.* at 914 (citing *Thomas v. Hoffman—LaRoche, Inc.*, 949 F.2d 806, 812 (5th Cir. 1992)).

Plaintiff alleges Lanx had a duty to inform the hospital and the attending physician that the Lanx Telluride Spinal Fixation System had not been cleared, or that a standalone 510(k) had not been submitted to the FDA, and that this failure caused his injuries.¹ In support of this claim, Plaintiff states that "Dr. Crosby has confirmed that had he known that Lanx Telluride Spinal Fixation System had not been cleared or that a standalone 510(k) had not been submitted to the FDA and the Telluride System had not been cleared by the FDA he would not have used the Telluride System in the surgical procedure he performed on Estes." No record citation is provided by Plaintiff, and no support is found therein, to substantiate this claim. Thus, Plaintiff has failed to put forth evidence that the treating physician would not have used this product had he known of the alleged lack of FDA clearance for the device or components of the product. Additionally, the treating physician did indicate in his deposition that he was aware of the risks of spinal fusion surgery and implantation

of fusion devices, including the possibility of device failure. Even knowing those risks, Dr. Crosby testified he still used the Lanx Telluride Spinal Fixation System. Plaintiff's failure to warn claim is dismissed.

¹ Although the Amended Complaint [90] does not assert a failure to warn theory of liability under the MPLA, and the Court generally will not consider claims raised only in response to summary judgment, the Court analyzes them herein because dismissal of these claims is necessary after their consideration. See *Roberts v. Lubrizol Corp.*, 582 Fed.Appx. 455, 461 (5th Cir. 2014) (quoting *Cutrer v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108, 113 (5th Cir. 2005); see also *Green v. JP Morgan Chase Bank, N.A.*, 562 Fed.Appx. 238, 240 (5th Cir. 2014).

c. Manufacturing Defect under the MPLA

*4 For a plaintiff to prevail on a manufacturing defect claim in Mississippi, he must prove by a preponderance of the evidence that at the time the product left the control of the manufacturer or designer:

- (i) The product was defective because it deviated in a material way from the manufacturer's or designer's specifications or from otherwise identical units manufactured to the same manufacturing specifications, ...; and
- (ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and
- (iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

MISS. CODE ANN. § 11-1-63(a)(1)(i)-(iii).

"[M]anufacturing defect claims involve allegations not that the entire product line in question was defectively designed, but rather that the specific product purchased by the consumer was manufactured in a way which deviated from the design specifications." *Hickory Springs Mfg. Co. v. Star Pipe Prods., Ltd.*, 991 F. Supp. 2d 778, 782 (N.D. Miss. 2014).

"[A] product is not 'defective' under § 11-1-63(a)(1) unless it is shown to be out of compliance with the manufacturer's specifications." *Cooper Tire & Rubber Co. v. Tuckier*, 826 So. 2d 679, 693 (Miss. 2002) (citing *Leverette v. Louisville*

Ladder Co., 183 F.3d 339, 341 (5th Cir. 1999) (holding that expert's testimony that ladder had manufacturing defect was properly excluded in products liability action under Mississippi law where expert failed to assess whether ladder met manufacturer's specifications)).

Plaintiff's Amended Complaint suggests that the “Lanx Pedicle Screws were not made in accordance with the Defendants' [sic] specifications or performance standards.” However, Plaintiff never states how the pedicle screws at issue deviated from the manufacturing specification. In fact, Plaintiff puts forth no manufacturing specifications at all. Plaintiff further contends that proof of malfunction creates a genuine issue of material fact as to a manufacturing defect under the MPLA. Moreover, Plaintiff alleges that Defendant spoliated the evidence by failing to collect or maintain the broken pedicle screws after their removal from the Plaintiff.

The Court finds that Plaintiff's assertion that proof of malfunction is enough to sustain a question of fact in manufacturing defect cases under the MPLA is erroneous. Plaintiff's citations on this issue indicate the converse of Plaintiff's contentions. See *Shelter Ins. Co. v. Mercedes-Benz USA, LLC*, 236 Fed.Appx. 45, 47-48 (5th Cir. 2007) (holding that evidence that only the battery malfunctioned, without proof of an actual deviation from manufacturer specifications, was not enough to prove an essential element of the plaintiff's claim); *Tuckier*, 826 So. 2d at 693 (“[A] product is not 'defective' under § 11-1-63(a)(i)(1) unless it is shown to be out of compliance with the manufacturer's specifications.”). Accordingly, without evidence of any manufacturer specifications, Plaintiff has failed to put forth evidence as to an element of the manufacturing defect claim that he would have to prove at trial. Therefore, Lanx's motion for summary judgment as to this claim is granted.

d. *Negligence*

*5 Plaintiff's Amended Complaint additionally alleges that Lanx breached its duty of reasonable care in that it negligently “designed, developed, manufactured, tested, inspected, packaged, promoted, marketed, distributed, labeled, and/or sold” the Lanx Telluride System and its component, the Lanx *Pedicle Screw*. Despite the allegations not being in his complaint, the Plaintiff, in response to Defendant's Motion for Summary Judgment asserts that Lanx was additionally negligent in releasing the Telluride Spinal Fixation System into commerce without proper FDA clearance.

The Mississippi Legislature amended the Mississippi Products Liability Act (MPLA) in 2014 to apply to “any action for damages caused by a product, *including, but not limited to, any action based on a theory of strict liability in tort, negligence or breach of implied warranty*” and details the requirements to find “[t]he manufacturer, *designer or seller*” liable in such actions. MS LEGIS 383 (2014), 2014 Miss. Laws Ch. 383 (H.B. 680) (amended text emphasized). This amendment seems to signal the Mississippi Legislature's intent for all claims brought for damage caused by a product to be analyzed under the MPLA. See *Little v. Smith & Nephew, Inc.*, No. 1:15-CV-028-GHD, 2015 U.S. Dist. Lexis 75666, *12-13, 2015 WL 3651769 (N.D. Miss. June 11, 2015). However, that version of the MPLA went into “force from and after July 1, 2014.” See 2014 Miss. Laws WL No. 48 (H.B. 680). “[I]f a statute is to apply 'effective from and after passage' it is not to apply to causes of action that have accrued prior to the passage of the statute.” *Tie—Reace Hollingsworth ex rel McDonald v. City of Laurel*, 808 So. 2d 950, 954 (Miss. 2002). “A cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested, and the theory that an injury has to happen before a tort is considered complete.” *Oaks v. Sellers*, 953 So. 2d 1077, 1081 (Miss. 2007) (internal quotation marks and citation omitted). Indisputably, this cause of action accrued prior to the 2014 amendments to the MPLA.

Under the previous version of the MPLA, a determination of whether a plaintiff's negligence claim can exist alongside his other MPLA claims requires this Court to navigate unsettled Mississippi law. The previous version of the MPLA states that it applies “in any action for damages caused by a product except for commercial damage to the product itself.” See Laws 2004, 1st Ex. Sess., Ch. 1, § 3, eff. September 1, 2004, amended by Laws 2014, Ch. 383 (H.B. No. 680), § 1, eff. July 1, 2014. To date, the Mississippi Supreme Court has never clearly indicated whether negligence claims are abrogated by the MPLA, and as recently as 2012 declined to decide that issue. See *Phillips 66 Co. v. Lofton*, 94 So. 3d 1051, 1063 (Miss. 2012) (“[G]iven that we have found that [the plaintiff] met his evidentiary burden under MPLA, it is unnecessary for this Court to reach the issue of whether [his] negligence claim was subsumed under MPLA”). In interpreting Mississippi law that same year, the Fifth Circuit stated that negligence claims can be brought alongside strict liability claims, but “a party may not disguise a products liability claim as a negligence claim to avoid dismissal.” *Murray v. GM, L.L.C.*, 478 Fed.Appx. 175, 181 (5th Cir. 2012) (per curiam) (citing *McSwain v. Sunrise Med., Inc.*, 689 F. Supp. 2d 835, 844

(S.D. Miss. 2010)). See *McSwain*, 689 F. Supp. 2d at 846 (the plaintiff's "common law negligence claims fail because they are mere restatements of the claims brought under the MPLA, and ... are not supported by sufficient evidence"); *Murray v. GM, LLC*, No. 3:10-CV-188-HTW-LRA, 2011 U.S. Dist. LEXIS 93845, 2011 WL 3684517, at *3 (S.D. Miss. Aug. 22, 2011) ("[W]hen a plaintiff's negligence claim cannot survive apart from his MPLA claim, regardless of how the plaintiff labels the claim ... the claim is governed by the MPLA."); *McKee v. Bowers Window & Door Co.*, 64 So. 3d 926, 940 (Miss. 2011) (the plaintiff's "negligence claim fail[s] to present any new discussion or claim that does not relate back to the ... products liability claim").

*6 With regard to specific claims, courts in Mississippi generally held that a negligence claim arising from defective design or failure to warn could not exist as a stand-alone claim because MPLA design defect claims and failure-to-warn claims necessarily required a negligence analysis. See *Hill v. Forest Labs., Inc.*, No. 2:06-CV-244-KS-MTP, 2014 U.S. Dist. LEXIS 78057, 2014 WL 2558756, at *2 (S.D. Miss. June 6, 2014) (the plaintiff's claim that defendant "negligently failed to warn of the alleged association between Lexapro and suicide" "was plainly a product liability claim within the scope of the MPLA"); *Hankins v. Ford Motor Co.*, No. 3:08-CV-639-CWR, 2011 U.S. Dist. LEXIS 143269, 2011 WL 6180410, at *4-5 (S.D. Miss. Dec. 13, 2011) (quoting *Palmer v. Volkswagen of America, Inc.*, 905 So. 2d 564, 599-600 (Miss. Ct. App. 2003) (internal quotation marks omitted) ("[W]hen a plaintiff claims defective design under the MPLA, a jury instruction on negligence is not necessary ... because the risk-utility test [in the MPLA] requires the jury to reach a conclusion about the manufacturer's conduct[;] the test is a version of Judge Learned Hand's negligence calculus. Therefore, ... a jury performing risk-utility analysis necessarily makes a negligence determination."); *McSwain*, 689 F. Supp. 2d at 846 ("The claim that [defendant] negligently failed to warn users of the danger of the chair without anti-tip tubes is a restatement of the failure to warn cause of action under the MPLA."); *Jowers v. BOC Group, Inc.*, No. 1:08-CV-036-KMO, 2009 U.S. Dist. LEXIS 53126, 2009 WL 995613, at *4 (S.D. Miss. Apr. 14, 2009) *aff'd in part, vacated in part on other grounds, and remanded sub nom.*, *Jowers v. Lincoln Elec. Co.*, 617 F.3d 346 (5th Cir. 2010) ("[T]he greater weight of the somewhat-mixed authority holds that negligence-based claims of product defect [against a manufacturer] are abrogated by the MPLA."); *Lundy v. Conoco, Inc.*, No. 3:05-CV-477-WHB, 2006 U.S. Dist. LEXIS 82423, 2006 WL 3300397, at *2

(S.D. Miss. Nov. 10, 2006) ("The Court finds that the failure to warn/inadequate warnings claims, regardless of the fact that Plaintiffs labeled one claim 'products liability' and the other 'negligence', are both governed by the [MPLA]."); *Bennett v. Madakasira*, 821 So. 2d 794, 804 (Miss. 2002) ("Although a plaintiff in a prescription drug liability case may alternatively rely on strict liability and negligence principles, these principles merge into one inquiry; the adequacy of the defendant's warnings."); *Palmer*, 905 So. 2d at 600, *aff'd in part, rev'd in part on other grounds*, 904 So. 2d 1077 (Miss. 2005) ("[L]ike a claim of design defect, a claim of inadequate warnings under the MPLA requires the jury to perform negligence analysis in assessing liability. ... [Thus], the court need not present the jury with a separate negligence instruction on inadequate warnings."). Therefore, it is clear that under the prior version of the MPLA, purported negligence claims that merely restate the elements of defective design or failure-to-warn claims brought under the MPLA are subsumed by the MPLA.

However, Mississippi case law interpreting the previous version of the MPLA is unclear as to whether a negligence claim arising from a manufacturing defect can exist as a stand-alone negligence claim. See *Little*, No. 1:15-CV-028-GHD, 2015 U.S. Dist. Lexis 75666, at *12-13, 2015 WL 3651769. The Fifth Circuit has determined under Mississippi law that "[t]he risk-utility analysis [employed in defect design and failure-to-warn claims] applies to design defect cases, not manufacturing defect cases," thus hinting that a negligence claim premised on manufacturing defect might exist alongside an MPLA manufacturing defect claim. See *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999); see also *Joiner v. Genlyte Thomas Grp., L.L.C.*, No. 1:09-CV-00093-GHD, 2012 U.S. Dist. LEXIS 20966, 2012 WL 567201, at *4 (N.D. Miss. Feb. 21, 2012) (a negligence claim arising from manufacturing defect might exist alongside a separate MPLA manufacturing defect claim). But see *Deese v. Immunex Corp.*, No. 3:11-CV-373-DPJ-FKB, 2012 U.S. Dist. LEXIS 17342, 2012 WL 463722, at *5 (S.D. Miss. Feb. 13, 2012) ("It is unclear whether Mississippi law recognizes such a negligence claim separate and apart from the MPLA claims for negligent design or failure to warn.").

In addition to Plaintiff's manufacturing defect claim under the MPLA, Plaintiff's Amended Complaint could be liberally read to include a negligence action on the basis of manufacturing. Regardless of whether the MPLA subsumes that negligence action or not, the Court finds

there are no genuine disputes of material fact concerning any manufacturing negligence, so summary judgment is appropriate as to that claim.

Plaintiff claims that the purpose of the Telluride Spinal Fixation System being implanted was to stabilize the spinal section to allow boney fusion. According to Dr. Crosby, Plaintiff's treating physician, achieving boney fusion takes between six and twenty-four months. The [pedicle screws](#) at issue here severed at five months. Plaintiff contends that evidence of the screws' malfunction is enough to show a breach of Lanx's duty. However, Plaintiff fails to elaborate or put forth expert testimony as to any particular manufacturing negligence on the part of Lanx. Plaintiff's expert testified that he had no opinions as to the manufacturing process as it applied to the particular screws. In follow up at the deposition, however, Lanx's counsel acknowledges that because the screws were not available, any opinion as to their defective construction would be inappropriate. Plaintiff contends that Lanx spoliated the evidence because it failed to save the broken pedicle screws after their removal.

*7 Spoliation is "[t]he intentional destruction, mutilation, alteration, or concealment of evidence." Black's Law Dictionary 1531 (9th ed. 2009). But "[a] party can only be sanctioned for destroying evidence that it had a duty to preserve, and such duty arises when 'the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.'" *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. 2006) (quoting *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)). When spoliation is the result of a litigant's bad-faith actions, it gives rise to an adverse inference that the evidence was detrimental to the spoliating party's case. *Vick v. Tex. Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975). "The party requesting an adverse inference must first show that the documents in question exist or existed and were within the control of the opposing party." *Jobe v. ATR Mktg., Inc.*, 189 F.3d 466, at *6 n.3 (5th Cir. 1999) (unpublished table decision) (citation omitted). "Moreover, a party seeking to obtain an adverse inference based on non-production or destruction of documents must show bad faith." *Id.* (citing *Vick*, 514 F.2d at 737 ("[T]he circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.")).

Dr. Fernandez performed the surgical removal of the Lanx Telluride System. Dr. Crosby and Allen Rasoul, a medical

product distributor, were also present during the surgery. Rasoul distributed Lanx, as well as other medical devices, and was present at Estes' surgery to deliver the new system being implanted. Plaintiff contends because complaints regarding broken screws were most often reported by distributors, and not individual patients, Rasoul should have collected the broken screws and either returned them to Lanx, had the hospital maintain possession of them, or retrieve them for himself. It is undisputed, however, the screws were not recovered after surgery, and the screws were not destroyed by Lanx or Rasoul. Because Plaintiff has failed to put forth a genuine issue of material fact as to bad faith on the part of Lanx, no spoliation instruction is warranted. Without evidence or testimony regarding Lanx's alleged manufacturing negligence, Plaintiff has not put forth any genuine issues of material fact as to that claim.

Aside from the negligence claims subsumed by the MPLA and the negligence in manufacturing claim, Plaintiff also makes negligence claims based on the alleged failure of Lanx to secure the appropriate clearance from the FDA. However, Plaintiff has not adequately shown a genuine issue of material fact as to causation against Lanx for its alleged releasing the Telluride System into commerce without FDA approval. It is well established that causation is an essential element of a negligence claim. See *Weathersby Chevrolet Co., Inc. v. Redd Pest Control Co., Inc.*, 778 So. 2d 130, 133 (Miss. 2001). Plaintiff's own expert testified that connecting the Plaintiff's injury with the alleged failure to properly file with the FDA would be improper as it was too speculative. Accordingly, despite whether there was any duty to Plaintiff to achieve proper FDA clearance or breach of that duty by Lanx, the negligence claim for allegedly failing to obtain proper FDA authorization cannot succeed as there is no causative link between that alleged failure and Plaintiff's injuries. Accordingly, Defendant's Motion for Summary Judgment as to Plaintiff's negligence claims identified is granted.

(2) Warranties

The second category of claims covers Plaintiff's breach of express warranty and breach of implied warranties. Defendant counters that because Lanx never made representations to Estes, that these causes of action are due to be dismissed.

a. Breach of Express Warranty

For a plaintiff to prevail on a breach of express warranty claim in an action for damages caused by a product in Mississippi, he must prove by a preponderance of the evidence that at the

time the product left the control of the manufacturer, designer, or seller:

*8 (i) ... The product breached an express warranty or failed to conform to other express factual representations upon which the claimant justifiably relied in electing to use the product; and

(ii) The defective condition rendered the product unreasonably dangerous to the user or consumer; and

(iii) The defective and unreasonably dangerous condition of the product proximately caused the damages for which recovery is sought.

MISS. CODE ANN. § 11-1-63(a)(i)(4), (ii), (iii).

“[A]n express warranty is any affirmation of fact or promise which concerns the product and becomes part of the basis for the purchase of such a product. Fault does not need to be shown to establish a breach. The plaintiff need only show that the product did not live up to its warranty.” *Scirocco*, 2015 U.S. Dist. LEXIS 66561, 2015 WL 2451225, at *4 (quoting *Forbes v. GMC*, 935 So. 2d 869, 876 (Miss. 2006) (quoting *Austin v. Will—Burt Co.*, 232 F. Supp. 2d 682, 687 (N.D. Miss. 2002), *aff’d*, 361 F.3d 862 (5th Cir. 2004) (internal quotation marks omitted)); *see also* MISS. CODE ANN. § 75-2-313(1) (a). The plaintiff must ultimately show that he relied on the alleged representation. *See* MISS. CODE ANN. § 11-1-63(a) (i)(4).

Plaintiff alleges the existence of an express warranty as follows:

Defendant expressly warranted that the Lanx Telluride System and its component part of the Lanx Pedicle Screw were safe and fit for use by consumers and users including Plaintiff Rocky Estes for its intended purpose, that it was of merchantable quality, that it did not produce any dangerous side effects, and that it was adequately tested and fit for its intended use.

In response to summary judgment, Plaintiff again spins his claim to reflect Lanx's alleged failure to get FDA clearance

for the Telluride System or its components. However, Plaintiff has failed to allege any express warranty that Lanx made to him regarding its 510(k) submission to the FDA, or even any specific claim made by Lanx to Plaintiff regarding the safety of the Telluride System or the pedicle screw associated therewith. Moreover, Plaintiff has produced no evidence or testimony creating a genuine issue of material fact that he relied on any representation by Lanx as to the safety or federal regulatory clearance. Accordingly, Defendant's Motion for Summary Judgment as to the breach of express warranty claim is granted.

b. Breach of Implied Warranty of Merchantability

To recover on a claim for breach of an implied warranty of merchantability, a plaintiff must demonstrate the following:

- (1) That a “merchant” sold “goods,” and he was a merchant with respect to “goods of the kind” involved in the transaction, (2) which were not merchantable at the time of sale, and (3) injuries and damages to the plaintiff or his property, (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of the injury.

Watson Quality Ford, Inc. v. Casanova, 999 So. 2d 830, 834 (Miss. 2008) (citing MISS. CODE ANN. § 75-2-314). With respect to the last element, the Mississippi Supreme Court has noted that “though there may have been a breach of the warranty of merchantability, the seller has a right to attempt cure. An opportunity for the seller to cure is a reasonable requisite of a buyer's right of recovery.” *Id.* at 834-35.

*9 Defendant asserts that because Plaintiff never allowed Lanx the chance to cure the alleged defect that Plaintiff's implied warranty of merchantability claim fails. Plaintiff failed to respond to this specific allegation of Lanx. Because opportunity to cure is a “requisite” to the buyer's right of recovery, and there is no testimony or proof that Plaintiff attempted to contact or contacted Lanx when it was discovered that the pedicle screw was broken, Lanx was not given an opportunity to cure and that claim is dismissed.

c. Breach of Implied Warranty of Fitness for a Particular Purpose

To recover on a claim for breach of an implied warranty of fitness for a particular purpose under Mississippi law, a plaintiff is required to demonstrate the following:

- (1) the seller at the time of the contracting had reason to know the particular purpose for which the goods were required; (2) the reliance by the plaintiff as buyer upon the skill or judgment of the seller to select suitable goods, and
- (3) the goods were unfit for the particular purpose.

Watson Quality Ford, Inc., 999 So. 2d at 835 (quoting *Garner v. S & S Livestock Dealers, Inc.*, 248 So. 2d 783, 785 (Miss. 1971) (internal quotation marks omitted) (citing MISS. CODE ANN. § 75-2-315)). “[N]o claim for breach of the implied warranty of fitness for a particular purpose will lie when a product is to be used for its ordinary purpose.” *Id.* (citing *Ford Motor Co. v. Fairley*, 398 So. 2d 216, 219 (Miss. 1981)).

Aside from the fact that there is no allegation that the pedicle screw or Lanx Telluride Spinal Fixation System was not used for its ordinary purpose, there is no proof or testimony that Plaintiff relied on Lanx, the seller, in selecting to use that product. In fact, Estes testified that he relied solely on his treating physician Dr. Crosby to make that decision. Accordingly, Defendant's request for summary judgment as to the implied warranty for fitness for a particular purpose is granted.

d. Negligent Misrepresentation

Numerous Mississippi district courts have held that the MPLA subsumes common law negligent misrepresentation claims based on a defective product. See *Austin*, 2013 U.S. Dist. LEXIS 137480, 2013 WL 5406589, at *8; *Gardley—Starks*, 917 F. Supp. 2d at 602; *McSwain*, 689 F. Supp. 2d at 844-45; *Lashley v. Pfizer, Inc.*, 877 F. Supp. 2d 466, 471 (S.D. Miss. 2012); *Murray*, No. 3:10-CV-188 HTW-LRA, 2011 U.S. Dist. LEXIS 93845, 2011 WL 3684517, at *3 (S.D. Miss. Aug. 22, 2011), *aff'd*, 478 Fed.Appx. 175

(5th Cir. 2012); *Walker v. George Koch Sons, Inc.*, 610 F. Supp. 2d 551, 562-63 (S.D. Miss. 2009). See also *Jowers*, 2009 U.S. Dist. LEXIS 53126, 2009 WL 995613, at *9 (discussing *R.J. Reynolds Tobacco Co. v. King*, 921 So. 2d 268 (Miss. 2005) (negligent misrepresentation claim may not be product liability claim if affirmative representations were made in addition to and separate from those in connection with a failure-to-warn claim)). Because Plaintiff in the case *sub judice* alleges that Defendant made representations with respect to the screw that mirror his allegations concerning the alleged representations in his failure-to-warn claim, the Court finds that his negligent misrepresentation claim is subsumed by the MPLA and must be dismissed.

(3) Claims as to the FDA

Plaintiff's factual basis for the final category of claims centers on Lanx's FDA clearance for either the pedicle screws used in the Telluride Spinal Fixation System, or the Telluride Spinal Fixation System itself. Plaintiff's fraudulent concealment cause of action alleges liability for the fraudulent concealment or misrepresentation that the Lanx Telluride System had been properly approved by the FDA.

*10 In a factually and legally similar case to this one, the United States Supreme Court in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-49, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001), held that federal law preempts state-law causes of action claiming that a medical device manufacturer made fraudulent representations to the FDA. 531 U.S. at 353, 121 S. Ct. 1012. *Buckman* involved orthopedic bone screws that the FDA approved in an expedited process as “substantially equivalent” to devices already on the market. 531 U.S. at 346, 121 S. Ct. 1012. Plaintiffs who suffered injuries after implantation of the screws brought suit alleging that the manufacturer misled the FDA. Like here, they further alleged that the misrepresentations were a “but for” cause of their injuries because, absent the misrepresentations, the product would never have reached the market. 531 U.S. at 343, 121 S. Ct. 1012.

The Supreme Court rejected the novel cause of action because the state law claim would conflict with the FDA's authority to punish fraud on the agency. As noted by the Court:

[T]he § 510(k) process sets forth a comprehensive scheme for determining whether an applicant has demonstrated that a product is substantially equivalent to a predicate device. Among other information, the applicant must submit to the FDA “proposed labels,

labeling, and advertisements sufficient to describe the device, its intended use, and the directions for its use,” 21 CFR § 807.87(e) (2000), and a statement attesting to and explaining the similarities to and/or differences from similar devices (along with supporting data), see § 807.87(f). The FDA is also empowered to require additional necessary information. See § 807.87(l). Admittedly, the § 510(k) process lacks the PMA review's rigor: The former requires only a showing of substantial equivalence to a predicate device, while the latter involves a time-consuming inquiry into the risks and efficacy of each device. Nevertheless, to achieve its limited purpose, the § 510(k) process imposes upon applicants a variety of requirements that are designed to enable the FDA to make its statutorily required judgment as to whether the device qualifies under this exception.

Accompanying these disclosure requirements are various provisions aimed at detecting, deterring, and punishing false statements made during this and related approval processes. The FDA is empowered to investigate suspected fraud, see 21 U.S.C. § 372; 21 CFR § 5.35 (2000), and citizens may report wrongdoing and petition the agency to take action, § 10.30. In addition to the general criminal proscription on making false statements to the Federal Government, 18 U.S.C. § 1001, (1994 ed., Supp. IV), the FDA may respond to fraud by seeking injunctive relief, 21 U.S.C. § 332, and civil penalties, 21 U.S.C. § 333(f)(1)(A); seizing the device, § 334(a)(2)(D); and pursuing criminal prosecutions, § 333(a). The FDA thus has at its disposal a variety of enforcement options that allow it to make a measured response to suspected fraud upon the Agency.

Buckman, 531 U.S. at 348-49, 121 S. Ct. 1012. Indeed, the Court stated “that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration.” 531 U.S. at 348, 121 S. Ct. 1012. Not only does federal law provide administrative tools to punish and deter fraud, but the agency's decision to employ those tools implicates its discretion and special competence.² Among the factors that make FDA enforcement “a somewhat delicate balance of statutory objectives,” *id.*, 121 S. Ct. 1012, are the need for administrative efficiency and the possibility that tort

liability based on inadequate disclosures would create “an incentive to submit a deluge of information,” 531 U.S. at 351, 121 S. Ct. 1012. The Court concluded that authorizing tort liability for failure to comply with FDA disclosure requirements “would exert an extraneous pull on the scheme established by Congress, and it is therefore pre-empted by that scheme.” 531 U.S. at 353, 121 S. Ct. 1012; *Lofton v. McNeil Consumer & Specialty Pharms.*, 672 F.3d 372, 375-76 (5th Cir. 2012).

² The FDA has authority to investigate fraud, 21 U.S.C. § 372, consider citizen petitions, 21 C.F.R. § 10.30, and seek criminal and civil penalties particular to fraud-on-the-FDA, 21 U.S.C. § 332-33. *Buckman*, 531 U.S. at 349, 121 S. Ct. 1012.

*11 The parties have failed to brief whether federal regulatory law impliedly preempts Plaintiff's causes of action based on Lanx's submissions to the FDA. Accordingly, the parties are ORDERED to SHOW CAUSE as to whether these claims and others are or are not preempted. Show Cause Responses are due JANUARY 8, 2016.

Conclusion

Accordingly, the Defendant's Motion for Summary Judgment [94] is GRANTED IN PART. Plaintiff has failed to bring forth genuine issues of material fact as to the following claims: (1) all negligence claims; (2) all claims under the MPLA; and (3) all warranty claims.

The parties shall have until January 8, 2016, to show cause as to why FDA regulations do or do not impliedly preempt Plaintiff's claims regarding Lanx's failure to procure the appropriate 510(k) clearance from the FDA before introducing the Telluride System and/or pedicle screw into commerce.

SO ORDERED, this the 23rd day of December, 2015.

All Citations

Not Reported in Fed. Supp., 2015 WL 9462964, Prod.Liab.Rep. (CCH) P 19,754

TAB 19

2020 WL 1434249

Only the Westlaw citation is currently available.
United States District Court, D. New Mexico.

Maria FIGUEROA, Plaintiff,

v.

ETHICON, INC., and Johnson
& Johnson, Defendants.

Case No. 2:19-cv-01188 KWR/KRS

|
Filed 03/24/2020

Attorneys and Law Firms

Dana Lizik, Pro Hac Vice, Johnson Law Group, Adam T. Funk, Potts Law Firm, Houston, TX, for Plaintiff.

Anita Modak-Truran, Butler Snow, Nashville, TN, Timothy C. Holm, Modrall, SPerling, Roehl, Harris & Sisk, P.A., Albuquerque, NM, for Defendants.

MEMORANDUM OPINION AND ORDER

KEA W. RIGGS, UNITED STATES DISTRICT JUDGE

*1 THIS MATTER comes before the Court upon the Defendants' Motion for partial dismissal, filed on January 23, 2020 (**Doc. 7**). Having reviewed the parties' pleadings and the applicable law, the Court finds that Defendants' motion is well-taken in part and therefore is **GRANTED IN PART** and **DENIED IN PART**. The strict liability and negligence claims (Counts II and III) are dismissed with leave to amend.

BACKGROUND

This case arises from the implantation of allegedly defective pelvic mesh. On December 13, 2010 Plaintiff underwent surgery to implant Defendant's pelvic mesh product to treat her urinary incontinence. This pelvic mesh product was designed, marketed and sold to treat this condition.

On December 22, 2016, Plaintiff underwent revision surgery at Sandoval Regional Medical Center in Rio Rancho, New Mexico. Plaintiff alleges she experienced significant mental and physical pain and suffering, permanent injury and physical deformity, and financial and economic loss.

Plaintiff alleges that contrary to Defendants' representations and marketing, their pelvic mesh product has a high failure and complication rate, fails to perform as intended, requires frequent and debilitating re-operations and has caused severe and irreversible injuries and damage. ¶ 25.

Plaintiff filed this case asserting the following claims against the Defendants: product liability – failure to warn (Count I); strict liability (Count II); negligence (Count III); negligent misrepresentation (Count IV); negligent infliction of emotional distress (Count V); breach of express warranty (Count VI); breach of implied warranty (Count VII); violation of consumer protection laws (Count VIII); gross negligence (Count IX); unjust enrichment (Count X); and punitive damages (Count XI).

The Defendants moved for dismissal of Counts II, III, V, VI, VII, VIII, IX and X. **Doc. 14**. Plaintiff agreed to dismiss the following claims: Counts V, VI, VII, VIII, and IX. Therefore, the following claims remain at issue in this opinion: strict liability (Count II), negligence (Count III), and unjust enrichment (Count X). This motion was fully briefed on February 19, 2020 and is ready for decision.

LEGAL STANDARD

Fed. Civ. P. Rule 8(a)(2) requires a complaint to set out "a short and plain statement of the claim showing that the pleader is entitled to relief." In reviewing a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "a court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F.3d 1155, 1159 (10th Cir. 2010). "To withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

*2 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.” *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

DISCUSSION

I. Strict Liability and Negligence claims (Counts II and III).

Defendants argue that Plaintiff failed to assert sufficient factual allegations as to the strict liability (Count II) and Negligence (Count III) claims. The Court agrees.

It is unclear if Plaintiff states a design, manufacturing, or marketing defect strict liability claim. To state a strict products liability claim, Plaintiff must allege facts that could satisfy the following: “(i) the product was defective; (ii) the product was defective when it left the Defendants’ hands and was substantially unchanged when it reached her; (iii) the product, because of the defect, was unreasonably dangerous to her; (iv) she suffered injury; and (v) the product’s defective condition was [the] proximate cause [of her injuries].” *Nowell v. Medtronic Inc.*, 372 F. Supp. 3d 1166, 1249 (D.N.M. 2019), citing *Armeanu v. Bridgestone/Firestone North Am. Tire, LLC*, 2006 WL 4060666, at *3 (D.N.M. 2006).

To assert a negligence claim Plaintiff must show the “existence of a duty from a defendant to a plaintiff, breach of that duty, which is typically based upon a standard of reasonable care, and the breach being a proximate cause and cause in fact of the plaintiff’s damages.” *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d at 185-86. “A proximate cause of an injury is that which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred.” *Id.* at ¶ 34. “It need not be the only cause, nor the last nor nearest cause.” *Id.* “It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury.” *Id.*

The complaint lack of factual allegations tailored specifically to Plaintiff. For example, Plaintiff does not identify the alleged defect in the mesh in her case nor her alleged injury, and it is therefore unclear how any defect caused any injury. See, e.g., *Mims v. Davol, Inc.*, No. 216CV00136MCAGBW, 2017 WL 3405559, at *5 (D.N.M. Mar. 22, 2017) (complaint

sufficient where Dr. Burton discovered product partially disintegrated and misshapen; disintegration indicated product was defective; and misshapeness caused several injuries, including bowel perforations, and caused plaintiff to undergo surgical interventions); *Nowell v. Medtronic Inc.*, 372 F. Supp. 3d 1166, 1250 (D.N.M. 2019) (complaint failed to sufficiently allege facts plausibly stating proximate causation element). Although Plaintiff indicated the injuries that have occurred in other cases, **Doc. 1-1 ¶ 34**, it is unclear what injuries Plaintiff suffered. Moreover, although the complaint alleges that the mesh failed in other cases, ¶ 21, it does not identify how the mesh was defective. For example, the complaint only alleges that she underwent revision surgery, but does not indicate why. It is unclear why the revision surgery was necessary. Similarly, it is also unclear how Defendants are alleged to have breached their duty of care.

*3 As explained above, Plaintiff also failed to allege facts supporting the proximate causation element. Plaintiff does not allege any facts regarding a connection between her injuries and a defect in the Defendants’ mesh.

To the extent Plaintiff alleges a manufacturing defect claim, she fails to allege that the mesh deviated from Defendants’ design specifications.

The Court notes that in her response, Plaintiff does not identify any such well-pled factual allegations. Therefore, for the reasons stated by Defendants (**Docs. 8 and 16**) and above, the Court concludes that Plaintiff has failed to plead sufficient facts to state plausible strict liability and negligence claims.

II. Unjust Enrichment (Count X).

To prevail on an unjust enrichment claim, “one must show that: (1) another has been knowingly benefitted at one’s expense (2) in a manner such that allowance of the other to retain the benefit would be unjust.” *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11. However, an unjust enrichment will fail if there is a “complete and adequate remedy at law.” *Sims v. Sims*, 1996-NMSC-078, ¶ 28, 930 P.2d 153, 159 (“equity will not act if there is a complete and adequate remedy at law”).

Defendants initially argue that this claim must be dismissed because there is an adequate remedy at law. However, Plaintiff may plead alternative, conflicting theories. *Fed. R. Civ. P.* 8(d)(2), (d)(3) (“A party may state as many separate claims or defenses as it has, regardless of consistency.”). Therefore, it appears that **Rule 8** allows alternative pleading of unjust

enrichment and legal claims. *See, e.g., In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices & Prod. Liab. Litig.*, 288 F. Supp. 3d 1087, 1259 (D.N.M. 2017). It would be premature to dismiss the unjust enrichment claim and it is unclear at this time whether Plaintiff has an adequate remedy at law.

Defendants also argue that Plaintiff has not sufficiently alleged facts supporting the above elements. However, Plaintiff has alleged that (1) Defendants knew its products were defective or had a high failure rate, and (2) retaining the benefit would be unjust. Therefore, the Court concludes that Plaintiff has stated a plausible claim for unjust enrichment.

III. Leave to Amend.

Plaintiff has requested leave to amend. At this stage in the case, amendment should be “freely given when justice so requires.” *Fed. R. Civ. P. 15(a)*. The Court should grant leave to amend unless “it is ‘patently obvious’ that the plaintiff could not prevail on the facts alleged and allowing [her] an opportunity to amend [her] complaint would be futile.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), *quoted in Cohen v. Longshore*, 621 F.3d 1311, 1314–15 (10th Cir. 2010); *Breuer v. Rockwell Int’l Corp.*, 40 F.3d 1119, 1131 (10th Cir. 1994) (court “should dismiss *with leave to amend* ... if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief.”), *quoted in Staats v. Cobb*, 455 F. App’x 816, 818 (10th Cir. 2011).

Here, the Court cannot conclude that amendment would be futile. For example, it appears possible for Plaintiff to state with specificity her injury, the alleged defect, and proximate causation.

***4** Therefore, Plaintiff may file an amended complaint as to the strict liability (Count II) and negligence (Count III) within **thirty (30) days** of the entry of this order.

CONCLUSION

For the reasons stated above, the Court dismisses the strict liability and negligence claims (Counts II and III) with leave to amend. Plaintiff may file an amended complaint as noted below. The Court dismisses the following claims with prejudice, as Plaintiff does not oppose dismissal: negligent infliction of emotional distress (Count V), breach of warranty (Counts VI and VII), consumer protection act (Count VIII) and gross negligence (Count IX).

IT IS THEREFORE ORDERED that Defendants’ Motion for Partial Dismissal (**Doc. 7**) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that the strict liability and negligence claims (Counts II and III) are **DISMISSED WITH LEAVE TO AMEND**. Plaintiff may file an amended complaint within **thirty (30) days** of the entry of this order. If Plaintiff fails to timely amend, the Court may, upon motion of a party or *sua sponte*, dismiss Counts II and III with prejudice.

IT IS FURTHER ORDERED that the negligent infliction of emotional distress (Count V), breach of warranty (Counts VI and VII), consumer protection act (Count VIII) and gross negligence (Count IX) claims are **DISMISSED WITH PREJUDICE**.

All Citations

Slip Copy, 2020 WL 1434249

TAB 20



KeyCite Yellow Flag - Negative Treatment

Order Corrected on Denial of Reconsideration by [In re Ford Tailgate Litigation](#), N.D.Cal., April 15, 2014

2014 WL 1007066

United States District Court, N.D. California.

San Francisco Division

In re Ford Tailgate Litigation

Case No. 11–CV–2953–RS

Signed March 11, 2014

Filed March 12, 2014

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT FORD MOTOR COMPANY'S MOTION TO DISMISS PLAINTIFFS' SECOND CONSOLIDATED AMENDED COMPLAINT

[Richard Seeborg](#), United States District Judge

*1 This putative class action involves thirty named plaintiffs from twenty-five states who seek to represent a nationwide class of millions of current and former owners or lessees of Ford vehicles. Plaintiffs allege that due to faulty manufacturing and/or design, the Ford vehicles at issue are defective in that the appliqué panel on the rear liftgate of the vehicles is prone to cracking, thereby posing a safety hazard. The alleged defect is referred to here as the “Cracked Tailgate Problem.” None of the named plaintiffs alleges the panel on his or her vehicle exhibited any cracking during the vehicle's warranty period. Defendants now move for partial dismissal of plaintiffs' Second Consolidated Amended Complaint. For the following reasons, plaintiffs' express and implied warranty claims arising under state law, as well as other state tort claims are dismissed without leave to amend. Plaintiffs' Magnuson Moss Warranty Act claim is dismissed with leave to amend, as are the majority of plaintiffs' unjust enrichment claims. The motion to dismiss is denied as to certain of plaintiffs' consumer protection and deceptive trade practices claims.

II. BACKGROUND

A. Procedural History

This case consolidates three separate lawsuits filed in this district: *Nettleton v. Ford Motor Co.*, No. CV–11–2953; *Gettman v. Ford Motor Co.*, No. CV–11–3133; and *Perrone v. Ford Motor Co.*, No. CV–11–3832. Plaintiffs' First Consolidated Amended Complaint added several named Plaintiffs and sought certification of both a nationwide class and twenty-five state subclasses. Ford answered the complaint, and discovery commenced.

Plaintiffs filed their Second Consolidated Amended Class Action Complaint (SCAC) on November 1, 2013, adding two additional plaintiffs (one in New Jersey and one in Florida). There are now a total of thirty named plaintiffs representing twenty-five states.¹ The nationwide class is defined as “[a]ll current and former owners or lessees of a model 2002 through model 2005 Ford Explorer or Mercury Mountaineer, or model 2003 through model 2005 Lincoln Aviator, in the United States.” (SCAC ¶ 294.) Plaintiffs assert claims on behalf of themselves and a putative nationwide class for violations of the Magnuson–Moss Warranty Act, 15 U.S.C. §§ 2301–2312. (*Id.* ¶¶ 10, 304–12.) Plaintiffs also represent subclasses of current and former owners and lessees who purchased the subject vehicles in one of the twenty-five states in which the individual named plaintiffs reside. (*Id.* ¶ 295(a)–(y)). Plaintiffs further allege state law claims, including breach of express and implied warranties, breach of implied warranty of merchantability, unjust enrichment, violation of state consumer protection statutes, negligence, and other state tort law claims. (*Id.* ¶¶ 313–876.) Ford now moves to dismiss with prejudice fifty-seven of plaintiffs' seventy-four claims under Fed.R.Civ.P. 12(b)(6).²

¹ Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, Washington, and West Virginia

² Ford's partial motion to dismiss comes three years after the filing of the first complaint relative to the Cracked Tailgate Problem, two and a half years after the complaints in this litigation were filed, and a full year and a half after Plaintiffs filed their Consolidated Amended Complaint setting forth their common allegations. Nevertheless, plaintiffs

do not argue that any portion of Ford's motion is precluded by its answer to the prior complaint.

B. Factual Background³

³ All factual allegations from the complaint are taken as true for purposes of this motion to dismiss.

*2 In 2002, Ford redesigned its primary four-door sports utility vehicle model known then as the Ford Explorer/Mercury Mountaineer. The 2002 redesign served as the basis for the 2002 to 2005 model years for the Ford Explorer and Mercury Mountaineer vehicles and the 2003 to 2005 Lincoln Aviator. Thus, all the vehicles at issue are mechanically identical, share the same model chassis, and have materially identical liftgates and tailgates. Ford marketed, distributed, and warranted the Ford vehicles in the United States. During the calendar years 2002 through 2005, Ford sold at least 1,386,086 Ford Explorers, 174,243 Mercury Mountaineers, and 70,890 Lincoln Aviators in the United States, totaling approximately 1.6 million Ford vehicles at issue in this litigation.

Plaintiffs allege that Ford has been aware of the defect in the appliqué since the first car rolled off the assembly line in 2002. Among other reasons, they base that claim on allegations that the Cracked Tailgate Problem began occurring: (a) almost immediately after the first models of the Ford vehicles were sold; (b) in an identical position on the defective part (i.e., the lower panel on the tailgate); (c) with nearly identical resulting damage to the defective part (a vertical crack across the lower panel); (d) across all three brand models (i.e., Ford, Lincoln, and Mercury); and (e) to thousands of Ford vehicles throughout the United States. Ford thereafter issued several Technical Service Bulletins to its dealerships regarding the Cracked Tailgate Problem. These bulletins, issued between December of 2002 and November 2005, were circulated only to dealership service departments and not to vehicle owners or to the public.

The Cracked Tailgate Problem presents known safety hazards, according to plaintiffs. They claim that as a result of the defect, the liftglass window portion of the tailgate is more susceptible to breaking and shattering, which poses a risk of bodily harm. Plaintiffs aver that the appliqué may also detach and fly off while a vehicle is in operation, resulting in the known danger of vehiclerelated road debris.

Plaintiffs allege that Ford has actively concealed material information regarding this defect, thereby allowing the

company to continue to sell and/or lease these vehicles to putative class members and to avoid the expense of the repair or redesign necessary to address properly the Cracked Tailgate Problem. As a result, plaintiffs aver, neither they nor the other putative class members could have discovered, even upon the reasonable exercise of diligence, that the Cracked Tailgate Problem was caused by a design or manufacturing flaw in the use of ABS or Xenoy for the tailgate.

III. LEGAL STANDARD

To survive a 12(b)(6) motion to dismiss for failure to state a claim, the complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Fed.R.Civ.P.* 8(a)(2). “Pleadings must be so construed so as to do justice.” *Fed.R.Civ.P.* 8(e). While “detailed factual allegations are not required,” a complaint must have sufficient factual allegations to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This determination is a context-specific task requiring the court “to draw on its judicial experience and common sense.” *Id.* at 679.

In dismissing a complaint, leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't of Corporations*, 66 F.3d 245, 248 (9th Cir.1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir.1996).

IV. DISCUSSION

A. Express and Implied Warranty Claims

1. Breach of Express Warranty

*3 Ford first argues that plaintiffs' express and implied warranty claims must be dismissed because none of the plaintiffs aver that the alleged defect (i.e., the cracked tailgate) manifested during the warranty period. Ford's New Vehicle Limited Warranty (NVLW) provides that “[d]uring the coverage period, authorized Ford Motor Company dealers will repair, replace, or adjust, all parts on [the] vehicle that are defective in factory-supplied materials or workmanship.” (Tew Decl., Ex. 1 at 5–6; Ex. 2 at 6–7.)⁴ The

NVLW further provides that “coverage begins at the warranty start date and lasts for three years or 36,000 miles whichever occurs first” and “[t]he warranty period starts on the day [the buyer] take[s] delivery of [the] new vehicle or the day it is first put into service.” (*Id.* at 2, 6–7.)

4 The warranties may be considered without converting this motion into a motion for summary judgment. *See Elias v. Hewlett-Packard Co.*, 903 F.Supp.2d 843, 850 n.1 (N.D.Cal.2012) (holding that court may consider contents of a manufacturer warranty on a Rule 12(b)(6) motion); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.2006) (“A court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.”) (internal citations omitted).

In response, plaintiffs counter that the alleged defect is not a cracked tailgate but rather a defective tailgate made from material prone to cracking. According to plaintiffs, this latent defect was present at the time of the purchase or lease, thus triggering Ford’s obligations under its NVLW regardless of when the tailgates themselves cracked. In other words, according to plaintiffs, a cracked tailgate is simply a by-product of the defect and not the defect itself.

Ford persuasively argues that a majority of states have rejected similar latent defect claims, invoking cases from many—though not all⁵—of the states in which plaintiffs bring express warranty claims. Ford also points to a Ninth Circuit case recognizing that California has adopted this majority position: “The general rule is that an express warranty does not cover repairs made after the applicable time or mileage periods have elapsed.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir.2008) (quoting *Daugherty v. Am. Honda Motor Co.*, 144 Cal.App.4th 824, 830, (2006)). *Clemens* goes on to criticize the position asserted by plaintiffs here, which the Ninth Circuit characterizes as one that “conflate[s] notions of express and implied warranty and pushe[s] the definition of ‘defect’ to the breaking point.” *Id.* The Ninth Circuit explains:

Every manufactured item is defective at the time of sale in the sense that it

will not last forever; the flip-side of this original sin is the product’s useful life. If a manufacturer determines that useful life and warrants the product for a lesser period of time, we can hardly say that the warranty is implicated when the item fails after the warranty period expires. The product has performed as expressly warranted. Claims regarding other buyer expectations and the manufacturer’s state of mind properly sound in fraud and implied warranty.

Id.

5 Defendants rely upon decisions on point in Connecticut, Maryland, Massachusetts, Mississippi, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Virginia, but acknowledge they could not locate case law on point in Alabama, Indiana, New Hampshire, or West Virginia.

Plaintiffs offer only a single counter-example in which a federal court, applying Michigan and Tennessee state law, allowed the plaintiffs to proceed with an express warranty claim predicated on a latent defect theory. *See In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F.Supp.2d 1069 (S.D.Ind.2001), *rev’d on other grounds*, 288 F.3d 1012 (7th Cir.2002). However, the plaintiffs in *Bridgestone/Firestone* alleged the defendants “expressly warrant[ed] the Tires and Explorers to be free of defects at the time of delivery.” *Id.* at 1101. Plaintiffs make no such averment here; *Bridgestone/Firestone* is thus of little persuasive value. Indeed, as the Seventh Circuit noted on appeal, “most states would not entertain the sort of theory that plaintiffs press.” 288 F.3d at 1017 (reversing the district court’s class certification decision in that case on other grounds). In fact, the only Tennessee state court decision cited by either party rejected a similar latent defect argument. *Moulton v. Ford Motor Co.*, 13 UCC Rep. Serv. 55, 59, 1973 WL 21361 (Tenn.Ct.App. May 25, 1973).

*4 Defendants acknowledge they could not locate case law on point in Alabama, Indiana, New Hampshire, or West Virginia. Plaintiffs, however, make no argument as to why those states, which have also adopted the Uniform

Commercial Code (U.C.C.), would reach any contrary result. Though mindful that the burden rests squarely with defendants to show that the facts as alleged fail to state even a plausible claim for relief, the absence of any contrary authority is persuasive. Plaintiffs' claims for breach of express warranty, must therefore be dismissed without leave to amend.⁶

- ⁶ Counts Two (Alabama), Twelve (Connecticut), Twenty-Three (Indiana), Thirty (Maryland), Thirty-Three (Massachusetts), Thirty-Seven (Mississippi), Forty (New Hampshire), Forty-Seven (North Carolina), Fifty-Four (Oklahoma) Fifty-Eight (Pennsylvania), Sixty Two (Tennessee), Sixty-Nine (Virginia), Seventy-Three (West Virginia).

2. Implied Warranty Claims

In addition to their express warranty claims, plaintiffs assert implied warranty claims in six states.⁷ Ford counters that its NVLW expressly limits any implied warranties "to the time period covered by the written warranties." (Tew Decl., Ex. 1 at 4; Ex. 2 at 5.) The U.C.C., as adopted by each of the plaintiffs' states, permits sellers or manufacturers to limit expressly the duration of any implied warranties, as does the federal Magnuson-Moss Warranty Act.⁸ Plaintiffs do not challenge Ford's ability to impose such a limit or the adequacy of this provision of the NVLW. Nor do they make any allegation that this particular provision was unconscionable. Instead, plaintiffs assert that the same latent defect theory discussed above makes this provision inapplicable as the vehicles were therefore not fit at the time of sale.

- ⁷ Colorado, Georgia, New Jersey, Oklahoma, Pennsylvania, and Texas.

- ⁸ See U.C.C. § 2-316(2); see also 15 U.S.C.A. § 2308(b) ("implied warranties may be limited ... to the duration of a written warranty"); Col.Rev.Stat. Ann. § 4-2-316; Tex. Bus. & Com.Code Ann. § 2.316; Ga.Code Ann. § 11-2-316; N.J. Stat. Ann. § 12A:2-316; Okla. Stat. Ann. tit. 12A, § 2-316; 13 Pa. Cons.Stat. Ann. §§ 2314-16.

While plaintiffs point to various state and federal decisions to suggest that an implied warranty claim may lie where a product is allegedly prone to defect at the time of sale even if the defect does not manifest, if at all, until after the close of the warranty period, none are persuasive. In

fact, only one of those decisions concerns a state in which plaintiffs advance such a claim: *Hornberger v. Gen. Motors Corp.*, 929 F.Supp. 884, 887-88 (E.D.Pa.1996).⁹ The district court in *Hornberger* found that the plaintiff did not receive any disclaimer of the implied warranty until after the sale was completed; thereby rendering the disclaimer invalid. Plaintiffs make no such allegation here, nor do they otherwise answer defendant's assertion that it explicitly limited all implied warranties to the duration of its express warranty as permitted by the law of each relevant state. In the absence of any allegation by plaintiffs that the durational limit here was unconscionable or otherwise invalid, plaintiffs implied warranties claims must be dismissed without leave to amend.¹⁰

- ⁹ Plaintiffs assert a related claim of tortious breach of warranty under Ohio state law, which is addressed below.

- ¹⁰ In the alternative, Ford argues the express and implied warranty claims in New Jersey, Connecticut and Maryland do not allege facts sufficient to satisfy the pre-suit notice requirement in those three states. In language adopted and incorporated into the commercial codes of each of these states, the *Uniform Commercial Code*, § 2-607(3) provides that a buyer must "within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." The SCAC, however, makes no averment that New Jersey plaintiffs Spencer Ware and Brian Martin ever notified Ford of the alleged defect. (SCAC ¶¶ 213-224.) Count Forty-Three (breach of implied warranty of merchantability under New Jersey law) is therefore also subject to dismissal for lack of pre-suit notice. Plaintiffs generally allege with respect to their Connecticut and Maryland warranty claims that "Ford has received sufficient and timely notice of the breaches of warranty." (SCAC ¶¶ 398, 529.) Plaintiffs also allege "[u]pon discovery the damage" to her vehicle, Maryland plaintiff Vivian Buchanan "requested that Ford repair the Cracked Tailgate Problem on her vehicle." (SCAC ¶ 183.) It is not necessary to determine whether general averments or a request to repair is sufficient as plaintiffs' express warranty claims in these states (Counts Twelve and Thirty) are otherwise

dismissed without leave to amend for the reasons discussed above.

*5 Plaintiffs also assert a claim for tortious breach of warranty under Ohio law, a form of action apparently intended to provide a remedy to remote purchasers not covered by written warranties due to the lack of privity. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 537 N.E.2d 624, 634 (Ohio 1989). As the *Chemtrol* court explained, “Application of the doctrine of implied warranty in tort to all products liability cases would render useless many, if not all, of the Uniform Commercial Code provisions involving products liability.” *Id.* (internal quotations omitted). In this case, the Ohio plaintiff, Diana Brunner, purchased her vehicle from a Ford dealership and otherwise appears to be entitled to the benefit of Ford’s express NVLW and any implied warranties not explicitly disclaimed therein. As such, Ford argues and plaintiffs do not dispute that Brunner is not entitled to relief under this hybrid tort remedy. In any case, Ohio allows manufacturers to limit the duration of any implied warranties. *Ohio Rev.Code Ann. § 1302.29*. The cases relied upon by plaintiffs concern class certification and do not establish any exception to the general rule discussed above. County Forty-Nine is therefore dismissed without leave to amend.

3. Magnuson–Moss Warranty Act

The Magnuson–Moss Warranty Act (MMWA) provides a federal class action remedy for breach of an implied or express warranty. 15 U.S.C. § 2310(d). “[C]laims under the Magnuson–Moss Act stand or fall with [plaintiffs’] express and implied warranty claims under state law. Therefore, this court’s disposition of the state law warranty claims determines the disposition of the Magnuson–Moss Act claims.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.2008). Those plaintiffs whose state law warranty claims are herein dismissed therefore lack any basis to assert claims under the Magnuson–Moss Act. Plaintiffs’ bare assertion that “any attempt by Defendants to limit the express warranties in a manner that would exclude coverage of the Ford Vehicles is unconscionable and any such effort to disclaim, or otherwise limit, liability for the Ford Vehicles is null and void,” without more, is insufficient to show that warranties should be treated as deceptive under the MMWA. The Ninth Circuit has held that the same Ford NVLW at issue in this litigation is not unconscionable. *See Smith v. Ford Motor Co.*, 462 Fed.Appx. 660, 663 (9th Cir.2011).

Plaintiffs MMWA claim must also be dismissed as to those plaintiffs in California, Florida, Illinois, Louisiana, Michigan, New York, and Washington who do not allege any breach of warranty claims under their respective state laws. Plaintiffs argue they are “masters of their complaint [who] may choose which claims to bring or not to bring.” That may be true, but without any allegations as to how plaintiffs in those states have suffered a cognizable claim for breach of an implied or express warranty under their states’ laws when plaintiffs’ other express and implied warranty claims have failed, the SCAC is insufficient to assert claims under the MMWA on their own behalf or on behalf of others in those states. To the extent that any of these deficiencies may be cured, Count One is therefore dismissed with leave to amend.

B. Unjust Enrichment Claims

Ford next moves to dismiss plaintiffs’ unjust enrichment claims. There is some debate as to whether a plaintiff may allege a stand-alone claim for unjust enrichment at all. California, among other jurisdictions, has rejected independent unjust enrichment claims. *See Jogani v. Superior Court*, 165 Cal.App.4th 901 (2008); *see also Baba v. Hewlett–Packard Co.*, C 09–05946 RS, 2010 WL 2486353 (N.D. Cal. June 16, 2010). Other states, like Florida, recognize such a claim only where plaintiffs lack an adequate remedy at law. *See Matthews v. Am. Honda Motor Co., Inc.*, 12–60630–CIV, 2012 WL 2520675 (S.D. Fla. June 6, 2012).

To the extent unjust enrichment is available as an independent claim, and not merely a remedy, it will not stand where the claim simply mirrors other statutory or tort claims. Plaintiffs are, of course, entitled to plead alternative claims. *Fed.R.Civ.P. 8(d)*. However, “where the unjust enrichment claim relies upon the same factual predicates as a plaintiff’s legal causes of action, it is not a true alternative theory of relief but rather is duplicative of those legal causes of action.” *Licul v. Volkswagen Grp. of Am., Inc.*, 13–61686–CIV, 2013 WL 6328734 (S.D.Fla. Dec. 5, 2013); *see also In re Apple & AT & iPad Unlimited Data Plan Litig.*, 802 F.Supp.2d 1070, 1077 (N.D.Cal.2011) (“plaintiffs can not assert unjust enrichment claims that are merely duplicative of statutory or tort claims”). As in those cases, plaintiffs do not distinguish the alleged deception underlying their unjust enrichment claims from that underlying their state tort claims. If plaintiffs claim they were damaged as a result of consumer deception, the proper remedy is under their respective state consumer protection statutes. If plaintiffs claim Ford failed to perform under the terms of its express warranty or implied warranty, the appropriate remedy is under those claims for relief. Should plaintiffs

ultimately be unable to recover under either a contract or tort theory, it does not mean a legal remedy was unavailable (thereby justifying an equitable remedy of unjust enrichment), but only that their claim lacks merit. Defendant's motion to dismiss must therefore be granted as to plaintiffs' claims for unjust enrichment.¹¹ These claims are dismissed with leave to amend except for the California claim (Count Seven), as that state has specifically rejected such a claim in this context. See *Jogani*, 165 Cal.App.4th 901.¹²

¹¹ Counts Three, Thirteen, Sixteen, Nineteen, Twenty-One, Twenty-Four, Thirty-One, Thirty-Four, Thirty-Eight, Forty-One, Forty-Five, Forty-Eight, Fifty, Fifty-Six, Sixty, Sixty-Three, Sixty-Seven, Seventy, and Seventy-Four.

¹² The Florida claim (Count Sixteen) is also dismissed without leave to amend as to one of the two Florida plaintiffs as that claim is partially time-barred, for reasons discussed below.

C. Economic Loss Doctrine

1. Ohio Negligence Claim

*6 Like many jurisdictions, the Ohio Supreme Court has held that a plaintiff cannot recover in negligence for purely economic losses allegedly caused by a defective product when the only damage is to the product itself. *Inglis v. Am. Motors Corp.*, 209 N.E.2d 583, 588 (1965); see *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868–75 (1986). A more recent Ohio decision suggested in dicta that this rule applies only where the consumer was in privity with the manufacturer at the time of sale. *Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co.*, 537 N.E.2d 624 (Ohio 1989). “For an ordinary consumer, i.e., one not in privity of contract with the seller or manufacturer against whom recovery is sought, an action in negligence may be an appropriate remedy to protect the consumer's property interests.” *Id.* at 631. The question presented in *Chemtrol* was whether a commercial buyer could recover economic loss in strict liability where the parties are in privity of contract, a question the Ohio court answered in the negative. *Id.* at 635. The Ohio state courts, however, continue to apply *Inglis* not *Chemtrol* in cases involving individual consumers. See *Potts v. Safeco Ins. Co.*, No.2009CA0083, 2010 WL 183 973 8, at *2 (Ohio Ct.App. May 3, 2010) (affirming summary judgment for insurance company, agent, and agency against noncommercial plaintiffs' negligence action to recover economic losses); *Hundemer v. Partin*,

No. CA2007–01–006, 2007 WL 3054324, at *5 (Ohio Ct.App. Oct. 22, 2007) (affirming dismissal of individual's negligence claim); *Lee v. Chrysler Corp.*, No.2004CA00164, 2005 WL 449762, at *3 (Ohio Ct.App. Feb. 22, 2005) (affirming dismissal of consumer's negligence claim against the manufacturer for economic losses).

Plaintiffs rely on three recent decisions from the federal district court that applied *Chemtrol* to allow negligence claims where, as here, the parties are not in privity. See, e.g., *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 880 F.Supp.2d 801, 816, 871–73 (S.D. Ohio 2012); *Hale v. Enerco Grp., Inc.*, No. 1:10 CV 00867–DAP, 2011 U.S. Dist. LEXIS 781, at *19–20 (N.D. Ohio Jan. 5, 2011) (“[I]n cases where the parties are not in privity of contract, [Ohio] courts apply a more relaxed rule, allowing individual consumers to bring negligence claims for solely economic injuries.”) (quotation omitted); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 684 F.Supp.2d 942, 951 (N.D. Ohio 2009) (same). None of these federal cases cite *Inglis* or discuss the continuing viability of that case. Because *Inglis* continues to be the rule in Ohio, defendant's motion to dismiss plaintiffs' Ohio negligence claim (Count Fifty-One) must be granted without leave to amend.

2. North Carolina and Pennsylvania Consumer Protection Claims

Ford next argues the economic loss rule bars plaintiffs' consumer protection claims in North Carolina and Pennsylvania. As the law is not clear in either state, plaintiffs' claim cannot be dismissed at this stage as a matter of law.

Ford's argument that the economic loss rule should bar plaintiffs' claim under North Carolina's Unfair and Deceptive Trade Practice Act (UDTPA) rests on federal district court cases holding such claims should be barred. Neither party here points to any North Carolina cases directly addressing whether the economic loss rule precludes claims under the UDTPA. Plaintiffs rely on *Coley v. Champion Home Builders Co.*, 590 S.E.2d 20 (N.C. Ct.App. 2004), which held that the plaintiffs sufficiently pleaded actual injury on the basis of a product defect that exposed them to the risk of personal injury and property damage, even though they did not seek damages beyond their replacement cost. *Coley* did not consider the economic loss rule, but neither does Ford point to any decisions from North Carolina precluding such claims. In the absence of such authority, it cannot be said at this juncture that plaintiffs' claims in Count Forty-Six are barred as a matter of law.

The same is true in Pennsylvania. In the absence of any binding authority from the Pennsylvania courts concerning the economic loss rule, the Third Circuit upheld the district court's dismissal of similar claims, predicting that the Pennsylvania courts would apply the economic loss doctrine to bar such claims under Pennsylvania's Unfair Trade Practices and Consumer Protection Claims Law (UTCPL). See *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 681 (3d Cir.2002). The Pennsylvania Supreme Court has yet to weigh in, but several Pennsylvania trial and intermediate appellate decisions have rejected the Third Circuit's analysis. In rejecting *Werwinski*, “[t]he [Pennsylvania] state courts explained that applying the economic loss doctrine to claims under the Pennsylvania Law would eviscerate the purpose of the statute and that the Pennsylvania legislature was fully aware of the doctrine when it enacted the Pennsylvania Law and thus did not intend for the doctrine to bar claims brought pursuant to the Law.” *In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, No. 05 C 4742, 05 C 2623, 2009 WL 937256, at *9 (N.D.Ill. Apr. 6, 2009) (citations omitted); see also *Seward v. Certo*, No. 05–6363, 2006 WL 266150, at *2 (E.D.Pa. Feb. 2, 2006) (“Pennsylvania courts, noting that lower federal court holdings are not binding on state courts, have expressly disagreed with *Werwinski*’s holding and refused to apply the economic loss doctrine to UTCPL claims.”) (citations omitted). In light of this contradictory authority, plaintiffs’ claim (Count Fifty–Seven) cannot be dismissed at this stage as a matter of law.

3. Colorado Strict Liability Claim

*7 In 2000, the Colorado Supreme Court adopted the economic loss doctrine, holding “that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.” *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo.2000). Although the claim at issue in *Town of Alma* was for negligence, the state court engaged in a broad review of the development of the economic loss rule in tort law. *Id.* at 1259–1264. The court concluded, “Consistent with this duty analysis, we now expressly adopt the economic loss rule. We hold that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law.” *Id.* at 1264. Consistent with *Town of Alma*, Ford’s motion to dismiss is granted without leave to amend as to plaintiffs’ strict liability claim (Count Nine).

D. Statute of Limitations

1. Florida Deceptive and Unfair Trade Practices Act and Unjust Enrichment Claims

Ford next moves to dismiss the claims of Florida plaintiffs Zane Dery and Lynne Benson brought under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (Count Fourteen) and for unjust enrichment (Count Sixteen).¹³ Benson purchased a new 2005 Ford Explorer in 2006. Dery’s claims are predicated on two different Ford vehicle purchases: a used 2003 Lincoln Aviator purchased in 2006 and a used 2005 Lincoln Aviator purchased in 2008. Ford does not argue Dery’s FDUTPA and unjust enrichment claims predicated on the 2008 purchase are time barred. It does argue, however, that Benson’s claims and Dery’s claims as they relate to his 2006 purchase are barred by the four-year statute of limitations set forth in Fla. Stat. § 95.11(d)(f). See *McKissic v. Country Coach, Inc.*, No. 07–1488, 2008 WL 616093, at *4 (M.D.Fla. Mar. 3, 2008) (FDUTPA claim); *Swafford v. Schweitzer*, 906 So.2d 1194, 1195 (Fla.Dist.Ct.App.2005) (unjust enrichment claim).

- ¹³ Ford also moves to dismiss the Florida plaintiffs’ negligence claim (Count Fifteen); plaintiffs do not oppose this motion.

Under Florida law, the statute of limitations applies from the time the action accrued; in this case, the date of purchase. See *S. Motor Co. of Dade Cnty. v. Doktorczyk*, 957 So.2d 1215, 1217 (Fla.Dist.Ct.App.2007) (holding that FDUTPA claim accrues at time vehicle was purchased); *Barbara G. Banks, P.A. v. Thomas D. Lardin, P.A.*, 938 So.2d 571, 577 (Fla.Dist.Ct.App.2006) (holding that unjust enrichment claim accrues when benefit is conferred). Time thus began to accrue in 2006 for both Benson and Dery, expiring sometime in 2010 for both claims and before this action was filed in 2011.

Plaintiffs argue incorrectly that the statute of limitations was tolled until plaintiffs discovered the defect according to the doctrine of fraudulent concealment. Florida’s tolling statute, Fla. Stat. Ann. § 95.051, “specifically precludes application of any tolling provision not specifically provided therein.” *Hearndon v. Graham*, 767 So.2d 1179, 1185 (Fla.2000) (holding delayed discovery may delay the time of accrual but does not toll the applicable statute of limitations). Fraudulent concealment is not listed in § 95.051 among the bases for tolling a statute of limitations. Plaintiffs do not assert delayed discovery here. Cf. *McKissic*, 2008 WL 616093, at *4 (holding that delayed discovery does not apply to FDUTPA

and/or unjust enrichment claims). Benson's claims under the FDUTPA (Count Fourteen) and for unjust enrichment (Count Sixteen) must therefore be dismissed without leave to amend, as must Dery's claims as to his 2003 model year vehicle.

2. California Legal Remedies Act (CLRA) Claim

A CLRA claim must "be commenced not more than three years from the date of the commission of such method, act, or practice." [Cal. Civ.Code § 1783](#). Ford argues that plaintiff Sally Nettleton's CLRA claim is time-barred because she alleges she discovered the crack in the appliqué in February 2008 but did not file her Complaint until June 15, 2011.

*8 In response, plaintiffs claim that the delayed discovery rule applies as Nettleton's discovery of the crack did not constitute discovery of the alleged defect. "In order to invoke the discovery rule, the plaintiff must plead and prove facts showing: (a) lack of knowledge; (b) lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date); and (c) how and when he did actually discover the fraud or mistake." *Saaremets v. Whirlpool Corp.*, No. 09-2337, 2010 U.S. Dist. LEXIS 26165, at *16 (E.D.Cal. Mar. 18, 2010) (citing *Gen. Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 (9th Cir.1991)). Plaintiffs do not allege any facts to satisfy this third requirement.

Plaintiffs further argue the statute of limitations was tolled in December 2010 by the filing of a putative class action compliant in the Southern District of California that encompassed Nettleton's claims pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). The equitable tolling doctrine articulated in *American Pipe*, however, applies only to federal question claims and not to plaintiffs' state law claim under the CLRA. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir.2008) (declining to apply the doctrine of cross jurisdictional tolling to a California state law claim).

In the alternative, plaintiffs allege the statute of limitations was tolled by virtue of the fraudulent concealment doctrine. To establish fraudulent concealment, a plaintiff must plead the following: "(1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." *Saaremets*, 2010 U.S. Dist. LEXIS 26165 at *19-20 (quoting *Clemens*, 534 F.3d at 1024). Fraudulent concealment tolling must be pled with particularity under

[Fed.R.Civ.P. 9\(b\)](#). If, as plaintiffs allege, the crack discovered by Nettleton in 2008 is merely a symptom of the defect and not the defect itself, then plaintiffs do not plead the circumstances under which Nettleton became aware of the defect, making it impossible to determine what information was lacking in 2008 such that she possessed neither actual nor presumptive knowledge of facts sufficient to put her on notice as to the nature of her claim. On this basis, Count Five must therefore be dismissed with leave to amend.

3. Louisiana Redhibition Claim

The prescriptive period for Louisiana redhibition claims is one year from the date the buyer discovers the alleged defect, or four years from the date the product is delivered to the buyer, whichever is earlier. [La. Civ.Code Art. 2534\(A\)\(1\)](#). If the seller knows, or is presumed to know, of the existence of the alleged defect, the one-year discovery rule applies regardless of the delivery date. [La. Civ.Code Art. 2534\(B\)](#).

Louisiana Plaintiff Connie Samaha alleges she discovered the cracked appliqué for the first time in 2005 (compl.¶ 175), and then discovered a second crack in April 2011 (compl.¶ 176). Although the tolling period would have run in 2006 based on her discovery of the initial crack, plaintiffs argue Samaha's discovery of the crack in 2005 did not constitute discovery of the underlying defect. This is the same latent defect argument rejected in most jurisdictions, as discussed above, and plaintiffs do not point to any contrary authority from Louisiana. Samaha's redhibition claim (Count Twenty-Six) is therefore time-barred and must be dismissed without leave to amend.

E. Statutory Fraud Claims In California, West Virginia, And Massachusetts

*9 Ford next moves to dismiss plaintiffs' statutory fraud claims in California (Count Five), Massachusetts (Count Thirty-Two), and West Virginia (Count Seventy-Two) because the SCAC does not adequately allege that plaintiffs provided the required pre-suit notice to Ford before filing the original complaints in these consolidated cases. Pre-suit notice is required by the law of each of these states. The CLRA mandates that "[t]hirty days or more prior to the commencement of an action for damages [under the CLRA], the consumer shall ... [n]otify the person alleged to have" violated the CLRA "of the particular alleged violations" and "[d]emand that the person correct, repair, replace, or otherwise rectify" the violations. [Cal. Civ.Code § 1782\(a\)](#). Similarly, the Massachusetts Consumer Protection

Act requires the plaintiff to allege and prove that the defendant was sent a demand letter thirty days prior to filing suit. *Mass. Gen. Laws. ch. 93A, § 1*; see *York v. Sullivan*, 338 N.E.2d 341, 346 (Mass.1975). Under the West Virginia Consumer Credit and Protection Act, the plaintiff must provide the defendant notice of the alleged violation of the WVCCPA in writing and by certified mail prior to filing suit. *W. Va.Code Ann. § 46A-6-106(b)*.

In support of their Massachusetts and West Virginia claims, plaintiffs generally plead that notice was given to Ford. (SCAC ¶¶ 294, 542.) Nothing more is required at this stage. In Massachusetts, moreover, the failure of a buyer to notify the seller of a breach of warranty only permits a bar for recovery when there has been prejudice to the defendant—a factual determination. See *M.G.L.A. c. 106, § 2-318*; *Henrick*, 458 N.E.2d 773; see also *Baba v. Hewlett-Packard Co.*, C 09-05946 RS, 2010 WL 2486353 (N.D. Cal. June 16, 2010). Defendant's motion must therefore be denied as to Counts Thirty-Two and Seventy-Two.

Plaintiffs do not allege that notice was provided as to the California claim, arguing instead that notice is not required as plaintiffs do not seek compensatory relief, only restitution, declaratory relief, and injunctive relief. *Cal. Civ.Code § 1782(d)* expressly provides that “an action for injunctive relief” may be brought without pre-suit notice. *Section 1782(a)* specifies that the notice requirement applies to an “action for damages.” There is some disagreement as to whether pre-suit notice is required when the only monetary relief sought is restitution. Compare *Cuevas v. United Brands Co., Inc.*, No. 11-991, 2012 WL 760403 (S.D.Cal. Mar. 8, 2012) (holding that a claim for disgorgement or restitution is a claim for damages) with *Util. Consumers' Action Network v. Sprint Solutions, Inc.*, No. 07-2231, 2008 WL 1946859 (S.D.Cal. Apr. 25, 2008) (“Prefiling notice is not required for a CLRA claim for restitution.”). However, the statutory scheme when read as a whole favors defendants' interpretation. *Section 1780*, lists the available remedies for violations of the CLRA, including “actual damages,” injunctive relief, and restitution. If the notice requirement in *§ 1782(a)* pertaining to “an action for damages” is read narrowly to apply only to “actual damages,” it would render the word “actual” in *§ 1780* redundant and ignore the Legislature's specific exemption of “injunctive relief” in *§ 1782(d)*.¹⁴ Accordingly, plaintiffs' restitution claim under CLRA (Count Five) is dismissed with leave to amend if plaintiffs can allege that pre-filing notice was given.

¹⁴ See *Laster v. T-Mobile USA, Inc.*, No. 5-1167, 2008 WL 5216255 (S.D.Cal. Aug. 11, 2008) (reaching the same conclusion) *aff'd sub nom. Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir.2009) rev'd on other grounds, 131 S.Ct. 1740 (2011).

F. Tennessee Consumer Protection Act Claim

Finally, Ford moves to dismiss the putative class claim under the Tennessee Consumer Protection Act (TCPA). The Tennessee Supreme Court has held that the language of the TCPA is “unambiguous” that it applies only to claims brought individually. *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 309 (Tenn.2008). “[W]hether a state law displaces a federal rule ‘turns on whether the state law actually is part of a State's framework of substantive rights or remedies.’ ” *Bearden v. Honeywell Int'l Inc.*, 2010 WL 3239285, at *9 (M.D.Tenn. Aug. 16, 2010) (citing *Shady Grove Ortho Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 418 (2010) (hereinafter *Shady Grove*)). *Bearaden* held “that the class action limitation contained in the TCPA is so intertwined with that statute's rights and remedies that it functions to define the scope of the substantive rights.... Because the restriction is a part of Tennessee's framework of substantive rights and remedies, Rule 23 does not apply.” *Id.* at *10.¹⁵ See also *Tait v. BSH Home Appliances Corp.*, 2011 WL 1832941, at *8 (C.D.Cal. May 12, 2011) (following *Bearden*'s analysis and dismissing the class claim under the TCPA with prejudice); *In re Optical Disk Drive Antitrust Litig.*, 3:10-MD-2143 RS, 2012 WL 1366718 (N.D.Cal. Apr. 19, 2012) (similar).¹⁶ Tennessee plaintiff Gary Buck's claim under the TCPA (County Sixty-One) must be dismissed to the extent that he asserts the TCPA claim on behalf of a class, with leave to amend.

¹⁵ *Thorogood v. Sears Roebuck and Co.*, 547 F.3d 742 (7th Cir.2008) does not hold otherwise. Although that decision noted in dicta that the Tennessee court's decision on state substantive law does not control federal procedure in a diversity case, the court went on to observe the defendant there was “on to something.” *Id.* at 746. “Even though the plaintiff bases his claim, and that of any other Tennesseans who happen to be members of the class, on Tennessee law, he and they are seeking a breadth of relief that Tennessee does not offer them in its courts. Maybe that is a defect of Tennessee law. But the purpose of the diversity jurisdiction

is to protect out-of-state residents against state judicial bias in favor of residents; it is not to expand the relief obtainable under state law.” *Id.* (reversing class certification on other grounds).

¹⁶ The Ninth Circuit has not yet addressed *Shady Grove*, in which a fractured Court articulated contrasting approaches to determine whether a New York statute prohibiting class actions in particular suits precluded a federal district court sitting in diversity from entertaining a class action under Rule 23. District court decisions in this circuit have varied. *See, e.g. In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09–2087, 2014 WL 295302 (S.D.Cal. Jan. 27, 2014) (analyzing the fractured opinion in *Shady Grove* according to *Marks v. United States*, 430 U.S. 188, 193, (1977) and concluding that “Rule 23 governs Plaintiffs’ claims, and Plaintiffs’ claims are not subject to dismissal based on the state statutes prohibiting class actions”).

V. CONCLUSION

*¹⁰ For the foregoing reasons, defendants’ motion to dismiss is granted in part and denied in part. ¹⁷

¹⁷ Plaintiffs do not oppose Ford’s motion to dismiss Plaintiff Dery’s, Benson’s, Caunt’s, and Hardee’s negligence claims (Counts Fifteen, Thirty–Six, and Sixty–Six); Plaintiff Samaha’s claims for violation of the Louisiana Unfair Trade Practices and Consumer Protection Act (Count Twenty–Five), breach of contract (Count Twenty–Seven), or unjust enrichment (Count Twenty–Eight); or Plaintiff Douglas’s claim under the Oklahoma Deceptive Trade Practices Act (Count Fifty–Three). These claims are therefore dismissed with prejudice.

The following counts of the SCAC are hereby DISMISSED without leave to amend:

- *Breach of Express Warranty*: Counts Two, Twelve, Twenty–Three, Thirty, Thirty–Three, Thirty–Seven, Forty, Forty–Seven, Fifty–Four, Fifty–Eight, Sixty–Two, Sixty–Nine, and Seventy–Three;

- *Breach of Implied Warranty*: Counts Ten, Seventeen, Forty–Three, Fifty–Five, Fifty–Nine, and Sixty–Five;
- *Violation of Consumer Protection/Deceptive Trade Practices Statutes*: Counts Five, Fourteen (as to Plaintiff Benson entirely, and as to Plaintiff Dery’s 2003 model year vehicle only); Twenty–Five, and Fifty–Three;
- *Unjust Enrichment*: Count Seven, Sixteen (as to Plaintiff Benson entirely, and as to Plaintiff Dery’s 2003 model year vehicle only), and Twenty–Eight;
- *Tort Claims*: Counts Nine, Fifteen, Thirty–Six, Forty–Nine, Fifty–One, Sixty–Six; and
- *Other*: Counts Twenty–Six and Twenty–Seven.

The following counts of the SCAC are hereby DISMISSED with leave to amend:

- *Magnuson Moss Act Claim*: Count One;
- *Unjust Enrichment*: Counts Three, Thirteen, Sixteen (as to Plaintiff Dery’s 2005 model year vehicle only), Nineteen, Twenty–One, Twenty–Four, Thirty–One, Thirty–Four, Thirty–Eight, Forty–One, Forty–Five, Forty–Eight, Fifty, Fifty–Six, Sixty, Sixty–Three, Sixty–Seven, Seventy, and Seventy–Four; and
- *Violation of Consumer Protection/Deceptive Trade Practices Statutes*: Fourteen (as to Plaintiff Dery’s 2005 model year vehicle only), and Sixty–One.

Defendants’ motion to dismiss is DENIED as to the following counts of the SCAC:

- *Violation of Consumer Protection/Deceptive Trade Practices Statutes*: Thirty–Two, Forty–Six, Fifty–Seven, and Seventy–Two.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 1007066, 83 UCC Rep.Serv.2d 115

2014 WL 12649204

2014 WL 12649204

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Francisco Division.

IN RE FORD TAILGATE LITIGATION

Case No. 11-CV-2953-RS

|
Signed 04/15/2014

**ORDER GRANTING LEAVE TO FILE MOTION
FOR RECONSIDERATION, DENYING MOTION
FOR RECONSIDERATION, AMENDING
PRIOR ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO DISMISS,
AND EXTENDING TIME TO AMEND**

The Honorable [Richard Seeborg](#), United States District Judge

*1 Pursuant to Civil Local Rule 7-9, plaintiffs request leave to file a motion for reconsideration of the prior order granting in part and denying in part defendants' motions to dismiss. (ECF No. 162.) Specifically, plaintiffs request reconsideration for failure to address plaintiffs' argument that Ford's express warranty was unconscionable and that equitable tolling should apply to the California plaintiff's Consumer Legal Remedies Act ("CLRA"). Plaintiffs also seek to correct certain scrivener's errors in the order. Because the order did not directly address these arguments, plaintiffs' application for leave to file is hereby granted. Plaintiffs' motion for reconsideration is, however, denied, except as to two corrections noted below to the March 12, 2014 order.

First, plaintiffs argue that the court's prior order failed to consider their allegations that Ford's express warranty was unconscionable. In their complaint, plaintiffs stated that "any attempt by Defendants to limit the express warranties in a manner that would exclude coverage of the Ford Vehicles in unconscionable" (¶ 309) and "any express limitation or negation of Ford's implied warranty, including any time limitation, is unconscionable, unreasonable, and unenforceable" (¶ 632). The former allegation was offered in support of Count One (violations of the federal Magnuson-Moss Act, 15 U.S.C. §§ 2301–12, based on Ford's written warranty). The latter allegation was offered in support of Count 43 (breach of the implied warranty of merchantability

on behalf of the putative New Jersey sub-class) and not in regard to plaintiffs' express warranty claims.

Although they may provide the framework of a complaint, legal conclusions are not accepted as true and "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Apart from these conclusory allegations that Ford's warranty was "unconscionable," plaintiffs offer no specific allegations as to how the durational limit of Ford's express warranty was either procedurally or substantively unconscionable.

Second, plaintiffs submit that the California plaintiffs' CLRA claim was dismissed on statute of limitations grounds without considering an alternative legal argument presented at oral argument regarding tolling. As the prior order stated, "The equitable tolling doctrine articulated in *American Pipe*, however, applies only to federal question claims and not to plaintiffs' state law claim under the CLRA. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (declining to apply the doctrine of cross-jurisdictional tolling to a California state law claim)." See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

Although *Clemens* is clear that the federal tolling rule articulated in *American Pipe* does not apply to California state law claims, plaintiffs correctly note that a later Ninth Circuit decision, *Hatfield v. Halifax PLC*, 564 F.3d 1177 (2009), held that a separate California rule does permit equitable tolling of a CLRA claim where there is "(1) timely notice to the defendant in the filing of the first claim; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim." *Hatfield*, 564 F.3d at 1185 (citing *Collier v. City of Pasadena*, 191 Cal. Rptr. 681, 685 (1983)). It is not necessary to reach this argument, however, as plaintiff's CLRA claim was otherwise subject to dismissal with leave to amend for lack of pre-filing notice.

*2 Third, plaintiffs note two scrivener errors in the summation appearing on pages 19-20 of the March 12, 2014 order. Count Five (Nettleton's CLRA claim) was incorrectly listed among those counts dismissed without leave to amend. Count Five was dismissed based on a finding that "plaintiffs do not plead the circumstances under which Nettleton became aware of the defect." Plaintiffs will, therefore, have an opportunity to amend this claim. Second, Count Fourteen (violation of the Florida Deceptive and Unfair Trade Practices

2014 WL 12649204

Act) as it pertains to plaintiff Dery's 2005 vehicle was not the subject of Ford's motion to dismiss, as noted on page 14 of the Order.

As hereby corrected, the summation appearing on pages 19-20 of the March 12, 2014 order should read as follows:

"The following counts of the SCAC are hereby DISMISSED without leave to amend:

- Breach of Express Warranty: Counts Two, Twelve, Twenty-Three, Thirty, Thirty-Three, Thirty-Seven, Forty, Forty-Seven, Fifty-Four, Fifty-Eight, Sixty-Two, Sixty-Nine, and Seventy-Three;
- Breach of Implied Warranty: Counts Ten, Seventeen, Forty-Three, Fifty-Five, Fifty-Nine, and Sixty-Five;
- Violation of Consumer Protection/Deceptive Trade Practices Statutes: Counts Fourteen (as to Plaintiff Benson entirely, and as to Plaintiff Dery's 2003 model year vehicle only); Twenty-Five, and Fifty-Three;
- Unjust Enrichment: Count Seven, Sixteen (as to Plaintiff Benson entirely, and as to Plaintiff Dery's 2003 model year vehicle only), and Twenty-Eight;
- Tort Claims: Counts Nine, Fifteen, Thirty-Six, Forty-Nine, Fifty-One, Sixty-Six; and
- Other: Counts Twenty-Six and Twenty-Seven.

"The following counts of the SCAC are hereby DISMISSED with leave to amend:

- Magnuson Moss Act Claim: Count One;
- Unjust Enrichment: Counts Three, Thirteen, Sixteen (as to Plaintiff Dery's 2005 model year vehicle only), Nineteen, Twenty-One, Twenty-Four, Thirty-One, Thirty-Four, Thirty-Eight, Forty-One, Forty-Five, Forty-Eight, Fifty, Fifty-Six, Sixty, Sixty-Three, Sixty-Seven, Seventy, and Seventy-Four; and
- Violation of Consumer Protection/Deceptive Trade Practices Statutes: Counts Five and Sixty-One.

"Defendants' motion to dismiss is DENIED as to the following counts of the SCAC:

- Violation of Consumer Protection/Deceptive Trade Practices Statutes: Thirty-Two,
- "Forty-Six, Fifty-Seven, and Seventy-Two."

Finally, plaintiffs unopposed request for an extension of time to file the amended complaint and Ford's response thereto is granted. Plaintiffs' amended complaint is due 21 days from the date of this order, with Ford's response to the amended complaint to follow within 21 days thereafter.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2014 WL 12649204

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 21

2017 WL 3443623

2017 WL 3443623

Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

IN RE: GENERAL MOTORS LLC
IGNITION SWITCH LITIGATION
This Document Relates To All Actions

14-MD-2543 (JMF)

|

14-MC-2543 (JMF)

|

Signed 08/09/2017

MEMORANDUM OPINION AND ORDER

JESSE M. FURMAN, United States District Judge

**[Regarding Plaintiffs' Motion for Reconsideration
and/or Clarification of the Court's Order
Dismissing the Claims of "Pre-Recall Plaintiffs"]**

*1 In an Opinion and Order entered on June 30, 2017, familiarity with which is assumed, the Court granted in part and denied in part a partial motion to dismiss that Defendant General Motors LLC ("New GM") had filed with respect to the Plaintiffs' Fourth Amended Consolidated Complaint ("FACC") in this multidistrict litigation ("MDL"). *See In re Gen. Motors LLC Ignition Switch Litig.*, 14-MD-2543 (JMF), 2017 WL 2839154 (June 30, 2017). The Court's 129-page Opinion and Order addressed a multitude of complex issues, including one narrow but important one that the parties had addressed only briefly in their memoranda of law: Whether Plaintiffs who had sold, traded in, or returned their vehicles prior to the recalls of those vehicles that began in February 2014 ("Pre-Recall Plaintiffs") had valid claims for economic loss. The Court held that they did not, on the theory that a plaintiff who had resold her car before any recall was announced could not have suffered economic loss damages because "the then-unknown defect could not have affected the resale price." *Id.* at *10.¹ Plaintiffs now move for reconsideration of that one aspect of the Court's Opinion and Order. (Docket Nos. 4256 & 4257 ("Pls.' Mem.")). For the reasons stated below, Plaintiffs' motion is GRANTED.

1

Although irrelevant for present purposes, the Court ultimately granted the Pre-Recall Plaintiffs leave to amend on the ground that some of them might be able to "plead and prove damages in the form of out-of-pocket expenses and lost time"—for example, by alleging payment for defect-related repairs prior to disposing of a vehicle. *Id.*

Motions for reconsideration are governed by [Federal Rule of Civil Procedure 59\(e\)](#) and [Local Civil Rule 6.3](#), which are meant to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Medisim Ltd. v. BestMed LLC*, No. 10-CV-2463 (SAS), 2012 WL 1450420, at *1 (S.D.N.Y. Apr. 23, 2012) (internal quotation marks omitted). "The major grounds justifying reconsiderations are an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Terra Sec. ASA Konkursbo v. Citigroup, Inc.*, 820 F. Supp. 2d 558, 560 (S.D.N.Y. 2011) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)). "It is well established that the rules permitting motions for reconsideration must be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the [C]ourt." *SOHC, Inc. v. Zentis Food Sols. N. Am., LLC*, No. 14-CV-2270 (JMF), 2014 WL 6603951, at *1 (S.D.N.Y. Nov. 20, 2014) (internal quotation marks omitted). Ultimately, though, a district court "has broad discretion in determining whether to grant a motion [for reconsideration]." *Baker v. Dorfman*, 239 F.3d 415, 427 (2d Cir. 2000).

*2 In light of this stringent standard, New GM's argument that Plaintiffs' motion should be rejected as an improper attempt to relitigate an issue they lost has considerable force. (Docket No. 4328 ("New GM Opp'n"), at 1-4). After all, New GM explicitly sought to dismiss the claims of the Pre-Recall Plaintiffs for lack of damages (Docket No. 3578 ("New GM MTD Mem."), at 23), and Plaintiffs responded to that argument—albeit in a single sentence relegated to a footnote. (Docket No. 3661, at 24 n.17). Additionally, the Court is largely unpersuaded by Plaintiffs' arguments on the merits (as it was by the footnote in Plaintiffs' original memorandum of law). They contend, for instance, that there is an "inconsisten[cy]" between the Court's observation that any injury under the benefit-the-bargain theory occurred at the time of sale and its holding that Plaintiffs who disposed of their vehicles prior to New GM's recalls suffered no damages. (Docket No. 4344, at 8). But a plaintiff who is *injured* at one

2017 WL 3443623

point in time by a defendant's conduct does not necessarily suffer cognizable *damages* at that same time for purposes of an economic loss claim. Plaintiffs also assert that they "intend to prove, through expert testimony and otherwise, that the Pre-Recall Plaintiffs" did suffer damages. (Pls.' Mem. 5). But to the extent that something is an element of a claim (more on that in a moment), it does not suffice for a plaintiff to merely assert in conclusory fashion—let alone in a memorandum of law rather than the complaint itself—that the element could be, or will be, satisfied down the road; instead, a plaintiff must allege "sufficient factual matter ... to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Most importantly, even now, Plaintiffs do not articulate a coherent theory of how a plaintiff who bought a vehicle with a concealed defect and sold the same vehicle before the defect was revealed can logically, if not legally, prove that he or she suffered damages.²

² Upon reflection, the Court imagines that some Pre-Recall Plaintiffs could conceivably show that their cars manifested defects and that they disclosed those defects (or the fact that the vehicles had undergone repairs) to prospective buyers, causing a decrease in the resale value even though New GM had yet to announce the recalls. Notably, however, Plaintiffs do not raise that argument even in their reconsideration motion papers.

That said, Plaintiffs' motion prompted the Court to take a closer look at the different states' laws governing the legal claims at issue (something it obviously should have done in the first instance, even if the parties' briefing failed to point the way) and, upon reflection, the Court concludes that it was too hasty in holding that the Pre-Recall Plaintiffs' claims failed across the board. That is because, for purposes of at least *some* claims in *some* states, the law does not appear to require a plaintiff to allege damages in order to survive a motion to dismiss. See, e.g., *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996) (holding that under the Illinois consumer fraud act, a plaintiff need only allege (1) a deceptive act or practice by the defendant, (2) that the defendant intended the plaintiff to rely on that deception, and (3) that the deception occurred in the course of trade and commerce, even though common law fraud requires a plaintiff to plead damages); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1099 (S.D. Ind. 2001) (concluding that, under Michigan and Tennessee law, a breach of implied warranty claim has "no requirement

that [p]laintiffs demonstrate any injury to their person or property as a result of the breach, but only that they purchased an unmerchantable product"), *overruled on other grounds by In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *Grant v. Bridgestone Firestone Inc.*, 57 Pa. D. & C. 4th 72 (Pa. Com. Pl. 2002) (concluding that "ascertainable loss" under the Pennsylvania consumer protection statute is satisfied "[w]henver a consumer has received something other than what he bargained for," even where "damages are not easily quantified or where a claim has failed to quantify the damages suffered" (internal quotation marks omitted)). Similarly, for some claims in some states, the law appears to allow for the recovery of nominal damages "where a party has demonstrated liability but is unable to prove the amount of damages incurred." *Lima LS PLC v. PHL Variable Ins. Co.*, No. 12-CV-1122 (WWE), 2013 WL 3327038, at *10 (D. Conn. July 1, 2013) (Connecticut law). Where that is the case, a court cannot, in ruling on a motion to dismiss, "determine as a matter of law that [the] plaintiff's claim fails for lack of damages." *Id.*; see also *Iannuzzi v. Wash. Mut. Bank*, No. 07-CV-964 (JFB) (WDW), 2008 WL 3978189, at *11 n.8 (E.D.N.Y. Aug. 21, 2008) ("[T]he issue of the nature and scope of any damages to which plaintiffs may be entitled cannot be resolved at the motion to dismiss stage of the litigation.").

*3 This lax approach is by no means universal. See, e.g., *Todorov v. Bank of Am., N.A.*, No. 14-CV-1028, 2014 WL 5465466, at *2 (N.D. Ill. Oct. 27, 2014) (dismissing a common law fraud claim under Illinois law for failure to "adequately allege damages," a necessary element of that claim); *House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A.*, No. 13-CV-519 (RJS), 2014 WL 1383703, at *10-11 (S.D.N.Y. Mar. 31, 2014) (dismissing a breach of contract claim under New York law where the complaint merely "assert[ed], in conclusory fashion, that th[e] loss caused 'financial harm' " but "allege[d] no facts showing that [the plaintiff] bore any of the loss"); *Spacesaver Corp. v. Marvel Grp., Inc.*, 621 F. Supp. 2d 659, 662 (W.D. Wis. 2009) (noting that, to prevail under the Wisconsin consumer protection statute, a plaintiff must show a misrepresentation by the defendant that "materially caused a pecuniary loss"); *Johnson v. Jos. A. Bank Clothiers, Inc.*, No. 13-CV-756, 2014 WL 64318, at *9-10 (S.D. Ohio 2014) ("[T]hose facts do not sufficiently allege actual injury resulting from the violation" because, "[u]nder Ohio law, actual injury is independent of a [statutory] violation and both must be adequately alleged in a class action...."). But the point is that the Court painted with too broad a brush in holding that *all* claims of *all*

2017 WL 3443623

Pre-Recall Plaintiffs in *all* states fail as a matter of law (absent allegations of out-of-pocket costs or “lost time”) because they cannot plausibly allege a theory of economic loss damages. *See In re Gen. Motors*, 2017 WL 2839154, at *10. Instead, the Court should have rejected New GM’s argument for dismissal of the Pre-Recall Plaintiffs’ claims for much the same reason that it rejected New GM’s “categorical” argument for dismissal of Plaintiffs’ “lost time” claims, and either examined New GM’s argument on a state-by-state and claim-by-claim basis or deferred it to “another day—either in connection with motions for class certification or dispositive motions examining the laws of each applicable state.” *Id.* at *8.

The question presented here, of course, is not whether the Court should have reached a different decision in its prior Opinion and Order. Instead, it is whether Plaintiffs should be granted reconsideration even though they failed to make the foregoing argument themselves in their original motion papers (and, to some extent, do not even make the argument in their reconsideration motion papers). In other circumstances, the Court would almost certainly answer that question in the negative. But given the unique circumstances presented in this MDL proceeding, the Court concludes that allowing its previous decision regarding the Pre-Recall Plaintiffs to stand would indeed result in a “manifest injustice.” *Terra Sec. ASA Konkursbo*, 820 F. Supp. 2d at 560. The Court’s decision on the validity of the Pre-Recall Plaintiffs’ claims affects untold numbers of Plaintiffs, including many whose states were not at issue in New GM’s last motion to dismiss and many who, for the reasons explained above, may well have valid claims under their applicable state law. Yet, no doubt due to the practical constraints of briefing scores of issues under the laws of eight different jurisdictions, the amount of attention devoted to the issue in the parties’ initial briefs was inversely proportional to its importance. At bottom, the magnitude of this litigation, the number and complexity of the issues to be analyzed, and the parties’ inadequate briefing of the issue addressed here persuade the Court that it is more important to get the issue right than it is to reject Plaintiffs’ motion for reconsideration as a mere “second bite” at the proverbial apple. *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012). Accordingly, Plaintiffs’ motion for reconsideration is GRANTED.

In light of that conclusion, the Court must briefly address the claims of Pennsylvania Plaintiff Greg Theobald, which were previously dismissed in full (albeit with leave to amend to plead out-of-pocket or “lost time” damages, if any). *See*

In re Gen. Motors, 2017 WL 2839154, at *10.³ Theobald owned a 2010 GMC Acadia, which he purchased new from a GMC dealership on June 3, 2010, and which was ultimately subject to the Side Airbag recall. (FACC ¶ 250). Theobald traded the vehicle into a car dealership in August 2013, prior to the recall announcement. (*Id.*). In its motion to dismiss, New GM challenged Theobald’s claims on several grounds, only two of which need to be addressed here given the Court’s holdings on Pennsylvania law in its prior Opinion and Order. *See In re Gen. Motors*, 2017 WL 2839154, at *32-40. First, New GM argued that Theobald’s claims should be dismissed because his vehicle never manifested a Side Airbag defect. (New GM MTD Mem. 16-17 & n.10). But Theobald alleges that, after purchasing his new car, its “airbag service light sometimes came on” when he started his car (although it would “typically” turn off after restarting the car). (FACC ¶ 250). Theobald even inquired about the airbag service light at a New GM dealership, but was told merely that “the car computer did[not] read the signals properly and he should just restart the car.” (*Id.*). As the Court previously held, such allegations suffice, at least for now, to plead manifestation of a defect. *See In re Gen. Motors*, 2017 WL 2839154, at *49 n.30 (reaching the same conclusion under nearly identical facts because “[t]he airbag light coming on is precisely how the defect would manifest itself short of the airbags not deploying in an accident”).

3 Texas Plaintiff Lisa McClellan also disposed of her vehicle prior to the recalls, but her claims survived the Court’s prior decision because she had alleged out-of-pocket costs relating to defect-related repairs. *See id.* Thus, the Court does not address her claims here.

*4 Second, New GM challenged Theobald’s claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. § 201-1 *et seq.*, on the ground that he failed to allege that New GM knew about the Side Airbag defect in his model vehicle, a 2010 GMC Acadia, prior to his purchase of the car on June 3, 2010. (Docket No. 3578, at 41-42). It is true that the FACC does not contain specific allegations relating to the 2010 GMC Acadia. But it does allege that, from the company’s inception, “New GM knew that a technical service bulletin had been issued” for the 2008-2009 GMC Acadia “instructing dealers to repair [the wiring defect],” and that, in late 2009, New GM extended a Customer Satisfaction bulletin for 2008 GMC Acadia models instructing dealers to “re-route or replace” certain wiring connectors. (FACC ¶¶ 740-41). Although close to the line, the

2017 WL 3443623

Court found similar allegations sufficient to allege knowledge at this stage of the proceedings. See *In re Gen. Motors*, 2017 WL 2839154, at *43 (“The case for New GM’s knowledge of the Side Airbag defect prior to Liddy’s vehicle purchase in May 2011 is a much closer call. But she alleges that, from its inception, New GM knew about problems in the wiring harness and other components of the airbag wiring dating back to 2008, in other vehicles and the 2009 model of the Saturn Aura XR, her vehicle. Although that barely alleges knowledge of a potential defect that was not disclosed to Liddy herself, it is—as the Court previously found with respect to similar allegations in the TACC—just enough to cross the Rule 9(b) line.” (internal quotation marks and

citations omitted)). The Court reaches the same conclusion as to Theobald’s claim.

Accordingly, Plaintiffs’ motion for reconsideration is GRANTED, and the Court’s prior Opinion and Order is modified as reflected here. The Clerk of Court is directed to terminate Docket No. 4256.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 3443623

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 22



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [RML Corp. v. Lincoln Window Products, Inc.](#), Va.Cir.Ct., December 3, 2004

50 Va. Cir. 71
Circuit Court of Virginia,
Virginia Beach.

GENITO GLENN, L.P.

v.

NATIONAL HOUSING BUILDING CORP. et al.

No. CL98-2847.

|

May 14, 1999.

Opinion

H. THOMAS PADRICK, JR., Judge.

*1 This matter is before the court on Defendants' demurrers to Plaintiff, Genito Glenn's ("Plaintiffs" or "Genito's") amended motion for judgment. Genito seeks recovery in excess of ten million dollars for damages allegedly sustained when certain fill material applied during the construction of its multi-family housing project expanded causing the foundations in the dwellings to crack. This swelling ultimately rendered the dwellings uninhabitable. As a consequence, the apartments will have to be demolished, the filler removed, and the project rebuilt.

Plaintiff seeks to impose its costs on several parties, beginning with the general contractor, Defendant National Housing Building Corp. ("NHBC"). Genito also filed suit against Defendant S.W. Rogers, Inc. ("Rogers"), the subcontractor responsible for the site development work, i.e., excavation, soil distribution, and the filling and grading of the project. In addition, Genito filed suit against Defendant Timmons, Inc. ("Timmons"), the firm responsible for developing the plans and site specifications, and Defendant Peter J. Fanara, a professional engineer employed by Timmons to perform the engineering work for the project. Finally, Genito named ReUse Technology, Inc., ("ReUse") and Cogentrix of Richmond, Inc., ("Cogentrix") as defendants in the action. ReUse markets and sells a product known as "Xtra Fill," the fill material which allegedly caused the damage described above. Xtra Fill is a trade marked, by-product of the coal combustion process known as "fly ash." If properly processed and applied, fly ash can apparently be used as fill material. However, if the ash is not properly processed, it can absorb

moisture for up to 800 days, resulting in severe swelling. Cogentrix supplied the fly ash to ReUse pursuant to a contract between the two parties, whereby ReUse agreed to remove the ash which it intended to resell as fill material.

Plaintiff alleges a host of theories in support of its amended motion for judgment. All of the defendants, except NHBC, filed demurrers attacking the respective counts which applied to them. In the interest of logic, the court has not necessarily addressed the various counts in the sequence in which they are raised in the amended motion for judgment.

Several of the Defendants have also filed cross-claims. I will address the demurrers to these cross-claims in Parts II and III of this opinion following my discussion of the issues raised in Genito's amended motion for judgment.

Standard of Review

In ruling on a demurrer, the court is required to view the facts in the light most favorable to the plaintiff to determine whether the pleading states a valid cause of action. *W.S. Carnes, Inc. v. Board of Supervisors of Chesterfield County*, 252 Va 377, 384 (1996). The only issue before the court is the legal sufficiency of the pleading. *Id.*

Legal Analysis

I. Demurrers to Genito's Amended Motion for Judgment

A. Counts IV, VIII, IX, and XII (Negligence as to Rogers, Timmons and Fanara, ReUse, and Cogentrix)

*2 In Counts IV, VIII, IX, and XII of its amended motion for judgment, Genito avers that Rogers, Timmons, Fanara, ReUse, and Cogentrix all negligently failed to perform certain duties in the various planning and construction stages of the project. (Amended MFJ ¶¶ 19, 23, 24, 27.) In each count, Genito also alleges that Defendants owed these duties to Plaintiff "separate and apart" from any contract. Defendants respond that Genito is merely attempting to transform its cause of action *ex contractu* into a negligence claim in order to circumvent the economic loss rule.

Simply put, the economic loss rule prevents a party from recovering economic damages in tort upon a theory of negligence absent privity of contract. *Blake Construction Co. v. Alley*, 233 Va. 31 (1987). Nowhere does Genito allege that

50 Va. Cir. 71, 1999 WL 33722382

it was in privity of contract with either Rogers, Timmons, Fanara, ReUse, or Cogentrix. Thus, the only issue is whether Genito's claims are for economic damages alone or whether they can be characterized as personal injury or property damages. See Va.Code § 8.01–223.

The leading cases is *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419 (1988). The dispute there arose when a homeowner contracted with a builder to construct a new home which was to include an indoor swimming pool. The builder in turn contracted with a designer, who agreed to draw up the plans for the project, and a pool contractor who agreed to build and install the pool. The homeowners alleged that the pool was built on fill rather than natural soils which caused the water pipes to break. The escaping water caused erosion under the pool and part of the foundation of the house, resulting in cracking in the foundation. *Id.* at 422. Contending that the losses were for damage to property, the homeowners sought damages in negligence from the architect and the pool contractor for the cost of repairing their home. *Id.* at 423.

The *Sensenbrenner* court, however, ruled that damages for diminution in value, measured by the cost of repair, were purely economic losses. *Id.* at 425. In analyzing the character of the loss, the court recognized that “when a product ‘injures itself because one of its component parts is defective, a purely economic loss results to the owner for which no action in tort will lie.’” *Id.* at 424 (quoting *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986)). In defining the standard for judging the character of the loss, the court gave the following explanation.

The controlling policy consideration underlying tort law is the safety of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for. If that distinction is kept in mind, the damages claimed in a particular case may more readily be classified between claims for injuries to persons and property on one hand and economic loss on the other.

*3 *Sensenbrenner*, 236 Va. at 425. Applying these principles, the court continued:

The plaintiffs here allege nothing more than disappointed economic expectations. They contracted with a builder for the purchase of a package. That package included land, design services, and construction of a dwelling. The package also included a foundation for the dwelling, a pool, and a pool enclosure. The package is alleged to have been defective—one or more of its component parts was sufficiently substandard as to cause damage to other parts. The effect of the failure of the substandard parts to meet the bargained for level of quality was to cause a diminution in the value of the whole, measured by the cost of repair. This is a purely economic loss, for which the law of contracts provides the sole remedy.

Id.

The principles set forth in *Sensenbrenner* likewise control the disposition of Counts IV, VIII, IX, and XII in this case. Genito contracted with NHBC for the construction of a multi-family housing project. In addition to the design and construction of the apartment dwellings, the project also called for certain site work to be done and for the application of suitable fill material. According to Genito's allegations, however, the Xtra Fill was substandard and did not meet its bargained for expectations regarding quality and suitability. As a result of the allegedly defective Xtra Fill, Genito alleges that the foundations of the dwellings cracked, making the dwellings unstable and ultimately uninhabitable. In an effort to retain its tax credits, Genito now seeks to recover the costs associated with removing the defective fly ash and rebuilding the project. This is precisely the problem encountered by the court in *Sensenbrenner*: The damages Genito claims are purely economic losses; as such, it is limited to seeking recovery for these losses from NHBC, with whom it was in privity of contract.

The court therefore sustains Defendants' demurrers with respect to Counts IV, VIII, IX, and XII of Genito's amended motion for judgment and those counts are dismissed.

B. Count III (Breach of Express and Implied Warranty as to NHBC, Rogers, ReUse, and Cogentrix)

1. Express Warranty Claims as to Rogers, ReUse, and Cogentrix

In Count III of its Amended Motion for Judgment, Genito alleges various express and implied warranty claims against the several Defendants. The first three claims at issue are the express warranty claims against Rogers, ReUse, and Cogentrix. As against Rogers, Genito claims that "Rogers expressly warranted that its work, including materials used in the work, would be in accordance with the plans and specifications, that labor would be performed in a good and workmanlike manner ... and that its work would be free from defective materials and workmanship." (Amended MFJ ¶ 15.) As against ReUse, Genito avers that ReUse "expressly warranted that the fly ash provided for the project was approved by the Virginia Department of Transportation ("VDOT") and was safe and suitable as a fill material." (Amended MFJ ¶ 16.) Finally, as against Cogentrix, Plaintiff alleges that ReUse made express warranty claims about the fly ash on behalf of Cogentrix. (Amended MFJ ¶ 16.)

*4 In judging the validity of these claims, the court must first determine whether the contracts between NHBC and Rogers, between Rogers and ReUse, and between ReUse and Cogentrix were contracts primarily for the sale of goods or contracts for the provision of services. If the contracts were primarily for the provision of services, then the discussion in Part I(A) of this opinion applies, and the claims must be dismissed as to Rogers, ReUse, and Cogentrix because Genito cannot establish privity of contract. On the other hand, if the contracts were primarily for the sale of goods, then the court must confront Va.Code § 8.2–318, which provides in pertinent part:

Lack of privity between plaintiff and defendant shall be no defense to any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did

not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods[.]

Note, there is obviously a serious question whether the agreement between NHBC and Rogers can be classified as an agreement for the sale of goods (the agreements between Rogers and ReUse and between ReUse and Cogentrix would almost certainly be classified as contracts for the sale of goods). Nonetheless, the court has assumed that this is the case since Genito's claim against Rogers has no chance of recovery if the NHBC–Rogers agreement is classified as a contract for the provision of services. See Part I(A) *infra*. Note also, this assumption is consistent with the court's conclusion reached in Part II(C)(2) below.

The leading case discussing the effect of Va.Code § 8.2–318 on the privity requirement is *Beard Plumbing & Heating v. Thompson Plastics*, 254 Va. 240 (1997). There, the court held that § 8.2–318 does not abrogate the privity requirement in the context of an implied breach of warranty claim for consequential economic damages. *Id.* at 246. In arriving at its conclusion, the court found that another section of the U.C.C. § 8.2–715(2), trumped § 8.2–318. Section 8.2–715(2) provides in pertinent part:

Consequential damages resulting from a seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller *at the time of contracting* had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.

(Emphasis added.) The court reasoned that the specific language "at the time of contracting" in § 8.2–715(2) prevailed over the more general provisions of § 8.2–318. Thus, the court held that the statute "requires a contract between the parties for the recovery of consequential

economic loss damages incurred as a result of a breach of warranty by the seller.” *Beard*, 254 Va. at 245. However, it is important to recognize that *Beard* does not address the effect of the privity requirement in warranty cases involving direct economic damages. See *id.* at 244. Further, unlike § 8.2-715(2), Va.Code § 8.2-714,¹ which deals with direct damages for a seller's breach, does not contain any reference to a privity requirement. Applying an analysis similar to that used by the *Beard* court, this court concludes that a plaintiff can still recover direct economic damages in a warranty case regardless of privity of contract.

- ¹ The text of Va.Code § 8.2-714 reads as follows:
- “(1) Where the buyer has accepted goods and given notification (subsection (3) of § 8.2-607), he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
- “(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
- “(3) In a proper case, any incidental and consequential damages under the next section [§ 8.2-715] may also be recovered.”

*5 The *Beard* case was admittedly decided in the context of a claim for economic damages resulting from a breach of an implied warranty of merchantability. But it is difficult to conceive that *Beard* could be read to permit a claim for economic damages in an express warranty case absent privity of contract. This is because § 8.2-715(2) imposes a contract requirement in “any” case where a party seeks recovery of a consequential economic loss. See *Beard*, 254 Va. at 246. Thus, even assuming that the contracts between the parties were primarily for the sale of goods, Genito cannot maintain its claims for breach of express warranties insofar as it seeks recovery for consequential economic losses because it has not alleged privity of contract. Accordingly, this aspect of Count III is hereby dismissed. As explained above, however, there is no privity requirement for recovery of direct economic losses in warranty cases. Accordingly, Defendants' demurrers to this aspect of Count III are overruled.²

- ² Counsel will observe that the court expresses no opinion as to the validity of any of the

warranty claims against NHBC since it did not file any demurrers to Plaintiffs amended motion for judgment.

2. Implied Warranty Claims as to Rogers, ReUse, and Cogentrix

In addition to its express warranty claims, Genito alleges in Count III that Rogers, ReUse, and Cogentrix “impliedly warranted that such fly ash was of good quality, free from defects, and fit, safe, and suitable as a fill material for Genito's project.” (Amended MFJ ¶ 17.) As with Genito's allegations for breach of express warranties, the court concludes that the disposition of these claims is governed by *Beard*. As discussed above, *Beard* specifically prevents a plaintiff from seeking recovery of consequential economic loss damages on an implied warranty claim absent privity of contract. Therefore, to the extent Genito seeks recovery of consequential economic losses, its implied warranty claims as to Rogers, ReUse, and Cogentrix must also be dismissed. However, Genito may still recover direct economic losses despite the fact that it was not in privity of contract with Rogers, ReUse, or Cogentrix.

C. Count v. (Indemnity as to Rogers)

In addition to the claims discussed in Parts I(A) and I(B) of this opinion, Genito has also asserted an indemnity claim against Rogers. In its contract with NHBC, Rodgers agreed to indemnify and hold harmless NHBC and Genito “from and against claims, damages, losses, and expenses, arising out of or resulting from performance of the Work, to the extent caused in whole or in part by negligent acts or omissions of the Sub-Contractor, or anyone directly or indirectly employed or retained by the Sub-Contractor.” (Amended MFJ ¶ 20.)

In response, Rogers raises two points. First, it argues that it had no written agreement with NHBC. Rogers points out that although it had tendered a draft agreement to NHBC, NHBC did not execute and return the draft to Rogers until after problems developed with the Xtra Fill. In ruling on a demurrer, however, this court is bound to view the facts in the light most favorable to the plaintiff. *W.S. Carries*, 252 Va. at 384. Since Genito has attached the purported agreement to its amended motion for judgment, this court must assume that NHBC and Rogers had in fact entered into a contract regardless of the truth of Rogers' claim.

*6 Second, Rogers argues Count V should be dismissed because the indemnity provision is void as against public

50 Va. Cir. 71, 1999 WL 33722382

policy. In support of its contention, Rogers points to Va.Code § 11-4.1, which provides that:

[a]ny provision contained in any contract relating to the construction ... of a building, structure or appurtenance thereto, including moving, demolition, and excavation connection therewith ... by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damages arising out of bodily injury to persons or damage to property suffered in the course or performance of the contract, caused by or resulting solely from the negligence of such other party ... is against public policy and is void and unenforceable.

(Emphasis added.) The short answer to Rogers' argument is that this section invalidates only those indemnity provisions which run in favor of a party to the contract. It does not, however, invalidate that portion of the agreement by which Rogers agreed to indemnify Genito. Accordingly, Rogers' demurrer to Count V is overruled.

D. Third-Party Beneficiary Claims (as against Rogers, Timmons and Fanara, ReUse, and Cogentrix)

In an apparent effort to make an end run around the privity requirement, Genito alleges that it is a third-party beneficiary of those contracts to which it was not a party. See Va.Code § 55-22. Genito further avers that “the parties to such contracts clearly and definitely intended to confer the benefits of such contracts on Genito...” (Amended MFJ § 9.) Defendants counter by arguing that Genito's amended motion for judgment does not allege sufficient facts to state a cause of action.

Under Virginia law, a person who is not a party to a contract may nonetheless sue upon the instrument if he can show that he was a beneficiary of the promise. Va.Code § 55-22. It is not enough, however, for the non-party to show that he was merely an incidental beneficiary of the contract. *Valley Landscape Co. v. Roland*, 218 Va. 257 (1977). Rather, the non-party must demonstrate “that the parties to the contract

clearly and definitely intended to confer a benefit upon him.” *Id.* at 259 (quoting *Professional Realty v. Bender*, 216 Va. 737, 739(1976)).

In the *Valley* case, Old Dominion University (“ODU” or “the University”) filed an action against its general contractor when the contractor failed to complete certain work on the University's mall improvement project. 216 Va. at 258. The contractor in turn sued the architect on the project, alleging that it was a third-party beneficiary of ODU's agreement with the architect. The contract between ODU and the architect was never made a part of the record; and the only allegation in the contractor's motion for judgment which addressed its status as a third-party beneficiary read as follows: “4. That certain provisions of [the architect's] contract with [ODU] were for the benefit of the general contractor.” *Id.* at 259. The trial court granted the architect's demurrer and the Supreme Court affirmed, holding that the ODU-architect contract contained no provisions which were intended to directly benefit the general contractor. *Id.* at 260. In reaching its conclusion, the court acknowledged that the contractor might benefit from the plans prepared by the architect. Nonetheless, said the court, this “is an incidental benefit that accrues to the contractor. But it is not the benefit that is primarily envisioned by the architect and the owner.” *Id.* at 261.

*7 The court reached the opposite conclusion in *Levine v. Selective Ins. Co.*, 250 Va. 282 (1995). There, the owners entered into an agreement with a contractor to build a house on their property. Included within the agreement was a provision requiring the contractor to purchase hazard insurance to cover any losses associated with personal injury or loss of materials. The contractor subsequently purchased coverage from an insurance firm. When the construction site was damaged and the insurance company refused to pay, the owners filed a motion for judgment against the insurer claiming their rights to the proceeds as third-party beneficiaries. *Id.* at 284-85. In reversing the trial court's grant of summary judgment in favor of the insurer, the court ruled that the owners had pleaded sufficient facts in their motion for judgment to establish a third-party beneficiary claim. *Id.* at 286. The court noted that although the owners were not named as the payees on the policy, “all parties expressly understood that the beneficiaries of the policies were the [owners].” Moreover, when the insurer decided to cover a portion of the damage, the check was made payable to the order of contractor and the owners. Finally, the owners in *Levine* alleged that, at all times, the insurer had actual notice

that they were third-party beneficiaries under the agreement between the contractor and the insurer. *Id.*

Had Genito sought merely to rely on the factual allegations contained in its amended motion for judgment, this court would be constrained to hold that Genito has not stated a valid cause of action. Genito's amended motion contains the bare allegation that the parties to the other contracts "clearly and definitely intended to confer the benefits of such contracts on Genito...." This allegation simply restates the legal standard set forth in *Valley* and *Levine* and does not set forth any specific facts in support of Genito's claim.

However, this court must also consider the contracts attached to Genito's amended motion in determining whether it has stated a valid third-party beneficiary claim against any of the defendants. As set forth above, paragraph 14 of the NHBC–Rogers agreement contains an indemnity provision whereby Rogers agreed to "indemnify and hold harmless" NHBC and Genito "from and against all claims, damages, losses, and expenses arising out of or resulting from the performance of the Work, to the extent caused by the negligent acts or omissions of the Sub-Contractor...." (Amended MFJ Exhibit B.) By its express terms, this indemnity provision runs in favor of Genito. The agreement thus evidences a clear intent on behalf of NHBC and Rogers to benefit a person who was not a party to the contract.³

³ At oral argument, counsel for Rogers argued that the primary purpose of the indemnity provision was to allow NHBC to perform its contract with Genito. Thus, the argument runs, since Genito was only an incidental beneficiary of Rogers' promise, it is not entitled to sue thereon. In essence, counsel is asking this court to view the allegations in the light most favorable to Rogers. The court declines Rogers' invitation.

The NHBC–Timmons contract, on the other hand, is insufficient to support Genito's attempt to claim third-party beneficiary status. Aside from sundry captions throughout the contract which indicate that the document pertains to the Genito project, there is absolutely no indication on the face of the contract that the parties intended to benefit Genito. Rather, the language in the agreement specifies certain work that Timmons was obligated to perform; and as a return consideration, NHBC agreed to pay Timmons upon performance of its obligations.

*8 To be sure, Genito would have undoubtedly enjoyed the benefits of Timmons' work. But as in the *Valley* case, the benefits to Genito are merely incidental. The primary purpose behind the contract between NHBC and Timmons was to allow NHBC to farm out a particular portion of the project (i.e., the design and engineering work relating to the site development) to Timmons, which was better suited to perform the work. This is utterly different from the *Levine* case, where the principal purpose behind the agreement between the builder and the insurer was to relieve the owners from the risk of loss associated with damage to persons or materials on their property, and where all the parties "expressly understood" that the insurance was purchased for the benefit of the owners.

Genito cites *Ward v. Ernst & Young*, 246 Va. 317 (1993), for the proposition that this court is not limited to considering the four corners of the NHBC–Timmons contract in determining whether the parties clearly and definitely intended to confer a benefit upon Genito. The *Ward* case, however, was decided in the context of a motion to strike, where the court was bound to consider the *evidence* and the inferences reasonably deducible therefrom in the light most favorable to the non-moving party. *See id.* at 330. Here, the court is limited to considering the pleadings and any exhibits attached thereto in determining whether Genito has stated a valid third-party beneficiary claim. And there are no facts in Genito's amended motion or the NHBC–Timmons contract which suggest that the parties clearly intended to confer a benefit upon Genito.

Accordingly, with the exception of the third-party claim against Rogers, the court sustains Defendants' demurrers to this aspect of Genito's amended motion for judgment, and those matters are dismissed.

E. Count VI (Constructive Fraud as to Rogers, Timmons, and Fanara) and Count VII (Actual and Constructive Fraud as to ReUse and Cogentrix)

1. Count VI (Constructive Fraud as to Rogers, Timmons, and Fanara)

In another effort to circumvent the economic loss rule, Genito alleges in Count VI of its amended motion that "Rogers, Timmons, and Fanara represented by NHBC, knowing and intending that such representations reach and be relied on by Genito, that fly ash in general and Xtra Fill in particular was a safe, suitable, proper fill material." (Amended MFJ ¶ 21.) Genito further alleges that the representation was "false" and "material," was "made with the intention that NHBC and

50 Va. Cir. 71, 1999 WL 33722382

Genito rely upon it,” and that Genito and NHBC in fact relied on the representations to their detriment.

As with its claims for negligence in Counts IV, VIII, DC, and XII, however, Genito's claims for constructive fraud are barred by the economic loss rule. Genito argues that the economic loss rule does not preclude its claims for constructive fraud and points to a footnote in the *Ward* case, wherein the court made the following statement:

*9 These observations cannot fairly be interpreted to mean that economic losses are never recoverable in tort. The language employed here has its predicate in the tort alleged in the Association's *negligence* count; it does not purport to foreclose a right to recover an economic loss in other tort actions such as those for fraud, conspiracy to injure another in a trade, business, or profession, or tortious interference with contract.

Id. (emphasis in original).

The footnote in *Ward*, however, should not be interpreted to mean that all claims for fraud are permissible in spite of the economic loss rule. Tort actions for conspiracy to injure another in a trade or business and tortious interference with contract both require the claimant to prove the element of intent. See *Commercial Bus. Sys. v. BellSouth Servs.*, 249 Va. 39 (1995) (conspiracy tort requires that defendant acted intentionally, purposefully, and without legal justification); *Commercial Bus. Sys. v. Halifax*, 253 Va. 292 (1997) (tortious interference with business relations requires proof of intentional misconduct). Likewise, a claim for actual fraud requires proof that the defendant intended to mislead the claimant. *Evaluation Research Corp. v. Alequin*, 247 Va. 143 (1994). The essence of constructive fraud, on the other hand, is negligent misrepresentation. See *Mortarino v. Consultant Engineering Servs.*, 251 Va. 289 (1996). It requires neither a showing of malice nor an intent to deceive. *Id.* at 295. Thus, since constructive fraud is simply another species of negligence, it follows that the economic loss rule also forecloses Genito's claims in Count VI.

Yet, even if this court were to hold that the economic loss rule did not apply, Count VI of Genito's amended motion lacks the specific factual allegations necessary to assert a claim for constructive fraud. A party asserting a claim for actual fraud must establish the following elements by clear and convincing evidence: (1) a false representation; (2) of a material fact; (3) made intentionally and knowingly; (4) with intent to mislead; (5) reliance by the party misled; and (6) resulting damage to the party misled. *Evaluation Research Corp.*, 247 Va. at 148. As explained above, the difference between actual fraud and constructive fraud is in the element of intent. Whereas the former requires a showing that the misrepresentation was made with the intent to mislead, the latter merely requires the claimant to show that the misrepresentation is made innocently or negligently. *Id.* at 148. As with actual fraud, a claim for constructive fraud must be established by clear and convincing proof. *Id.* More importantly, Virginia courts have consistently emphasized that “[w]here fraud is relied on, the [pleading] must show specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defense accordingly....” *Mortarino*, 251 Va. at 295 (quoting *Ciarochi v. Ciarochi*, 194 Va. 313, 315 (1952)).

*10 Here, Genito's allegations in Count VI are too vague and conclusory to state a cause of action. Count VI fails to allege any of the circumstances relating to the fraud, including which officers and employees of Rogers or Timmons allegedly made the misleading statements, when the statements were made, or how the statements were communicated from either Rogers or Timmons to NHBC, and then to Genito. See *Tuscarora, Inc. v. B.V.A. Credit Corp.*, 218 Va. 849 (1978).

For both these reasons, the demurrers to Count VI are sustained, and leave to amend is denied.

2. Count VII (Actual and Constructive Fraud as to ReUse)

The court's conclusion in the previous section regarding the impact of the economic loss rule on the claims in Count VI applies with equal force here to bar Genito's claims against ReUse for constructive fraud. The allegations in Count VII of actual fraud, however, are more problematic. Here, Genito alleges that prior to contracting with Rogers to supply Xtra Fill for the project, A. Sidney Buford of ReUse made several specific misrepresentations to Rogers regarding the suitability of fly ash as fill material. Genito then goes on to allege that the representations were false, material, and were known by ReUse to be false when they were made, or alternatively, that ReUse made the statements without knowledge of their truth

or falsity. Genito also avers that ReUse knew and intended that the statements would be communicated and relied on by NHBC and Genito. (Amended MFJ ¶ 22.)

Citing *Richmond Met. Auth. v. McDevitt Street Bovis, Inc.*, 256 Va. 553 (1998), ReUse argues that Genito may not recover for fraud based upon duties which existed solely by reason of a contractual relationship. In *McDevitt*, the Richmond Metropolitan Authority contracted with McDevitt to build a baseball stadium. In order to receive progress payments during the construction, the contractor submitted several sworn applications indicating that certain work had been completed. When the Authority discovered that the work had not in fact been performed, it filed suit against the contractor for actual and constructive fraud. *Id.* at 555–56. In affirming the trial court's dismissal of the claims, the court held that the duties and obligations required of the contractor were imposed by virtue of contract, not by tort law. *Id.* at 559. Thus, the court concluded that the Authority could not base its recovery on a cause of action for fraud. *Id.*

ReUse's reliance on *McDevitt*, however, is misplaced. Genito is not alleging that ReUse fraudulently breached any of the duties it owed to Rogers as a result of the contract of sale between the two parties. Such an allegation would clearly be demurrable under the facts of *McDevitt*. Rather, Genito is alleging that ReUse, through its misrepresentations, fraudulently induced Rogers to enter into a contract for the supply of defective fill material. The duty to refrain from making misrepresentations in an effort to procure a contract is a duty imposed by common law. This duty exists separate and independent of any of the duties imposed under the contract between Rogers and ReUse; and assuming Genito can establish a *prima facie* case, it is a ground for recovery of damages. See *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 220 Va. 109, 111–12 (1979) (stating the elements for fraudulent inducement).

*11 Of more pressing concern, though, is Genito's allegation that it relied on the representations made by ReUse employees. In order to establish a claim for fraud, “it is essential that the defrauded party demonstrates the right to reasonably rely upon the misrepresentation.” *Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 374 (1993). As explained above, Genito's claim against ReUse in Count VII is essentially one for fraudulent procurement of its contract with Rogers. Genito also alleges that the misrepresentations were communicated to NHBC and Genito. The problem, though, is that the decision to enter

into the agreement for the supply of fill material belonged to Rogers, not Genito. In other words, how could Genito have relied on the statements unless it had the right to take some sort of action (i.e., deciding whether to enter into the supply contract) which could have accrued to its detriment?

The contract between Genito and NHBC provides one possible answer.⁴ The following language appears in Article 6.2.1 of the contract:

4 As noted previously, the contract was attached to Genito's amended motion for judgment.

Prior to the execution of any subcontract and the commencement of Work, [NHBC] shall submit to [Genito] and the Bank the names of each Subcontractor (including persons or entities who are to furnish materials or equipment fabricated to a special design) to whom [NHBC] proposed to subcontract any part of the Work, together with such information as [Genito], Architect, or the Bank may request with respect to the qualifications and ability of each such Subcontractor to perform the Work. [NHBC] shall not subcontract any work to a Subcontractor with regard to which [NHBC] has received written notice of objection from [Genito]

(Amended MFJ Exhibit A; emphasis added.) This provision clearly gives Genito the right to reject a proposed “Subcontractor” because of concerns about the subcontractor's “qualifications and ability.” Moreover, if the phrase “qualifications and ability” is broadly construed, it is conceivable that Genito could have objected to NHBC's decision to enter into its subcontract with Rogers on grounds that Rogers intended to use fly ash as fill material. But Genito does not complain about NHBC's decision to enter into its subcontract with Rogers. Rather, the gravamen of Count VII is that ReUse fraudulently procured its contract with Rogers. And although Genito had the right to object to NHBC's decision to enter into a subcontract with Rogers, the agreement does not purport to give Genito veto power over the subcontractor's agreements with its sub-subcontractors (the position occupied by ReUse).⁵ Absent the ability to object to Rogers' decision to purchase fly ash from ReUse, it is difficult to understand how Genito had the right to rely on ReUse's representations.

5 Pursuant to Article 6.1.1, the term “Subcontractor” means “a person or entity who has a direct contract with [NHBC] to perform any of the

Work at the site ... The term Subcontractor *does not* include any separate contractor or his subcontractors.” The term “Sub-subcontractor” means “a person or entity (other than the Contractor or a Subcontractor) who has a contract to perform any of the Work at the site.” (Amended MFJ Exhibit A, ¶ 6.1.1.) (Emphasis added.)

As indicated above, Genito might be able to show reliance if it alleged either (1) that it would have refused to enter into the contract with NHBC, or (2) that it would have objected to NHBC's decision to enter into a subcontract with Rogers. In order to establish such a claim, though, Genito must allege specific facts relating to the purported fraud. Genito avers merely that the representations were communicated from ReUse to Rogers and then to NHBC and Genito and that Genito subsequently relied on the statements. The amended motion for judgment says nothing about the circumstances under which the statements were communicated from Rogers to NHBC and then to Genito, including the times and the individuals who allegedly relayed the information to Genito, and, most importantly, what action Genito took in reliance on the statements.

***12** Accordingly, Genito's claims against ReUse for actual and constructive fraud are hereby dismissed.

3. Count VII (Actual and Constructive Fraud as to Cogentrix)

In addition to its allegations against ReUse in Count VII of its amended motion, Genito also states that the “misrepresentations were made with the knowledge, approval, encouragement, and authority of Cogentrix of Richmond and were ratified by Cogentrix....” (Amended MFJ ¶ 22.) Genito's claims against Cogentrix for actual and constructive fraud, however, fare no better than its allegations against ReUse.

As discussed twice previously, the economic loss rule prohibits Genito from attempting to sidestep the privity requirement through a claim in constructive fraud. Moreover, apart from its allegation that Cogentrix ratified the misleading statements, Genito sets forth absolutely no facts to support either of its claims against Cogentrix. Genito's claims against Cogentrix for actual and constructive fraud are therefore dismissed.

F. Count X (Nuisance as to NHBC, Rogers, ReUse, Cogentrix, Timmons, and Fanara)

In Count X of its amended motion for judgment, Genito alleges that Defendants created a nuisance on its property through “their various breaches, acts, and omissions” in applying the Xtra Fill. For their part, Defendants advance various arguments, all in an attempt to show that Genito has not properly pleaded a claim for nuisance.

A private nuisance is the using, or authorizing the use of, one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property (1) by diminishing the value of that property; (2) by continuously interfering with his power of control or enjoyment of that property; [or] (3) by causing material disturbance or annoyance to him in his use or occupation of that property.” *Bowers v. Westvaco Corp.*, 244 Va. 139, 148 (1992) (quoting *Virginian Railway Co. v. London*, 114 Va. 334, 344–45 (1912)). Indeed, the term nuisance encompasses a broad range of conduct, including “everything that endangers life or health, or obstructs the reasonable and comfortable use of property.” *National Energy Corp. v. O'Quinn*, 223 Va. 83 (1982).

Count X of Genito's amended motion, however, suffers from a more fundamental defect. Through artful pleading, Genito has attempted to transform what is essentially a breach of contract case into a tort action. See *McDevitt*, 256 Va. at 558–59. Although the Supreme Court has recognized that in certain instances a party can show both a breach of contract and a tortious breach of duty, “the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract.” *Id.* at 558 (quoting *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241 (1991)). In determining whether a cause of action sounds in contract or in tort, the *McDevitt* court enunciated the following standard:

***13** If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand,

the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the action is one of tort.

Id. at 558.

Applying these principles to the facts in the instant case, it is clear that Genito's nuisance count should be dismissed. It is undoubtedly true that every landowner has a duty not to engage in activities that might interfere with his neighbors' use and enjoyment of their property. *See Bowers*, 244 Va. at 144. But the breach that Genito complains of grew not out of any general duty founded in the common law, but the duties specifically outlined in the sundry contracts among the various parties. Indeed, were it not for Genito's general contract with NHBC and NHBC's agreements with Rogers and Timmons, the fly ash never would have been deposited onto Genito's property in the first place. Accordingly, the court sustains Defendants' demurrers to Count X of Genito's amended motion for judgment,⁶ and Count X is therefore dismissed.

⁶ Neither the discussion in this Part nor the discussion in Part I(G) applies to NHBC since it failed to file any demurrers to Genito's amended motion for judgment.

G. Count XI (Trespass as to NHBC, Rogers, ReUse, Cogentrix, Timmons, and Fanara)

Finally, in Count XI, Genito charges that the application of the defective fill material was unauthorized and that the defendants who "participated in, approved, directed or encouraged" its application are therefore liable in trespass. (Amended MFJ ¶ 26.) Defendants respond that Count XI must be dismissed because their entry onto Genito's land was not "unauthorized."

The allegations in Count XI suffer from the same defect that plagues Count X. As with Count X, the breach that Genito complains of is a product of its contract with NHBC and of NHBC's agreements with its subcontractors. Were it not for the various contracts, Defendants would never have been authorized to deposit the fly ash onto Genito's property.

In any event, the contracts make it impossible for Genito to allege a cause of action in trespass. "A trespass is an unauthorized entry onto property which results in interference with the property owners' possessory interest therein." *Cooper v. Horn*, 248 Va. 417 (1994) (quoting 5 Richard R. Powell, *The Law of Real Property*, Para. 707 (Patrick J. Rohan, ed., 1994)). Even viewing the allegations in the light most favorable to Genito, it does not appear that there was any unauthorized entry. Indeed, Genito concedes on brief that it not only authorized Defendants to enter onto its property, but that it consented to the application of the Xtra Fill.

Genito nonetheless maintains that even if Defendants were initially authorized to enter onto its property to apply the fly ash, they exceeded the scope of their authority because of their negligent conduct and therefore became trespassers *ab initio*. It is true, of course, that a person who lawfully enters onto another's property may subsequently exceed the scope of his authority by his wrongful conduct, thereby making him a trespasser. *See McClannan v. Chaplain*, 136 Va. 1 (1923). But this is altogether different from attempting to collect damages in trespass when the plaintiff has consented to the very actions alleged to constitute the wrongful conduct. *See Vicars v. First Va. Bank*, 250 Va. 103 (1995). Further, this court has not uncovered any cases which suggest that Genito may authorize Defendants to enter onto its property to apply the fly ash and then declare that prior entry to be a trespass when it subsequently discovers that the product did not perform as expected.

*14 Accordingly, the court sustains Defendants' demurrers to Count XI of Genito's amended motion for judgment, and it is dismissed.

II. Demurrers to NHBC's Amended Cross-Claims

A. Count II (Negligence of Timmons)

Following Genito's filing of its amended motion for judgment, NHBC filed an amended cross-bill against Rogers, Timmons, and ReUse. In Count II of its amended pleading, NHBC alleges that pursuant to its contract with Timmons to provide the geotechnical engineering expertise on the project, Timmons was required to make recommendations for site grading, foundation design, and recommendations concerning the suitability of fly ash for use as structural fill material. (Amended Cross-Claim ¶¶ 9, 17.) Count II goes on to allege that Timmons negligently failed to inform NHBC that fly ash had the potential for swelling, failed to perform any swell tests on the fly ash it had approved for use on the

project, and that these failures caused damage to NHBC's work. (Amended Cross–Claim ¶¶ 31–34.) Timmons responds that Count II is deficient as a matter of law because any duties it owed to NHBC arose out of the parties' contract rather than common law negligence principles.

As explained in Parts I(E) and (F), Virginia law generally forbids a claimant from attempting to transform a cause of action *ex contractu* into a tort claim where the duties between the parties arise solely by virtue of contract. See *McDevitt*, 256 Va. at 558. The rule is apparently different in cases involving economic damages where there is privity of contract; though, the Supreme Court has not explained why this should be so.

The court first addressed the issue in *Rotonda Condo. Owners Assoc. v. Rotonda Assoc.*, 238 Va. 85 (1989). The *Rotonda* case is important because there was arguably privity of contract between the parties and because the plaintiff, in addition to its contract claim, was seeking to recover purely economic damages based upon a negligence theory. See *id.* at 86–87. The court ultimately decided the *Rotonda* case based on principles of standing. Nonetheless, at the foot of its opinion, the court noted that the trial court had correctly dismissed the plaintiff's count for negligent repairs. Citing *Sensenbrenner*, the court stated that plaintiff's claims for “economic losses are not recoverable in tort; they are purely the result of disappointed economic expectations. The law of contracts provides the sole redress for such claims.” *Rotonda*, 238 Va. at 90.

This language is consistent with the general rule set forth in the *McDevitt* case, and following *Rotonda*, several circuit courts interpreted it to mean that even where a party asserts privity of contract, the sole redress for economic damages is in the law of contracts. See *Pender Veterinary Clinic v. Patton, Harris, Rust & Assoc.*, 23 Va. Cir. 106 (Fairfax 1991) (Stevens, J.); *P & T Assoc v. Paciulli, Simmons and Assoc.*, 27 Va. Cir. 405 (Richmond 1992) (Johnson, J.). Yet, despite the relatively clear implication of its language in *Rotonda*, the court took the opposite view in a footnote in *Ward v. Ernst & Young*, 246 Va. 317 (1993). In *Ward*, there was no privity of contract between the parties, so the footnote is obviously dicta. Nonetheless, the court noted that a fair reading of the language in *Rotonda* meant that “when privity exists, economic losses may be recovered under a negligence theory.” *Id.* at 326, n. 3.

*15 It is difficult to understand how one might attempt to reconcile the footnote in *Ward* with the general rule set forth

in *McDevitt*. Yet, given the clarity of the court's statement in *Ward*, this court will overrule Timmons' demurrer and allow NHBC to proceed on both a contract and negligence theory.

B. Count III (Indemnity against Rogers)

In Count III, of its amended cross-claim, NHBC avers that it entered into a contract with Rogers, whereby Rogers agreed to provide “the material and construction method to create the pads for the buildings which are the subject of [Genito's] amended motion for judgment.” (Amended Cross–Claim ¶ 36.) In addition to the various other contractual duties which Rogers allegedly breached, the amended cross-claim also asserts that Rogers is liable in indemnification to NHBC. As outlined in Part I(c) above, Rogers agreed to indemnify and hold harmless NHBC “from and against all claims, damages, losses, and expenses arising out of or resulting from performance of the Work, to the extent caused in whole or in part by negligent acts or omissions of the Sub–Contractor, or anyone directly or indirectly employed or retained by the Sub–Contractor.” Once again, Rogers insists that Va.Code § 11–4.1 renders the indemnity provision unenforceable.

Section 11–4.1 does no such thing. That section renders unenforceable only those agreements which attempt to force the sub-contractor to indemnify the contractor for damages arising solely from the negligence of the *contractor* or the *contractor's* agents or employees. Section 11–4.1, however, says nothing about an agreement whereby a sub-contractor agrees to indemnify a contractor for damages arising out of the *sub-contractor's* negligence or the *sub-contractor's* breach of contract.

The indemnification provision in the NHBC–Rogers contract clearly falls within the latter category of cases. Accordingly, Rogers' demurrer to Count III of NHBC's amended cross-claim is overruled.

C. Counts IV and V (Breach of Express and Implied Warranties against Rogers)

1. Breach of Express Warranties by Rogers

In Count IV, NHBC avers that Rogers expressly warranted that the fly ash was appropriate for use as structural fill material. NHBC further alleges that Rogers breached the express warranty because the fly ash had a high potential for swelling and therefore was not suitable for use as fill material. (Amended Cross–Claim ¶¶ 53–57.) Rogers argues, however, that NHBC cannot claim any breach of express warranties

50 Va. Cir. 71, 1999 WL 33722382

because the contract was primarily for the provision of services and the U.C.C. only applies to contracts for the sale of goods.

It almost goes without saying that the U.C.C. applies only to contracts for the sale of goods, see [Va.Code § 8.2–102](#), and that the implied warranties in Article 2 therefore apply only to contracts for the sale of goods. See [Va.Code §§ 8.2–314, 8.2–315](#). But there is nothing in Virginia's U.C.C. which purports to limit a party's ability to give an express warranty simply because the contract is for services. In other words, the issue whether the contract was for the sale of goods or for the provision of services is irrelevant to NHBC's ability to collect damages from Rogers on an express warranty theory. Rogers' demurrer to Count IV is therefore overruled.

2. Breach of Implied Warranty by Rogers

*16 In a related argument, NHBC alleges that Rogers “impliedly warranted that the product supplied as structural fill was merchantable,” and that because the fly ash was not suitable as fill material, Rogers therefore breached its implied warranty of merchantability. (Amended Cross-Claim ¶¶ 58–62.) Rogers counters with the same argument it raised with respect to NHBC's express warranty claims, to wit: NHBC cannot claim a breach of any implied warranty because the contract does not fall under the U.C.C.

Although there are no appellate decisions in Virginia which discuss the question of when a mixed contract is predominately for the sale of goods or services, the Fourth Circuit has addressed the issue on at least two occasions. In [Princess Cruises, Inc. v. General Elec. Co.](#), 143 F.3d 828 (4th Cir.1998), *cert. den.* 119 S.Ct. 444 (1998), the court considered the question using the analysis set forth in the seminal case of [Bonebrake v. Cox](#), 499 F.2d 951, 960 (8th Cir.1974):

The test for inclusion or exclusion is not whether they are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor

incidentally involved (e.g., installation of a water heater in a bathroom).

[Princess Cruises](#), 143 F.3d at 833. In determining the nature of the contract, courts have typically considered the following factors: (1) the language of the contract; (2) the nature of the business of the supplier; and (3) the intrinsic worth of the materials. [Coakley & Williams, Inc. v. Shatterproof Glass Corp.](#), 706 F.2d 456 (4th Cir.1983), *cert. den.*, 475 U.S. 1121 (1986).

The *Coakley* case is especially significant because it involved a construction contract where the contractor, a glass company, had agreed “to furnish and install aluminum and glass curtain wall and store front work” on the plaintiff's-owner's building. *Id.* at 457. The case is also instructive because it was decided in the context of the contractor's 12(b)(6) motion to dismiss. In *Coakley*, the owner filed a complaint alleging that the contractor had breached the implied warranties of merchantability and fitness for a particular purpose because the glass had undergone some discoloration. The contractor filed a motion to dismiss, arguing that the U.C.C. warranties did not apply because the contract was primarily for the rendition of services.

In holding that the trial court had incorrectly sustained the contractor's 12(b)(6) motion, the court observed that the agreement required the contractor to furnish the materials that would form the curtain wall and store front. This fact alone, said the court, “creates an uncertainty to be resolved only by a full factual presentation to determine whether the nature of [the contractor's] business was predominantly the provision of goods or the furnishing of services.” *Id.* at 461. The court acknowledged that contractors are typically engaged in the provision of services but refused to impute such a generalization in determining the predominant purpose of the agreement at issue in that case. *Id.* Likewise, the court refused to consider the impact of the second and third factors until the trial court had held an evidentiary hearing. In reaching its conclusion, the *Coakley* court was also quick to point out that it could not find any case where the issue had been disposed of at the 12(b)(6) or demurrer stage. *Id.* at 460.

*17 Applying these principles here, the Court overrules Rogers' demurrer to Count V.

D. Count VI (Negligence against Rogers)

In Count VI, NHBC avers that Rogers determined to use fly ash as filler for the project, that Rogers negligently failed to warn NHBC of the potential for swelling, and that NHBC suffered damages as a result. (Amended Cross-Claim ¶¶ 63–71.) Like Timmons, Rogers argues that any breaches that occurred grew out of duties which existed solely by virtue of the contract between the parties.

The validity of Count VI is controlled by the same principles discussed in Part n(A) above. As such, Rogers' demurrer to Count VI is overruled.

E. *Count VII (Negligence of ReUse)*

In Count VII of its amended cross-claim, NHBC alleges that ReUse entered into a contract with Rogers to supply the Xtra-Fill, which was to be used as the structural fill material for the Genito project. NHBC further alleges that ReUse was negligent in the following respects: (1) it failed to warn NHBC and the other defendants that Xtra Fill had a potential for swelling; (2) it failed to give NHBC and the other defendants instruction on the proper methods for the application and testing of Xtra Fill; and (3) it negligently manufactured, mixed, and stored the fly ash resulting in damage to NHBC. (Amended Cross-Claim ¶¶ 72–81.) For its part, ReUse argues that *Sensenbrenner* prevents NHBC from attempting to recover economic damages in tort because the parties are not in privity of contract.

As explained in Part I(A) above, *Sensenbrenner* holds that “when a product ‘injuries *itself*’ because one of its component parts is defective, a purely economic loss results to the owner for which no action in tort will lie” absent privity of contract. 236 Va. at 424. (Emphasis added.) However, recovery in tort against parties not in privity with the purchaser of the product is available when it can be established that the negligence jeopardized the safety of persons or property “*other than the product itself*.” *Id.* at 424. (Emphasis added.) Applying these principles in Part I(A), this court held that *Sensenbrenner*'s “package analysis” applied to dispose of Counts IV, VIII, IX, and XII of Genito's amended motion for judgment. This ruling was based on the fact that Genito contracted with NHBC for the purchase of a “package” development. Pursuant to the contract, this package development was to include, among other things, design and construction services, building materials, site development work, and the provision of suitable fill material. The fill material was thus one of the component parts of the package; and when it proved defective, it caused the “package,” i.e., the apartment development, to injure *itself*. According to *Sensenbrenner*,

these are purely economic damages which Genito cannot recover absent privity of contract.

At first blush, this analysis would seem to apply to the NHBC's claim against ReUse. But the “package” involved in the NHBC–Rogers contract was different because the package did not include the apartment dwellings themselves. Under the NHBC–Rogers contract, Rogers agreed to provide a site excavation “package,” which included, among other things, excavation, grading, the construction of building pads, and the provision of certain materials including the Xtra Fill. Yet, when the fly ash swelled, the damage was not confined to the NHBC–Rogers site development “package” *itself*, the swelling also injured the apartment dwellings. Thus, to the extent the fly ash caused damage to the dwellings, which were not part of the NHBC–Rogers contract package, these losses must be classified as property damages rather than economic losses. Accordingly, the absence of privity does not preclude NHBC's negligence claim against ReUse, and the demurrer is hereby overruled.

F. *Counts XIII and IX (Breach of Express and Implied Warranties by ReUse)*

*18 In Counts XIII and IX, NHBC avers that ReUse made express and implied warranties that Xtra Fill was suitable for use as structural fill material and that ReUse breached these warranties because it provided fill that was highly susceptible to swelling. ReUse shoots back that the economic loss rule also prevents NHBC's breach of warranty claims and points to the *Beard Plumbing* case in support of its claim.

As discussed in Part I(B) above, Va.Code § 8.2–715(2) imposes a privity requirement in warranty cases where the claimant seeks recovery of consequential economic losses. See *Beard Plumbing*, 254 Va. at 246. Va.Code § 8.2–318, however, abrogates the privity requirement in cases where the claimant seeks recovery of direct economic damages, as long as the claimant “was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.” See *id.* at 245–46.

Accordingly, NHBC's warranty claims in Counts XIII and IX are dismissed insofar as they seek recovery of consequential economic losses. However, Counts XIII and IX are valid to the extent NHBC seeks recovery of direct economic losses, and Defendant's demurrer is overruled in this regard.

III. Demurrers to Timmons' Amended Cross-Claim and Fanara's Cross-Claim

In addition to the claims asserted against ReUse by Genito and NHBC, Timmons and Fanara have also filed cross-claims alleging constructive fraud against ReUse. The cross-claims both allege that before any work was done on the Genito project, ReUse employees represented to Timmons and Fanara that fly ash was suitable as structural fill material on construction projects. The cross-bills also allege that ReUse supplied engineering data and other literature which Timmons and Fanara relied on in giving their qualified approval to NHBC to use the fly ash as filler. Additionally, the cross-bills allege that the fly ash that was actually delivered to the Genito worksite was susceptible to swelling and was therefore different from the material which had been advertised. According to Timmons and Fanara, these recommendations regarding the suitability of fly ash were false and negligently made and resulted in the damage complained of in Genito's amended motion for judgment and in NHBC's amended cross-claim. Timmons and Fanara both pray for recovery against ReUse in the event they are found liable to Genito or NHBC. (Timmons Amended Cross-Claim ¶¶ 4–11; Fanara Cross-Claim ¶¶ 2–11.)

As outlined in Part (f)(E) of this memorandum, a party asserting a claim for actual fraud must establish the following elements by clear and convincing evidence: (1) a false representation; (2) of a material fact; (3) made intentionally and knowingly; (4) with intent to mislead; (5) reliance by the party misled; and (6) resulting damage to the party misled. *Evaluation Research Corp. v. Alequin*, 247 Va. 143 (1994). In this case, however, Timmons and Fanara are asserting claims for constructive fraud rather than actual fraud. As such, they need only show that the misrepresentations were made either innocently or negligently, though, their claims must still be established by clear and convincing evidence. *Id.* at 148.

*19 Assuming all the allegations in the two cross-claims are true, as this court must, Timmons and Fanara have properly alleged all the elements of a claim for negligent misrepresentation. Neither of the cross-claims allege which ReUse employees made the misrepresentations or the specific

times that the communications were made. However, unlike Counts VI and VII in Genito's amended motion for judgment, the cross-claims here allege sufficient facts to give ReUse the opportunity to shape its defense. See *Mortarino v. Consultant Engineering Services, Inc.*, 251 Va. 289, 295 (1996).

ReUse counters by arguing that Timmons and Fanara are simply trying to create fraud claims out of disappointed economic expectations. ReUse once again points to the *McDevitt* case as support for its proposition and argues that both cross-claims should be dismissed.

ReUse's reliance on *McDevitt* is misplaced. As noted several times above, *McDevitt* simply prevents a plaintiff from attempting to transform a contract claim into a fraud case, where the breaches complained of are based on duties which exist solely by virtue of a contractual relationship between the parties. Here, there was no contractual relationship between the parties. Moreover, ReUse had an affirmative, noncontractual duty to avoid making misleading statements about its products which might cause consumers such as Timmons and Fanara to act to their detriment.

Accordingly, ReUse's demurrers to Timmons' and Fanara's cross-claims are overruled.

Conclusion

The court's rulings with respect to the validity of each count are detailed above. It is requested that Mr. Watkins submit a properly endorsed order consistent with the foregoing opinion. Upon entry of the order, Genito will have ten days to amend its motion for judgment with respect to the following claims: (1) its third-party beneficiary claims against Timmons, Fanara, ReUse, and Cogentrix; and (2) its claims for actual fraud against ReUse and Cogentrix. Otherwise, Genito's motion for leave to amend its pleadings is denied.

All Citations

Not Reported in S.E.2d, 50 Va. Cir. 71, 1999 WL 33722382

TAB 23

2001 WL 881929

2005 WL 775929

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana, Indianapolis Division.

Ronald HENDERSON,
Christine Henderson, Plaintiffs,
v.

FREIGHTLINER, LLC, Daimlerchrysler
Corporation, Hendrickson Spring, the Boler
Company, Hendrickson Truck Suspension
Systems, BFS Diversified Products, LLC,
Firestone Industrial Products Co., Defendants.

Ronald HENDERSON and
Christine Henderson, Plaintiffs,
v.

FREIGHTLINER, LLC, Firestone Industrial
Products Co., BFS Diversified Products, LLC,
Hendrickson Truck Suspension Systems, the Boler
Company, and Hendrickson Spring, Defendants.

No. 1:02-CV-01301DFH-WTL.

|
March 24, 2005.

Attorneys and Law Firms

Christine Henderson, Pro Se, Portland, TX.

William E. Winingham, Wilson Kehoe & Winingham,
Indianapolis, IN, for Plaintiffs.

Angela Pease Krahulik, Richard A. Smikle, Gretchen S. Hess,
Jeremy A. Klotz, Ice Miller, George E. Purdy, Sarah Steele
Riordan, Bose McKinney & Evans, Marc T. Quigley, Mark
J.R. Merkle, Joshua D. Hague, Krieg DeVault, Indianapolis,
IN, for Defendants.

ENTRY ON MOTIONS FOR SUMMARY
JUDGMENT AND RELATED MOTIONS

HAMILTON, J.

*1 Plaintiff Ronald Henderson is a diesel truck mechanic who was seriously injured when a component of the pressurized air suspension system of a Freightliner FL-106 truck burst while he was under the truck. In this diversity action, Henderson and his former wife Christine have sued

the manufacturers of the truck and of several components of its suspension system under the Indiana Products Liability Act ("IPLA"). Plaintiffs have also sued for common law negligence and breach of implied warranties.

The defendants can be divided into three groups for purposes of the case. Freightliner, LLC manufactured the FL-106 truck. Firestone Industrial Products Company and BFS Diversified Products, LLC (together "Firestone") manufactured an allegedly defective air spring component of the truck's suspension system. Hendrickson Truck Suspension Systems, the Boler Company, and Hendrickson Spring (together "Hendrickson") manufactured an allegedly defective leaf spring that was part of the suspension. The defendants have moved separately for summary judgment on various grounds. They have also moved to strike the testimony of plaintiffs' expert witnesses and to strike plaintiffs' surreply brief. Plaintiffs have moved to strike a portion of Hendrickson's reply brief.

For the reasons discussed below, the court denies defendants' motions for summary judgment as to the core product liability claims. Plaintiffs' common law claims and breach of implied warranty claims are in effect superseded by or merged into their statutory product liability claims, so the case will proceed on only the statutory claims. Defendants' motions to strike or exclude plaintiffs' expert testimony are denied, except that Dr. Walson may not testify as to whether instructions about torque on the relevant U-bolts were confusing and defective. Plaintiffs' motion to strike the portion of Hendrickson's reply brief addressing the issue of privity is granted. All defendants' motions to strike plaintiffs' surreply briefs concerning the testimony of Timothy Couch are denied.

Undisputed Facts

In considering a motion for summary judgment, the court does not try to determine the credibility of conflicting evidence. Instead, the court must consider all evidence in the light reasonably most favorable to the non-moving parties, giving them the benefit of conflicts in the evidence and any favorable and reasonable inferences that could be drawn from the evidence. See *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Construing the evidence in that light, the court assumes the following facts are true for purposes of defendants' motions for summary judgment.

The FL-106 Freightliner in question went into service on July 15, 2000. On August 24, 2000, it was serviced in the state of Washington because the driver's side air suspension had failed after about 18,000 miles. The piston was missing and the air bag, a component of the air spring assembly, had a hole in it. Pl. Ev. Tab 14 (Resp. to Hendrickson). A new air bag and piston assembly was installed. Two days later, the owner brought the truck in for repairs to Stoops Freightliner-Quality Trailer, Inc. ("Stoops") in Indianapolis. The new air bag and piston assembly on the driver's side had failed.

*2 Richard Taylor was the Stoops mechanic assigned to repair the failed air spring. He did so by replacing the rubber air bag and piston assembly. After he finished, he noticed that the air spring he had repaired was still not quite vertical. He told his foreman of the problem. Because Taylor was at the end of his shift, he was not assigned the job of fixing the leaning air spring. Taylor Dep. 30, 39.

Plaintiff Ronald Henderson was also employed as a mechanic at Stoops. His shift began on the morning of August 27, 2000. He was assigned to repair the leaning air spring. Henderson Dep. 70, 72. Sometime after receiving the assignment, Henderson rolled under the FL-106 truck on his creeper, a low rolling platform used by mechanics to move around under vehicles. *Id.* at 79. He had not released the air in the air suspension system, so it remained pressurized when he rolled under the truck. *Id.* at 83. Also, the truck was loaded with freight when Henderson rolled under it. Barker Dep. 25.

Freightliner provides instructions for service of its trucks in a Business Class Trucks Service Manual ("Service Manual"). The Service Manual provides the following instructions for replacement of an air spring assembly:

Replacement:

1. Park the vehicle on a level surface. Shut down the engine. Set the parking brake and chock the front tires. Raise the vehicle frame and support it with safety stands to remove all weight from the air springs.
2. Disconnect the leveling valve and exhaust all air from the air springs.

Freightliner Ex. H at Ex. 6. Henderson was familiar with the warning and with the need to take these steps, including releasing the air from the system, before beginning to work on the suspension system. Henderson Dep. at 6.

While Henderson was beneath the truck, the air spring assembly exploded, resulting in his serious injuries. The focal point of the explosion was the plastic composite piston, also called a "pedestal." The piston is a component of the air spring assembly and is critical to the high pressure air suspension system.

The parties dispute whether Henderson rolled under the truck merely to diagnose or inspect the leaning air spring, or whether he had actually started to work on it. Henderson does not recall anything that occurred after he rolled under the truck. Henderson Dep. 82. After Henderson was taken to the hospital, a co-worker inspected the scene and found tools under the truck, including an impact gun, some sockets, and a wrench. Barker Dep. 20-21.

Mechanic Timothy Couch was assigned to replace the failed air spring assembly on the FL-106. Couch Dep. 18-19. He was the first mechanic to work on the truck since Henderson's injury. *Id.* at 18. Couch found a deep-well socket wedged between the truck's frame and the axle housing. The socket belonged to Henderson. Couch testified that mechanics put such sockets in that location to prevent the frame from lowering completely down onto the axle housing when the air is released from the suspension system. Having the frame supported in that way makes work on the air spring assembly easier. *Id.* at 32-33.

*3 Couch removed the failed air spring assembly that injured Henderson. Removing an air spring assembly requires the mechanic to loosen U-bolts that hold the truck's leaf springs in place. The leaf springs are integral to the truck's air suspension system. Proper alignment of a leaf spring is necessary for proper alignment of an air spring assembly.

The parties dispute whether the U-bolts securing the leaf spring were tight when Couch began to remove the failed air spring assembly, or whether Henderson had already loosened them. As explained in more detail below in the discussion of the misuse and incurred risk defenses, the court finds, applying the standard for a motion for summary judgment, that the evidence would allow a reasonable jury to find that Henderson had *not* loosened the U-bolts when the piston exploded. A reasonable jury could find that Henderson had not begun to service the truck at all, that he had rolled under the truck only to inspect the suspension system, and that he had placed the deep well socket on the frame so he would have extra working space after he bled the air out of the suspension.

Couch installed an aluminum replacement piston as part of his repairs to the truck. At the time the truck was inspected for purposes of litigation, the truck had 200,000 miles on it. The original leaf spring remained intact and functional, as did the aluminum replacement piston.

The Freightliner FL-106 truck at issue had an auxiliary axle added to it, known as a “push axle” or a “tag axle.” The axle had been added at some unknown date before Henderson’s injury and was in place at the time of the injury. The axle was not manufactured, designed or installed by Freightliner. The extra axle did not drive the truck, but it helped handle additional weight. Other facts are noted below, applying the standard for a motion for summary judgment.

Discussion

The multiple motions present numerous issues. The court begins by sorting out the legal grounds for recovery, then turns to the asserted defenses of misuse, incurred risk, and product alteration. The court then turns to the related issues of expert testimony and proof of defects.

I. Legal Theories

The Indiana Products Liability Act (“IPLA”) governs “all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; regardless of the substantive legal theory or theories upon which the action is brought.” *Ind.Code § 34-20-1-1*. This section was amended in 1995 and recodified in 1998 to apply to all product liability claims. See *Butler v. City of Peru*, 733 N.E.2d 912, 918 n. 2 (Ind.2000), citing Pub.L. No. 278-1995, § 1, 1995 Ind. Acts 4051; and Pub.L. No. 1-1998, § 15, 1998 Ind. Acts 125.

Plaintiffs have also asserted claims under the common law of negligence and claims for breach of an implied warranty of merchantability. The IPLA effectively supplants both the common law negligence claims and the breach of implied warranty claims. All of plaintiffs’ claims in this case are brought by a user or consumer, against a manufacturer or sellers, for physical harm caused by a product. Plaintiffs’ common law negligence claims and breach of implied warranty claims will therefore be treated as merged into the IPLA claims. The jury will be instructed only on the IPLA.¹

1

Plaintiffs’ motion to strike a portion of Hendrickson’s reply brief raising a new issue (lack of privity) is hereby granted. Though this decision has little practical effect, it is still worth noting that a reply brief is not an appropriate occasion for offering an entirely new argument in favor of summary judgment. Hendrickson’s suggestion that this tactic is acceptable because it had asserted lack of privity as an affirmative defense in its answer entirely misses the point. When a party moves for summary judgment on specified grounds, the opponent is entitled to respond to those grounds, and need not respond with argument and evidence on other theories that might have been raised but were not. See *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir.1989). If courts do not enforce that limit, summary judgment practice will become more expensive and uncertain.

Freightliner’s motion for summary judgment poses a similar problem, though there is no separate motion to strike. Freightliner’s reply brief raises a new theory of alleged product misuse, asserting at pages 13-15 that Henderson misused the truck by driving it from one service bay to another. The court has simply disregarded that improper attempt to inject a new ground for summary judgment into the reply brief.

II. The Incurred Risk and Misuse Defenses

*4 All defendants argue that they are entitled to summary judgment because Henderson misused the product, or incurred the risk of harm, by working on the truck’s suspension system without first bleeding the air pressure from the system. Misuse of a product is the failure to use it in a reasonably expected manner. *Leon v. Caterpillar Industrial, Inc.*, 69 F.3d 1326, 1343 (7th Cir.1995). Indiana Code § 34-20-6-4 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.

2001 WL 881929

The misuse defense is not necessarily a complete defense but is an element of comparative fault. *Chapman v. Maytag Corp.*, 297 F.3d 682, 689 (7th Cir.2002). Misuse has been further defined as “use for a purpose or in a manner not foreseeable by the manufacturer.” *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind.App.2003) (citation omitted).

The incurred risk defense is closely related, at least under the circumstances here. To prevail on an incurred risk defense, the defendants must present sufficient evidence to convince a reasonable jury that Henderson had actual knowledge of the specific risk that he faced. *Ferguson v. Modern Farm Systems, Inc.*, 555 N.E.2d 1379, 1381 (Ind.App.1990). To prevail at summary judgment on this defense, the defendants would have to show that any reasonable jury would be required to find that Henderson had such knowledge. “Incurred risk involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk.” *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind.App.1999). Because incurred risk is also an element of comparative fault, defendants would need to show that any reasonable jury would have to find that Henderson's fault was greater than fifty percent. *Smock Materials Handling Co., Inc. v. Kerr*, 719 N.E.2d 396, 402 (Ind.App.1999).

The defendants rely on evidence that shows, they contend, that Henderson had loosened the U-bolts on the leaf spring while the suspension system was still pressurized. If Henderson had done that, it would have been very dangerous and directly contrary to product warnings.

Defendants are not entitled to summary judgment on the misuse and incurred risk defenses. The evidence on this record would easily allow a jury to find that Henderson had not begun working on a still pressurized air suspension system when the piston exploded. He was certainly preparing to work on the system. He had gathered some tools. He was underneath the truck looking at the suspension system. Perhaps most telling, a jury could find that he put the deep well socket on the truck frame so that he would have more room to work after bleeding the air from the system.

The defendants point to statements in Mr. Henderson's deposition testimony as evidence that he was aware of the specific risk posed by the air spring.

*5 Q Why do you want to get the air out of the system before you remove the components?

A So it won't explode.

Henderson Dep. 6. This evidence helps support plaintiffs' case. Henderson understood that it was dangerous to work on a pressurized suspension system. That understanding provides some evidence that weighs against the circumstantial evidence that defendants cite to argue that he began working while the system was still pressurized. Perhaps even more important is the fact that Henderson put his deep well socket in a position where it would be used to support the truck after he bled the air pressure from the system. That fact weighs in favor of an inference that he intended to bleed the air pressure before working on the system, and that he would not have begun working on the system while it was still pressurized. Henderson also gave additional testimony that would support a finding that he rolled under the truck not to service it but to inspect it.

Q Well, wouldn't you have let the air out of the system in this case involving your accident, August 27, 2000, as part of your process of servicing the air bag?

A No.

Q Why not?

A Because I would have visually inspected it first.

Henderson Dep. 83.

Defendants rely most heavily on a few passages in the deposition testimony of Timothy Couch, the mechanic who repaired the FL-106 after the explosion that injured Henderson. Defendants characterize Couch's deposition testimony on this latter point as unambiguous in their favor. The court does not agree.

At his deposition Couch was shown a repair order written by someone other than himself and summarizing work done on the FL-106.² On the repair order, an entry labeled “B” includes the following statement: “B. THE DRIVERS SIDE AIR BAG PER OWNER IS BUSTED CHECK AND REPAIR.” Below that statement, also under entry B is this notation: “CK'D & FOUND THE PED ON LEFT REAR AIR BAG BROKE & DAMAGED BAG, U-BOLTS LOOSE & SPRING SHIFTED. R/R AIR BAG, SHIFTED AXLE BACK TO PROPER POSITION & TORQUED U-BOLTS.” Pl. Ev. Tab 16 (Resp. to Hendrickson). Couch was asked what this entry meant. He responded: “The mechanic looked at the

2001 WL 881929

truck, basically found the pedestal damaged and broken, the U-bolts were not tight and the spring was not in position. Removed and replaced the air bag, shifted the axle back to the position that it should be in and retorqued the U-bolts.” Couch Dep. 26. When asked if he was the mechanic who performed that work described in entry B, Couch responded that he was. *Id.*

2 On the repair order, “AIR BAG” refers to the flexible rubber housing around the air spring assembly piston. “PED” stands for “pedestal,” which is another term for the plastic composite piston. “CK'D” stands for “checked.” “R/R” stands for “removed and replaced.” “Spring,” as used in “Spring shifted,” refers to the leaf spring.

Defendants characterize this evidence as follows:

In his deposition, Mr. Couch read through the work order for the repair of the air spring after Mr. Henderson's accident that stated, “U-bolts loose and spring shifted.” Mr. Couch explained that the mechanic who worked on the truck “found the pedestal damaged and broken, the U-bolts were not tight and the spring was not in position.” Mr. Couch testified under oath that *he* was the mechanic who performed that check and performed that work. Again Mr. Couch's testimony is significant because it is evidence that Plaintiff Ronald Henderson actually performed work on the truck by loosening the U-bolt while the system was pressurized.

*6 Firestone MSJ Reply Br. at 4.

From the court's review of the Stoops work order, it is not clear that the “B” entries that Couch read aloud and interpreted in his deposition even refer to the work he actually performed himself. Portions of Couch's testimony at page 26 of his deposition seem to correct his earlier statement that he had done the work on the “B” entries. The “B” entries start with the *owner's* complaint that the driver's side air bag was broken, and the entries then summarize the repair work. That seems to be the original work that Taylor did. The “C” entries start with the exploded piston that injured Henderson: “PEDESTAL ON AIR BAG JUST INSTALLED EXPLODED.” See Pl. Ev. Tab 16 (Resp. to Hendrickson). After identifying the parts replaced as part of “C,” including the air spring, piston, and air bag, the summary goes on to describe what appears to be the work actually performed by Couch after Henderson's injury: “CK'D & FOUND PEDESTAL ON AIR BAG JUST INSTALLED ON LINE B OF THIS REPAIR ORDER EXPLDED &

DAMAGED BAG. R/R AIR BAG.” *Id.* There is no reference to loose U-bolts in that entry.

In any event, what is most striking about Couch's quoted deposition testimony is that defense counsel did not ask Couch directly whether he found the U-bolts loose when he began working on the FL-106 after Henderson was injured. Couch answered that question in an affidavit that plaintiffs have submitted in opposition to summary judgment. He noted that he was the first person to work on the truck after Henderson's accident. Couch continued: “When I began work on the truck, the left (driver's side) u-bolt on the drive axle was fully tight, not loosened in any way. I did not find anything that had been loosened. During the course of replacing the air spring assembly, I loosened the u-bolt with an impact wrench, moved the leaf spring to the extent I could toward the outward side (left side) of the truck by use of a port-o-power tool, then re-tightened the u-bolt.” Couch Aff. ¶¶ 5-7.

That affidavit testimony is consistent with Couch's later deposition testimony that directly addressed the key issue. He was asked to describe his repair work:

Q You were discussing that there was some alignment issues. Can you describe for me kind of what you did to maybe correct the situation?

A Loosened the U-bolts on the left side spring and moved the air spring outward toward the outward side of the truck.

Couch Dep. at 41. This testimony clearly implies that the U-bolts were tight when he began working on the truck.

In their reply briefs, all defendants objected to the Couch affidavit, quoted above. They argued that the affidavit was an improper attempt to create a genuine issue of fact by recanting deposition testimony. The Seventh Circuit has often warned that a party cannot avoid summary judgment by attempting to submit an affidavit that recants or contradicts the affiant's prior deposition testimony. See, e.g., *Stinnett v. Iron Works Gym*, 301 F.3d 610, 614-15 (7th Cir.2002) (affirming summary judgment; district court has discretion to disregard affidavits that attempt to repair deposition testimony if no suitable explanation is offered, such as confusion, mistake, or lapse of memory); *Piscione v. Ernst & Young, LLP*, 171 F.3d 527, 532 (7th Cir.1999) (collecting cases); *Adelman-Tremblay v. Jewel Companies*, 859 F.2d 517, 521 (7th Cir.1988); (applying principle to deposition and affidavit of non-party witness); *Miller v. A.H. Robbins Co.*, 766 F.2d 1102, 1105 (7th Cir.1985).

*7 That rule does not come into play, however, unless the affiant's prior deposition testimony was clear and specific on the point. *E.g.*, *Maldonado v. U.S. Bank*, 186 F.3d 759, 769 (7th Cir.1999) (affirming denial of motion to strike affidavit; opposing party "simply never asked about some of the evidence provided in [the] supplemental affidavit and its attachments," and many alleged discrepancies only clarified previous testimony); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007 (7th Cir.1999) (reversing summary judgment: "where the deposition testimony is ambiguous or incomplete, as it is here, the witness may legitimately clarify or expand upon that testimony by way of an affidavit"); *Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1314 n. 3 (7th Cir.1989); see also *Pries v. Honda Motor Co.*, 31 F.3d 543, 544-45 (7th Cir.1994) (reversing summary judgment in product liability case; plaintiff explained deposition testimony, and physical evidence supported her theory of defect).

The rule against submitting affidavits that contradict prior depositions does not apply to Couch's testimony, where defense counsel danced around the direct question. They obtained deposition testimony they could use to support their argument, but did not get a direct answer to the critical direct question: Were the U-bolts already loose when Couch began working on the truck? In such a case, it is entirely proper for a party opposing the motion for summary judgment to submit an affidavit from the witness stating clearly the answer to the critical question. See *Holland*, 883 F.2d at 1314 n.3 (reversing summary judgment where affidavit "presents no direct contradiction of any plain or unequivocal admission in her deposition.... Here, [plaintiff's] affidavit answers a question-a key question-that was never put to her squarely in the deposition").

Defendants' effort to discount Couch's affidavit is especially weak in this case because Couch's deposition testimony actually did directly address the critical question. As noted, at page 41 of his deposition testimony, Couch testified that he loosened the U-bolts. Defendants are not entitled to summary judgment on the theory that Henderson misused the product or incurred the risk by working on the truck suspension system while it was still pressurized. The weight of the evidence appears to point in the opposite direction; in any event, the evidence certainly does not support defendants' view beyond a reasonable dispute.³

3

To support these defenses, defendants also cited deposition testimony from Bruce Barker, a co-worker who thought the U-bolts had been loose when Couch started working on the truck. Barker further testified, however, that he had only a sketchy memory on the point, and that the lawyers should ask Couch, who actually worked on the truck and made the repairs. See Barker Dep. at 32, 41. Barker's testimony does not entitle defendants to summary judgment.

After defendants filed their reply briefs, plaintiffs submitted surreply briefs that attached fresh copies of the Couch affidavit and argued that Couch had not contradicted his deposition testimony. All defendants then moved to strike the surreply briefs as late and unauthorized. In the court's view, the surreply briefs were late but otherwise proper. Defendants' original briefs had attempted to finesse the critical issue by ignoring Couch's testimony on the key question, and by relying on inference from some of their indirect questions to him. Plaintiffs properly responded with the Couch affidavit and other portions of his testimony. That response showed quite clearly that defendants' attempt to portray the evidence on this question as undisputed was groundless. In fact, those attempts undermined the credibility of the defense motions more broadly.

*8 Defendants then raised new arguments in their reply briefs attacking the Couch affidavit. Local Rule 56.1(d) allows a surreply brief in opposition to summary judgment where, among other situations, the moving party's reply brief "objects to the admissibility of the non-moving party's evidence." The court believes it is fair to treat the defendants' attacks on the Couch affidavit as an attack on its admissibility. It is only fair to allow plaintiffs to respond to that argument and to explain fully why the Couch affidavit was not an improper attempt to contradict deposition testimony. Defendants point out correctly that the plaintiffs' surreply briefs were late, by varying degrees, since defendants filed their reply briefs at different times. The court believes it is in the interests of justice to consider these reply briefs, and to excuse the late filing. See *Harmon v. OKI Systems*, 115 F.3d 477, 481 (7th Cir.1997) (affirming district court's decision to deny motion to strike brief and to excuse failure to comply strictly with local rules by party who sought and won summary judgment). All three defense motions to strike plaintiffs' surreply briefs are denied.

III. Alteration

2001 WL 881929

Freightliner argues that the FL-106 truck was substantially altered by the addition of the auxiliary axle, also known as a push axle or tag axle. Freightliner's expert Paul Hynes testified in his affidavit that the addition of the auxiliary rear axle "increased the likelihood that a malfunction or failure of the suspension system or its component parts would occur." Freightliner argues that this substantial alteration was an unforeseeable intervening and proximate cause of Henderson's injuries. According to Freightliner, the presence of the auxiliary axle means that plaintiffs cannot establish the essential element of proximate cause, so that Freightliner is entitled to summary judgment as a matter of law.

The argument is not persuasive as a basis for summary judgment. The conclusory statement in Hynes' affidavit stops well short of claiming that the auxiliary axle actually contributed at all to the Henderson accident. "When a defendant manufacturer in a [products] liability case moves for summary judgment, it has the burden to show the uncontroverted nonexistence of at least one of the elements essential to plaintiff's case." *Wolfe v. Storks RMS Protecon, Inc.*, 683 N.E.2d 264, 267 (Ind.App.1997), citing *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158, 1162 (Ind.App.1988). Freightliner has not established the "uncontroverted nonexistence" of proximate cause.

Proximate cause in a product defect action is established "if the injury caused by the product is a natural and probable consequence which was, or should have been, reasonably foreseen or anticipated in light of the attendant circumstances." *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1156 (Ind.App.1990). In a product defect action, "substantial alteration of the product is relevant to the issue of proximate cause." *Leon v. Caterpillar Industrial, Inc.*, 69 F.3d 1326, 1339 (7th Cir.1995). The plaintiff bears the burden to show that the product reached him without substantial alteration. *Bishop v. Firestone Tire & Rubber Co.*, 814 F.2d 437, 443 (7th Cir.1987). Substantial alteration is "any change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put." *Leon*, 69 F.3d at 1338, quoting *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 938 (Ind.App.1994).

*9 The defendants here rely on *Wolfe*, *Leon*, and *Bishop* to argue that the plaintiffs cannot meet their burden of proof on proximate cause. However, all three cases involved critical facts missing from this case. In all three cases the alteration was a direct and undisputed cause of the injury, and

there was no evidence independent of the alteration that the product was defective when it left the control of the defendant manufacturer.

In *Leon*, a retailer had installed a new seat and a "dead man's switch" on a forklift. An injured employee sued the manufacturer for strict liability after the dead man's switch (designed to disengage the transmission when no one was sitting on the seat) failed and the employee was struck by the forklift. On the issue of strict liability, the Seventh Circuit upheld a district court's dismissal of the claim because the evidence was undisputed, indeed it was confirmed by the plaintiff's own expert, that the added seat and the added dead man's switch combined to cause the injury. 69 F.3d at 1332. Further, it was "undisputed that the forklift was not in a defective or in an unreasonably dangerous condition when it left [the manufacturer]." *Id.* at 1340. Here, there is no evidence that the auxiliary axle contributed to the injury at all. There certainly is not undisputed evidence that it did contribute to the injury. It is also disputed whether the FL-106 left Freightliner's control in a defective condition. Plaintiffs have raised issues of fact on these questions independent of the auxiliary axle.

Similarly, in *Wolfe*, the Indiana Court of Appeals affirmed summary judgment for the defendant manufacturer where a meat processing worker was injured after her clothing became entangled in a turning bolt which protruded from a hydraulic motor. In that case, the motor with the protruding bolt was a replacement motor, supplied by a supplier other than the defendant manufacturer of the original motor. The manufacturer's original motor did not have a protruding bolt. The court noted that "[i]t is a defense that *the cause* of the physical harm is a modification or alteration of the product ... *if* such modification or alteration is *the proximate cause* of physical harm where such modification or alteration is not reasonably expectable to the seller." 683 N.E.2d at 268 (emphasis added). The court observed that:

In the present case, Wolfe was injured when her smock became caught in a protruding, turning bolt which connected the coupler to the hydraulic motor. The original system provided by Stork had no coupler and no protruding bolts. Thus, *the undisputed, designated evidence reveals* that the dangerous instrumentality, the protruding, turning bolt, was introduced when the hydraulic motor was replaced. As noted above, there is no evidence of Stork's involvement in the replacement of the conveyor motor.

2001 WL 881929

.... [W]e conclude, as a matter of law, that the replacement of the conveyor motor with the addition of the protruding, turning bolts, one of which *directly caused* Wolfe's injuries, constituted the *sole proximate cause* of Wolfe's injury which served to cut off any liability Stork may have had. Stork has established the uncontroverted nonexistence of the element of proximate cause.

***10** In the present case, Wolfe failed to establish that her injuries were proximately caused, even remotely, by Stork. As noted above, the replacement of the hydraulic motor with the protruding, turning bolts was the *sole proximate cause* of Wolfe's injuries.

Id. at 268-69 & n. 1 (emphasis added). Defendants seek to analogize the added auxiliary axle here to the added motor and protruding bolt in *Wolfe*. However, as the language of the Court of Appeals makes clear, the protruding bolt in that case, like the dead man's switch in *Leon*, was the undisputed sole and direct cause of the plaintiff's injury. That is simply not the case here.

Finally, in *Bishop*, the Seventh Circuit upheld a directed verdict in favor of a defendant tire manufacturer where the plaintiff was injured when a lock ring on a tire gave way under pressure while the plaintiff was inflating the tire. "The evidence presented was *uncontroverted that the lock ring which caused* Bishop's injuries had undergone a substantial change after it had left the manufacturer and prior to Bishop's accident, and thus Firestone was entitled to a directed verdict." 814 F.2d at 443 (emphasis added).

In each of those cases, the cause of the accident was shown, beyond reasonable dispute, to be the identified alteration. Freightliner argues: "Plaintiffs have failed to produce any evidence-as required-to establish that the addition of the [auxiliary] axle was not a superceding and intervening cause of Plaintiffs' alleged injuries." Freightliner MSJ Br. at 7. In fact, the plaintiffs have come forth with evidence from which a jury could infer that the leaf spring and air spring with which the truck left Freightliner's control were the sole causes of the injury. That evidence constitutes evidence that the auxiliary axle was not the cause at all. Freightliner has not come forward with evidence tending to show that the auxiliary axle contributed to this injury in any way. Hynes testified only vaguely that the alteration "increased the likelihood" that some unspecified "malfunction or failure of the suspension system or its component parts would occur." Hynes Aff. ¶ 13. In addition, plaintiffs have pointed to evidence from

Stoops employee Bruce Barker that the auxiliary axle was in place and was supporting part of the weight of the truck's load at the time of the accident. Barker Dep at 41-42, 44-45. That evidence tends to show that the auxiliary axle contributed nothing to the accident. Freightliner may make its substantial alteration argument to a jury. Its motion for summary judgment on this point is denied.

IV. Expert Testimony and Product Defects

The Indiana Product Liability Act provides in part that:

a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer ... is subject to liability for physical harm caused by that product to the user or consumer [if] that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.

***11** Ind.Code § 34-20-2-1. Under the IPLA, plaintiffs must prove: (1) the product was "defective" and as a result "unreasonably dangerous"; (2) the defect existed at the time the product left the defendants' control; (3) the product was expected to and did reach the consumer without substantial alteration; (4) the plaintiff's injuries were proximately caused by the defect in the product. *Moss v. Crosman Corp.*, 136 F.3d 1169, 1171 (7th Cir.1998). Where the existence of a defect depends on matters beyond the common understanding of a lay juror, admissible expert testimony is required to sustain the plaintiff's burden of proof on the question. *Cansler v. Mills*, 765 N.E.2d 698, 706 (Ind.App.2002).

To meet that burden, plaintiffs rely on Dr. Robert Walson and David Zedonis. Dr. Walson has a Ph.D. in metallurgical engineering and teaches at Butler University. Plaintiffs offer Dr. Walson to testify about two principal conclusions: (1) that the Firestone air spring was defective due to voids and irregularities in the plastic composite material used to manufacture the piston; and (2) that the Firestone air spring was defective due to inadequate warnings on the air spring regarding the proper torque at which to tighten the nuts securing the air spring assembly to the leaf spring. Pl. Ev. Tab

2001 WL 881929

12 at 6 (Resp. to Firestone). David Zedonis is an engineer who has often worked on litigated matters. He is expected to testify about three principal conclusions: (1) that the leaf spring manufactured by Hendrickson was defective due to improper dimensions, and that the improper dimensions contributed to the failure of the air spring assembly; (2) that the air spring assembly manufactured by Firestone was defective due to weaknesses in the plastic composite material used to manufacture the air spring's piston that exploded; and (3) that by incorporating these two defective components, the FL-106 truck manufactured by defendant Freightliner was itself defective. Pl. Ev. Tab 15 at 2 (Resp. to Firestone).

Defendants have moved to strike the testimony of Dr. Walson and Zedonis. Without their opinions, plaintiffs would have no expert testimony to support their claims of product defect, so that summary judgment would be mandated on all claims. Defendants argue that the testimony of Zedonis and Dr. Walson fails to meet the standards of [Rule 702 of the Federal Rules of Evidence](#), as articulated by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

[Federal Rule of Evidence 702](#) governs the admissibility of such testimony because it is premised on specialized engineering knowledge. [Rule 702](#) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

*12 The court's role in applying [Rule 702](#) is to be a "gatekeeper." *Daubert*, 509 U.S. at 589. In its role as gatekeeper, the court must consider both the relevance and the reliability of the proffered evidence. *Kumho Tire*, 526 U.S. at 141.

A. Relevance of Both Experts' Opinions

The relevance test asks whether the fact finder will be helped by the expert testimony either to understand the evidence or to determine a fact at issue in the case. In other words, the testimony must fit the issue in the case, and about which the expert is testifying. *E.g.*, *Zarecki v. National R.R. Passenger Corp.*, 914 F.Supp. 1566, 1573 (N.D.Ill.1996). Dr. Walson's and Zedonis's opinions about the design and manufacture of the plastic composite piston, the leaf spring, the FL-106 truck and the circumstances of Henderson's injury are highly relevant and fit the issues in the case. The relevance prong of the *Daubert* analysis is easily satisfied with regard to both Dr. Walson and Zedonis.

There is one exception, however. The motion to strike Dr. Walson's testimony will be granted in part, with respect to his opinion that the instructions to mechanics about the torque to use on the U-bolts were confusing. Dr. Walson testified that the torque applied to the U-bolts did not cause the failure of the piston. Walson Dep. at 119. Accordingly, his opinion about the instructions does not address a relevant issue that the jury would need to evaluate.

B. Reliability of Dr. Walson's Testimony

Firestone does not challenge Dr. Walson's qualifications, and the court is satisfied that Dr. Walson is qualified by both education and experience to give his proposed testimony. Dr. Walson holds a Ph.D. in metallurgical engineering, an M.S. in physics, and a B.S. in engineering physics. Pl. Ev. Tab 13 (Resp. to Firestone). He has over thirty years experience in mechanical engineering stress and materials failure analysis in academic and industry settings. *Id.* He has taught a seminar in automotive materials and design. *Id.* He has university-level teaching experience and design experience involving the composite plastic material at issue in this case. Walson Dep. 27-28, 32. Dr. Walson is president of a technical consulting company specializing in forensic engineering and failure analysis of products, systems, parts, and materials. Walson Dep. 44; Pl. Ev. Tab 13 (Resp. to Firestone).

Firestone contends that Dr. Walson's methods were not sound. It argues that "his opinions lack the requisite indicia of trustworthiness required by *Daubert*." Firestone Br. on Mot. to Strike at 6. Specifically, Firestone argues that Dr. Walson did not "scientifically test his positions" and "can point to no peer review or outside analysis. In short, he goes

from observation to conclusion and bypasses the scientific method.” *Id.*

In *Kumho Tire*, the Supreme Court explained that the four factors most often cited from *Daubert*-testability, peer review, known or potential error rates and standard procedures, and degree of acceptance in relevant scientific community-were addressed to scientific testimony. The relevant inquiries for other types of expert testimony may be different. 526 U.S. at 149-51. The Court instructed district judges to focus on the central goal, which is “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at 152. As a result, “the *Daubert* framework is a flexible one that must be adapted to the particular circumstances of the case and the type of testimony being proffered.” *Mihailovich v. Laatsch*, 359 F.3d 892, 919 (7th Cir.2004).

*13 Rigid adherence to the four *Daubert* factors for scientific evidence is not appropriate where, as with Dr. Walson, the expert is relying on his experience in the relevant field. The concept of peer-reviewed literature, for example, does not fit this case well. See *Kumho Tire*, 526 U.S. at 150-51 (“relevant reliability concerns may focus upon personal knowledge or experience.... It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist”); *United States v. Allen*, 269 F.3d 842, 846 (7th Cir.2001) (affirming district court’s determination that DEA agent with substantial experience was qualified expert in field of narcotics trafficking and his opinion about weapons used in narcotics trafficking was therefore reliable and relevant), quoting *Fed.R.Evid.* 702 advisory committee note (“In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”).

Dr. Walson researched the suspension system, springs, composite plastics, rubber and metals involved in this case in reference materials published by the American Society of Metals International and the Society of Automotive Engineers. Walson Dep. 7-9. He reviewed the Freightliner maintenance manual for the FL-106 and also the maintenance history of the FL-106 at issue. *Id.* at 52-53. He visually inspected the truck and its suspension system, including the leaf spring and failed air spring assembly. *Id.* at 18. He examined the failed composite plastic components of the air

spring assembly at his office at Butler University using an optical microscope and a scanning electron microscope. *Id.* at 20. Dr. Walson testified to “many years” of experience using electron scanning microscope technology for engineering failure analysis in both academic and industry settings, and to fourteen years of teaching a course in the use of the scanning electron microscope at Butler University. *Id.* at 42-43. Dr. Walson also performed x-ray inspection of the failed plastic composite piston, and compared it to x-rays of the other pistons from the same truck, both plastic composite and aluminum. *Id.* at 24, lines 6-11; 97, lines 129-37. Dr. Walson testified to twenty years of experience in the use of x-ray technology in engineering failure analysis. *Id.* at 24, lines 12-16. He has taught university-level courses in engineering x-ray techniques. *Id.* at 25-26. He received training through and is a participating member of the American Society for Nondestructive Testing. *Id.* at 25. He has used x-ray technology in failure analysis approximately 200 times, 20 of which involved the failure of plastics, including automotive parts, and including the composite plastic at issue in this case. *Id.* at 27-28. Dr. Walson has performed failure analysis on failed heavy-duty trucks, including several involving the suspension system, though not an air suspension system. *Id.* at 57-58.

*14 Dr. Walson used the x-ray and electron microscopy technology to examine the failed air spring component and its non-failed counterparts to determine the origins and nature of the material failure. He testified at his deposition that these examinations revealed that the composite plastic piston contained voids or holes that its unbroken counterparts did not contain and that should not have been there. He was asked for the basis of his conclusion on this point.

Based on my experience of looking at failed parts, when you have holes in them, that is weaker than if you don't have holes in them. And we do testing for students, that's what we do: We test parts. We drill holes and show them that when you have a hole ... it is weaker. So based on my training, experience, the part is going to be weaker with defects than if it didn't have defects.

Walson Dep. 82, lines 10-19. Dr. Walson also opined that the component materials of the composite plastic were not

2001 WL 881929

bonded adequately and that this contributed to its failure. He was asked for the basis of this opinion.

That would be years of experience in products where, when we made composites at John Deere, we wanted to make sure [adequate bonding] happened.... That you get a stronger part when the matrix is attached to the particles of glass or a reinforcing glass.

Id. at 87, lines 6-11. At another point, Dr. Walson testified:

[B]ased on my experience, looking at broken parts, looking at composite parts, looking at literature, it is [an] established fact that defects reduce the strength and make the parts more susceptible to breakage.... The lack of bonding to glass to the matrix, this lack of uniform filling of the glass is a defect, yes.

Id. at 77, lines 8-17.

Dr. Walson's testimony about the failure of the piston is based, as he notes throughout his deposition, on his years of experience in materials failure analysis. This experience included the instruments, principles and methods of analysis that he applied to the alleged material failures in this case, and some of it involved the plastic composite material at issue in this case. Dr. Walson acquired his knowledge of the use of these instruments and methods of analysis from training at universities and professional engineering organizations and has taught them to science and engineering students as well as professional engineers. Pl. Ev. Tab 13 (Resp. to Firestone). The court is satisfied that the opinions of Dr. Walson concerning the failure of the piston are based on his knowledge and professional experience, that his knowledge and personal experience form a reliable basis for expert opinion in the engineering or materials failure fields, and that he applied his knowledge and experience reliably to the specific facts of this case.

Defendants contend that the Dr. Walson has engaged in circular reasoning: from the premise that the piston exploded, he has concluded that it must have been defective. The court does not interpret his testimony that way. The fact that a brand new piston exploded just hours after it was installed does not prove conclusively that the part was defective under the law. However, the fact is surely highly relevant in the analysis. The new piston exploded without even having been subjected to the forces and rigors of highway driving. The fact that this was the third piston on a new truck is also relevant. The first had failed after about 20,000 miles. The second failed after two days of driving. The fact that the aluminum fourth replacement piston was used without incident for 180,000 miles is also relevant. Dr. Walson did not merely conclude that a failed part must have been defective because it failed. He used his professional knowledge and experience to examine the remains of the failed part, to compare them to other parts that had not failed, and to provide a plausible explanation for its failure. The explanation is reliable enough to allow it to be presented at trial and tested through the more conventional means of challenging evidence, through cross-examination and presentation of contradictory evidence. See *Daubert*, 509 U.S. at 595-96.

C. Reliability of Zedonis's Testimony

*15 Both Firestone and Hendrickson have also challenged the qualifications and methodology of David Zedonis. Plaintiffs propose to have Zedonis testify (1) that the leaf spring manufactured by defendant Hendrickson was defective due to improper shape and dimensions; (2) that inherent weaknesses in the plastic composite material used to manufacture the air spring's piston constituted a design defect; and (3) that by incorporating these two defective components, the FL-106 truck manufactured by Freightliner was itself defective.

Zedonis is a registered professional engineer in Indiana. He is employed as a consulting engineer for an engineering consulting company called Forensic Services Group. Zedonis Dep. 8. He has a bachelor's degree and approximately twenty years experience in the field of mechanical engineering, including some experience in the areas of product design and testing, and including product design experience involving metals, plastics and composites. His principal area of specialty appears to be accident reconstruction. Pl. Ev. Tab 16 (Resp. to Firestone).

Zedonis's theory of the accident is that the leaf spring had dimensions that were different from those of a new leaf spring

to which he compared it. This difference, he contends, caused an abnormal misalignment of the air spring assembly, so that it leaned off of vertical and caused an abnormal load of pressure on the composite plastic piston. The inherent weakness of the piston caused it to burst under this abnormal load of pressure. Thus, Zedonis contends that the failure of the piston resulted from the combination of the defective leaf spring and a piston that was too weak. In support of these opinions, Zedonis noted that the new plastic piston on the driver's side exploded, while the plastic piston on the other (less seriously misaligned) side of the truck survived for at least 200,000 miles without failing. He also noted that the aluminum replacement piston functioned for 180,000 miles without bursting under the same misalignment conditions caused by the defective leaf spring, which had not been replaced.

The defendants contend that Zedonis is not qualified to testify because he has no training or experience in truck suspensions. Plaintiffs point out that Zedonis has testified as an expert in other cases involving truck suspensions. Pl. Resp. to Boler at 9. However, this court's gatekeeper responsibilities are not discharged by relying on other courts' exercise of that function. Zedonis has no apparent practical experience with truck suspension systems in general or air springs in particular. When asked if he had "ever heard of" leaning air springs or leaning air ride suspension issues prior to this case he responded: "Not that I recall." Zedonis Dep. 30. When asked if he considered himself an expert in air spring design he responded: "Not specifically." When asked if he considered himself an expert in air spring failure he responded: "Not specifically." *Id.* at 150.

***16** On the other hand, Zedonis has extensive experience in mechanical engineering and failure analysis in general. Defendants can challenge Zedonis's qualifications as not on par with the qualifications of their own experts, but a witness may testify as an expert without a perfect match between qualifications and the specific issues in the case. See *Smith v. Ford Motor Co.*, 215 F.3d 713, 720 (7th Cir.2000) (reversing exclusion of plaintiffs' experts who had engineering qualifications even though neither was an expert in automotive design or engineering: "[E]xpert testimony need only be relevant to evaluating a factual matter in the case. That testimony need not relate directly to the ultimate issue that is to be resolved by the trier of fact."); *Owens v. Amtrol, Inc.*, 94 F.Supp.2d 952, 954-55 (N.D.Ind.2000) (allowing expert testimony from engineer with experience with pressure vessels different from the water pressure vessel at issue in the case). Zedonis is qualified to assist the trier of

fact in determining "what happened, and why it happened and what's wrong." That is, he is qualified to describe how the leaf spring was different in size and shape from one made to the manufacturer's specifications; how this difference caused a misalignment that increased the pressure on the air spring; and how he concludes this increased pressure caused the plastic piston to burst. He is also qualified to opine as to the relative strength of the composite plastic material used to manufacture the piston. See *Smith*, 215 F.3d at 720.

The central question then becomes whether Zedonis applied reliable methods in arriving at his opinion of *what* happened-*i.e.*, the shape and dimensions of the leaf spring increasing the pressure on the air spring-to cause the plastic piston to burst, injuring Henderson. Zedonis examined the failed air spring assembly, which had been saved. He also inspected the truck on January 19, 2004, approximately three and a half years after the accident. The failed air spring had been replaced by that time, but the leaf spring had not been replaced. He examined the truck's overall suspension system, and removed and replaced both air springs. He examined the surviving plastic composite piston and the aluminum piston that was used to replace the one that burst. Pl. Ev. Tab 15 (Resp. to Firestone). He removed the driver's side leaf spring and measured its dimensions. For this task, Zedonis relied on a service bulletin created by Freightliner, the "Freightliner Airliner Suspension Air-Spring Bag Misalignment Troubleshooting Service Bulletin (32-40)," and fabricated a measuring tool ("span tool") pursuant to instructions provided in the bulletin. According to Zedonis's report:

[D]imensional checks made on the removed [leaf] spring showed it was a deviated part per the bulletin. [Also], the position of the spring mounting hole location in the new spring to be installed would improve the centering condition of the air spring by approximately 3/4 of an inch. Use of the 16-inch span tool described in the bulletin showed that the hole of the old spring was off position (short) and that the new spring was satisfactory. This measured condition documents the Hendrickson spring as a defective part in the rear suspension. This part should be replaced according to the Freightliner Airliner Suspension Air-Spring Bag

2001 WL 881929

Misalignment Troubleshooting Service
Bulletin (32-40).

*17 *Id.* at 5.

Zedonis has described a method satisfactory to arrive at the conclusion that the leaf spring at issue had dimensions different from those specified by the manufacturer of the truck. Zedonis has also linked the effects of the different dimensions to the alignment of the suspension and to the forces on the piston. He reported that the alignment of the air spring improved when the new leaf spring was installed. He further explained that “the air spring piston is an integral part of the air spring assembly and the truck suspension. The piston ... communicates the loading between the ... frame of the truck, and the leaf spring that is attached to the axle.” *Id.* at 8. The “loading forces that are reacted into the base by the misalignments, lean and tilt” of the air spring assembly add to the load on the piston. *Id.* After describing how the leaf spring caused misalignment, lean and tilt of the air spring assembly, Zedonis observed that this misalignment places “additional loads on the air spring pistons. This composite piston is made of plastic and does not have an infinite strength. There is no doubt that there is a limit to the tilt that the plastic piston can withstand.” *Id.* at 9. Zedonis further stated that “The use of a composite piston in the suspension system of a medium duty truck appears to me to be a poor choice given the misalignment condition....” *Id.*

Zedonis did not conduct tests that would quantify his analysis and measure the extra forces or replicate the circumstances that led to failure of the piston. Such tests may not have been possible. In reaching his conclusions, however, he had the real-world experience of the other plastic piston, which was not subject to the same misalignment, and of the replacement aluminum piston, which was subject to the same misalignment but did not fail in 180,000 miles, after a brand new plastic piston had exploded while the truck was still in the repair shop. Defendants also have not yet come forward with tests showing that Zedonis's testimony cannot be reliable.

In *Daubert*, the Supreme Court reminded lower courts that traditional methods of challenging weak evidence, such as cross-examination and presentation of contradictory evidence, would remain the principal methods. Along those lines, it is worth noting that on the existing record, the defense experts apart from the theory that Henderson started working

on the suspension while it was still pressurized-do not provide a satisfactory explanation for the explosion of a new piston. Also, their testimony in this record does not show the use of methods different from Dr. Walson's or Zedonis's. Tom Wirtz is the director of product engineering for the company that actually molded the plastic cylinder in question. He testified in his affidavit, that he examined the failed piston, that he “found it to be appropriately manufactured consistent with its design,” and that he found “no visible evidence of any product failure due to any problem in the manufacture or design” of the piston. Wirtz Aff. ¶ 17. The affidavit provides no further explanation, nor any indication of further testing. Similarly, Nathan Ware opined that the Hendrickson leaf spring was not defective. He disagreed with Zedonis's theory that misalignment caused by the leaf spring added to the loads on the piston. Ware offered no specific explanation for the explosion here other than the possibility that Henderson tried to work on a pressurized suspension system. For the reasons explained above, that theory is at least fairly debatable here. There is considerable evidence to the contrary. If the jury rejects that theory, plaintiffs' experts appear to offer the only available explanation for the explosive failure of a brand new piston while the truck was still in the shop.⁴

4 The court does not yet have access to all of the reports and testimony of the defense experts. These comments about defense expert theories are based on the current record on the pending motions.

*18 Accordingly, the defense motions to strike plaintiffs' expert testimony are denied except with respect to Dr. Walson's opinion about whether torque instructions on the air spring assembly were confusing and defective. The testimony of Dr. Walson and Zedonis is sufficient to meet plaintiffs' burden of showing the existence of product defects that proximately caused Henderson's injuries. Defendants' motions for summary judgment are denied to the extent they are based on attempts to exclude the expert testimony.

Conclusion

For the reasons stated above, the court makes the following rulings with respect to the various motions: Firestone's motion to strike the expert testimony of Dr. Walson and Zedonis is denied in its entirety with this exception: Dr. Walson may not testify as to the supposed defects in instructions about torque for the U-bolts. Hendrickson's motion to exclude the expert testimony of Zedonis is denied. Firestone's, Hendrickson's

2001 WL 881929

and Freightliner's motions for summary judgment are denied with the qualification that plaintiff's common law and breach of implied warranty claims are superseded by their statutory claims. The case will proceed to trial on the statutory product liability claims only. Plaintiffs' motion to strike the portion of Hendrickson's Reply Brief addressing the issue of privity is granted. All defendants' motions to strike plaintiff's surreply briefs concerning Couch's testimony are denied. The court will conduct a scheduling conference on Friday, April 22,

2005 at 4:30 p.m. in Room 330, Birch Bayh U.S. Courthouse, Indianapolis, Indiana, to set a new trial date and address other issues as needed.

So ordered.

All Citations

Not Reported in F.Supp.2d, 2005 WL 775929

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 24

2002 WL 34447541

2002 WL 34447541

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.

[Andrew HUNT](#), et al., Plaintiffs,
v.

AMERICAN WOOD PRESERVERS
INSTITUTE, et al., Defendants.

No. IP 02-0389-C-M/S.

|
July 31, 2002.

ORDER

[LARRY J. McKINNEY](#), Chief District Judge.

*1 The Court GRANTS that portion of Defendant's, Universal Forest Products, Motion to Dismiss addressed to the Plaintiffs' medical monitoring claim, as such a claim is not cognizable in the State of Indiana.

The Court now orders the Plaintiffs to file an amended complaint on the additional counts, giving attention to the requirements of [FRCP 8\(a\)](#). The Court accepts Plaintiffs' declaration that they do not allege fraud against the Defendants.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2002 WL 34447541

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 25

1986 WL 213409 (R.I.Super.)
Superior Court of Rhode Island, Providence

HYDRONIC ENTERPRISES, INC.

v.

DANAL JEWELRY CO.

C.A. No. 81-4011

|

December 22, 1986

Callaghan & Company's Headnote and Classification

***1537** P2606.2, P2606.4(2)Acceptance of nonconforming goods.

R.I.Super. Dec. 22, 1986

Where purchaser of gold solutions suspected nonconformities in 1979, had solutions tested verifying nonconformity in May 1980, but never notified plaintiff of any difficulties and continued to order and use plaintiff's gold solutions, purchaser retained the goods in spite of their nonconformity constituting acceptance under § 2-606(1)(a), and was required to pay for the goods at contract rate subject to its counterclaim for breach of warranty.

Callaghan & Company's Headnote and Classification

P1204.4, P2607.2, P2607.15, P2607.22Reasonable time for notice of nonconformity; effect of failure to timely notify.

R.I.Super. Dec. 22, 1986

Where both parties were merchants, and the buyer of gold solutions suspected their nonconformity in 1979, confirmed it by assay by May 1980, by mid-June seller's attorney was aware of the problem, but seller himself was not notified until August when he pressed suit for payment, notice was not given within a reasonable time. Commercial standards are applied to a merchant whereas retail consumers are held to a less stringent standard. The minimum notice required is such that the transaction is troublesome and must be watched, and not only did plaintiff not receive notice until it pressed defendant for its long overdue payment, but although defendant's suspicions were confirmed in May it had persisted in placing and using a unusually large and expensive order for more gold solutions thereafter, despite the fact that it had other suppliers. Since seller, not having received notice, had no opportunity to make adjustments, to suggest opportunities for cure, or to discover how a gold shortage could have occurred in accordance with the policies of § 2-607(3)(a), defendant was required to pay for the goods at contract rate even if it did meet its burden of proving a breach.

***1538 UCC Sections Cited: § 1-204, § 2-606, § 2-607(3)(a), (4), § 2-714(2).**

Opinion

COCHRAN, J.

This matter is before the court on plaintiff's claim on book account for goods sold and services rendered. Defendant, Danal Jewelry Company, counterclaims for breach of contract, breach of warranty, and fraud. Plaintiff, Hydronic Enterprises, Inc., supplied gold plating solutions to defendant for use in defendant's jewelry manufacturing business. Plaintiff claims that defendant took possession of gold solutions (goods), that defendant used the goods in its manufacturing process, and that defendant did not pay plaintiff the contract price for the goods. Defendant counterclaims that the goods were not the 100% gold solutions that plaintiff represented. This matter was heard by the court sitting without a jury.

Mr. Allen Carr, president and majority stockholder of Hydronic testified that Hydronic was in the business of buying and selling scrap metal and furnishing the jewelry plating industry with gold, silver, and rhodium solutions or salts. Hydronic was a small company that employed Mr. Carr, his daughter Kimberly Carr, and a part-time driver Mr. Walter Jackson. Hydronic regularly supplied plating solutions for approximately 7 or 8 years to Danal with Danal employees ordering goods by telephone almost daily from Hydronic. Payment terms for Danal were either within 10 days after receipt of the goods or on a cash on delivery basis. Mr. Carr stated that Danal had a running account with Hydronic and that Danal was fairly regular with payments.

Plaintiff's Exhibit 1, Hydronic's record of the running balance with Danal, shows that as of May 2, 1980, Danal's balance was \$30,164.49. Between May 2 and May 19, the balance increased to \$47,012.77. This figure is supported by some of the invoices submitted as plaintiff's exhibit 5 A-N. Of these invoices, A, B, C, and E are excluded for the following reasons. With respect to A, B, and C, the balance as of May 2, 1980 includes a credit given for Danal's last payment in the amount of \$5,546.02. Plaintiff's Exhibit 1. Plaintiff's exhibits 5 A, B, and C all are recorded and dated in the running balance before this final credit was issued. Therefore, 5 A, B, and C were already deducted from the running balance to arrive at the \$30,164.49 amount.

Invoice marked plaintiff's exhibit 5 E will not be included because it represents the receipt for the order invoiced on plaintiff's exhibit 5 F. They are both for the exact same amount and indicate the exact same goods ordered and received. Plaintiff's exhibit 5 D and F-N total \$16,848.48. This amount equals the amount shown on the running balance between May 2, 1980 and May 21, 1980 for a total of \$47,012.77.

*1539 Then on May 19, 1980, Danal placed an unusually large order for a heavy gold bath. This order consisted of 79 ounces of gold solution, 100 pounds of acid salts, and 2 gallons of brightener totaling \$39,001.72. This order was followed by two more orders, one for \$1,344.44 and the final order by Danal for \$16,520.70 on May 21 and 22, 1980 respectively. These orders are shown on 3 invoices that were introduced as plaintiff's exhibits 2, 3, and 4. These invoices are for exactly the same amounts as indicated on plaintiff's exhibit 1, the running balance. Danal's total balance owed including the heavy gold bath, was \$103,879.63 as of May 22, 1980.

The evidence introduced at trial showed clearly that Hydronic never received any payment for the heavy gold bath or for the running balance owed by Danal. Mr. Carr stated that he attempted to discuss non-payment with Danal within two weeks after the heavy gold bath was delivered, but to no avail. Mr. Carr stated further that his next contact with anyone from Danal was in June, 1980 at a meeting at the law offices of Danal's attorneys. Mr. Carr testified that prior to that time no one from Danal told him there was anything wrong with the heavy gold bath. Both parties agree that the heavy gold bath, and all of the goods ordered in May, 1980, were used at some point by Danal in its jewelry manufacturing process.

Mr. John O'Neill, a lawyer who represented Mr. Carr and Hydronic with respect to the balance owed by Danal, testified that he requested that Danal pay for the gold or return it to Hydronic. On cross-examination, Mr. O'Neill stated that at a meeting at Danal in June, 1980 he was aware that the gold solution was not the 100% gold solution that it was purported to be.

Mr. Albert Colangelo testified for defendant. Mr. Colangelo was a partner in Danal. He stated that Danal manufactured costume jewelry using precious metals. He explained the plating process that Danal used wherein the gold solutions were plated onto jewelry pieces and then placed on racks. Hydronic was one of Danal's suppliers of gold solutions.

Mr. Colangelo testified that Danal became aware in late 1979 and early 1980 that it was having problems in its manufacturing process. As a result, various employees attempted to discover the source of Danal's problem.

Mr. David Kiley, chief financial officer and controller of Danal, testified that he also played a role in determining the source of Danal's manufacturing problem. As a result of his efforts, he stated that internal employee theft at Danal was ruled out.

*1540 Mr. Colangelo, however, conceded on cross-examination that the results of Danal's assay tests of Hydronic's gold solutions were not given to Mr. Carr. Mr. Colangelo stated that the test results were given to his own lawyer. He stated further that no officer or employee of Danal ever told Mr. Carr of the test results. In addition, Mr. Colangelo stated that no one at Danal ever returned the solutions to Hydronic and that indeed the solutions were used by Danal in its manufacturing process.

.....

II

The instant case involves a contract for the sale of goods. As such, these transactions are governed by the provisions of Article 2 of the Uniform Commercial Code (UCC) [G.L. 1956 \(1985 Reenactment\) § 6A-2-101 et seq.](#) The first question is whether the goods were in fact accepted by defendant (buyer). Section 2-606 states what constitutes acceptance:

“(1) Acceptance of goods occurs when the buyer

(a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) Fails to make an effective rejection (subsection (1) of § 6A-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.”

G.L. § 6A-2-606 <<UCC § 2-606>>.

Plaintiff contends that defendant accepted the goods according to § 2-606(1)(a); specifically, that Danal retained the goods in spite of their non-conformity. The evidence shows that Danal suspected that there were problems in its manufacturing process as early as 1979. Mr. Colangelo testified that Danal began testing Hydronic's gold solutions in late April, early May, 1980. Mr. Colangelo testified that Danal received these reports in May 1980 yet Danal continued to order and use Hydronic's gold solutions. This court finds therefore, that Danal ***1541** retained the goods in spite of their non-conformity. According to G.L. § 2-606(1)(a), such actions constitute acceptance of the goods.¹

Having determined that Danal accepted the goods, the court must consider the effect of acceptance under the UCC. The general rule is that the buyer must pay at the contract rate for any goods accepted. G.L. § 2-607(1). Plaintiff contends that the amount owed is \$103,879.63. Danal's defense, however, is that this amount should not include the amount it owed on account and that its total balance is reduced by the amount equivalent to the alleged gold shortages. Thus, defendant states that it would owe \$68,487.32.

First, this court has already determined that Danal's balance on account cannot be excluded as defendant suggests. See Part I supra. Second, this court cannot simply reduce the contract rate by an amount defendant chooses to represent as gold shortages. See e.g., *Superior Wire & Paper Products, Ltd. v. Talcott Tool & Mach., Inc.*, 441 A.2d 43, 46 [31 UCC Rep Serv 101] (Conn. 1981). The UCC sets out a specific provision to measure damages in a breach of warranty claim in § 2-714(2). G.L. § 2-714(2). In the instant case, the goods were accepted, therefore, defendant must pay the contract rate. The defendant may assert its counterclaim for breach of warranty which it has done. The warranty issues will be discussed infra. This court finds therefore, plaintiff submitted sufficient competent evidence that the total amount of gold ordered pursuant to this contract for the sale of goods was \$103,879.63. See plaintiff's exhibits 1, 2, 3, 4, and 5 D and F-N.

Plaintiff contends that it did not receive notice within a reasonable time after Danal discovered the breach. Plaintiff states that it is unnecessary to determine whether the goods were defective because defendant's failure to give notice within a reasonable time bars it from any remedy under § 2-607(3)(a).²

G.L. § 6A-2-607(3)(a) <<UCC § 2-607>>.

***1542** Plaintiff also argues that defendant's use of the goods with knowledge of the non-conformity operates as a waiver of the right to sue for breach.

The court will consider each of these contentions. First, it is important to point out that § 2-607(4) states that, "[t]he burden is on the buyer to establish any breach with respect to the goods accepted." G.L. § 2-607(4). In warranty cases, the buyer must pay for the goods at the contract rate. If the buyer can meet its burden of proving a breach, the buyer may sue the seller for breach of warranty. In order to sue for breach of warranty the buyer must, however, give the seller reasonable notice of the breach. Whether notice was timely is a question of fact for the trier. *Parillo v. Giroux Co., Inc., R.I.*, 426 A.2d 1313 (1981); R. Anderson, *Uniform Commercial Code*, § 2-607:11. The Official Comment to § 2-607 states that "[t]he content of the notification need merely be sufficient to let the seller know that the transaction is troublesome and must be watched The notification which saves the buyer's rights under this Article [Chapter] need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." G.L. § 6A-2-607 <<UCC § 2-607>> Comment 4. The question to resolve, therefore, is whether the buyer gave the seller reasonable notice of the breach.

Mr. Carr testified that from the time the heavy gold bath was put in at Danal on May 23, 1980 until the middle of June, no one from Danal told him of any defect in the goods. Mr. John O'Neill, Mr. Carr's lawyer, testified on cross-examination that he was aware at a meeting at Danal in June, 1980 that the goods were non-conforming. Mr. Carr testified also on cross-examination that he, Mr. O'Neill, one principal from Danal, two of Danal's attorneys, and Mr. John Babcock were all present at that meeting. The evidence shows that it was really through the attorneys in the instant case that notice was eventually communicated. Plaintiff's Exhibit 6, hereby admitted as a full exhibit, relevant to the issue of when notice was given by defendant, is a letter dated July 31, 1980 from defendant's attorney that states in part:

"At this juncture your client has had an opportunity to cause an assay to be made of material furnished to Danal and it is our understanding that the results are confirmatory of what Danal had already advised your client, viz, that the material

failed to conform with the representations of your client as to gold content.”

Plaintiff's Exhibit 6.

This court finds that the testimony of Mr. O'Neill was credible that in June, 1980, he was aware that the heavy gold bath was nonconforming. *1543 Having determined that at the earliest, plaintiff received notice in June and at the latest in July, 1980, the issue is whether this notice was reasonable under § 2-607(3)(a). Section 2-607(3)(a) does not define a reasonable time.³ Section 1-204 of the UCC sets out what a reasonable time is as follows:

“(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.” G.L. § 6A-1-204 << UCC § 1-204>>.

There is no set length of time that absolutely determines whether notice is reasonable. Commentators are in agreement, however, that what constitutes a reasonable time must be determined on the facts of individual cases and circumstances.⁴

In the instant case, the court finds that notice was not given within a reasonable time. The evidence put forth by both defendant and plaintiff shows that by mid-June, at least Mr. O'Neill was aware that the solutions were non-conforming. By the end of July to August, 1980, Mr. Carr clearly knew of the defect. The UCC Comment 4 to § 2-607 does distinguish between a merchant buyer and a retail consumer as to what constitutes a reasonable time. G.L. 6A-2-607 <<UCC § 2-607>> Comment 4. Commercial standards are applied to a merchant whereas retail consumers are held to a less stringent standard. Danal and Hydronic were both merchants. Thus, the parties will be held to a stricter standard with respect to what constitutes reasonable notice.

The minimum notice required is such that the transaction is troublesome and must be watched. G.L. § 2-607 Comment 4; *Stelco Industries, Inc. v. Cohen*, 438 A.2d 759, 761 [31 UCC Rep Serv 86] (Conn. 1980). Plaintiff contends that it did not receive notice until it pressed defendant for payment, approximately one month had passed until the meeting at Danal in mid-June. The court finds this testimony credible.

The policy behind the notice requirement was stated by White & Summers in this often quoted passage:

“One can identify at least three policies behind 2-607. The first and most important reason for requiring notice is to enable the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer. . . . The second policy behind the notice *1544 requirement is to afford the seller an opportunity to arm himself for negotiation and litigation. . . . A final, and less important policy behind the notice requirement is to give the defendant that same kind of mind balm he gets from the statute of limitations. There is some value in allowing a seller, at some point, to close his books on goods sold in the past and to pass on to other things.”

J. White & R. Summers, *Uniform Commercial Code* § 11-10 (2d ed. 1980).

Danal claims that it suspected since late 1979 or early 1980 that the Hydronic solutions were defective. Yet, Danal never once communicated this suspicion to anyone from Hydronic until it was long overdue for payment on the heavy gold bath. Defendant's suspicions were confirmed in May, 1980 yet it still persisted in placing and using an unusually large and expensive order for more gold solutions at the end of that same month. Even more disturbing is that Danal had more than one supplier of gold solutions; no explanation was offered as to why Danal did not go to another supplier. Defendant's response is that it trusted Hydronic because of their long business relationship. Danal's argument that it did not want to accuse Danal until it had “concrete corroborative data” missed the point under UCC law. The UCC requires simply that between merchants, the minimum notice required to the seller is that the transaction is troublesome. The court although sympathetic to defendant's consideration of the parties' business relationship, is hard-pressed to find that defendant complied with the reasonable notice requirement of the UCC.

Furthermore, given the policies behind the notice requirement of § 2-607(3)(a), the seller had no opportunity to make adjustments, to suggest opportunities for cure, or to discover how a gold shortage could have occurred.

The court finds that even if the buyer did meet its burden of proving a breach, that it did not provide the seller with reasonable notice of the breach. Defendant must, therefore, pay for the goods at the contract rate of \$103,879.63. It is unnecessary for the court to consider whether defendant's use

2 UCC Rep.Serv.2d 1537

of the goods with knowledge of the nonconformity operated
as a waiver of the right to sue for breach.

All Citations

Counsel may submit an order in conformity with this decision. 1986 WL 213409, 2 UCC Rep.Serv.2d 1537

Footnotes

1 While plaintiff relies on [§ 2-606\(1\)\(a\)](#) to assert that defendant accepted the goods, some jurisdictions allow for a buyer's use of the goods with knowledge of the non-conformity to constitute acceptance under [§ 2-606\(1\)\(c\)](#) as an act inconsistent with the seller's ownership. See e.g., [67 A.L.R. 3d 363 Sections 2, 3](#).

2 [Section 2-607\(3\)\(a\)](#) sets out the notice requirement in the UCC with respect to breach after acceptance of the goods. This section states in pertinent part:

“(3) Where a tender has been accepted

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify seller of breach or be barred from any remedy. . . .”

3 See *infra* for a discussion of reasonableness under [§ 2-607\(3\)\(a\)](#) and the accompanying Comment 4 to this section.

4 See [J. White & R. Summers, Uniform Commercial Code, § 11-10 \(2d ed. 1980\)](#); [R. Anderson, Uniform Commercial Code, § 2-607:55 \(3d ed. 1983\)](#); [93 A.L.R.3d 363, §§ 6-12](#).

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 26

2020 WL 2783581

Only the Westlaw citation is currently available.
United States District Court, D. Delaware.

Debra JAVENS, Plaintiff,

v.

GE HEALTHCARE INC. and General
Electric Company, Defendants.

Civil Action No. 18-1030-RGA-SRF

|
Signed 05/29/2020

Attorneys and Law Firms

Kyle John McGee, Michael J. Barry, Paige Jessica Alderson, Grant & Eisenhofer, P.A., Wilmington, DE, Todd A. Walburg, Pro Hac Vice, Stephanie S. Riley, Connolly Gallagher LLP, Newark, DE, for Plaintiff.

Jeremy A. Moseley, Pro Hac Vice, Michael L. O'Donnell, Pro Hac Vice, Bartholomew J. Dalton, Andrew Caulfield Dalton, Michael Caulfield Dalton, Dalton & Associates P.A., Wilmington, DE, for Defendants.

REPORT AND RECOMMENDATION

Sherry R. Fallon, United States Magistrate Judge

I. INTRODUCTION

*1 Presently before the court in this products liability action is the motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, filed by defendants GE Healthcare Inc. and General Electric Company (together, "Defendants").¹ (D.I. 45) For the following reasons, I recommend that the court GRANT Defendants' motion for judgment on the pleadings.

¹ The briefing for the pending motion is as follows: Defendants' opening brief (D.I. 46), Plaintiff's answering brief (D.I. 48), Defendants' reply brief (D.I. 49), and Defendants' notices of supplemental authority (D.I. 54; D.I. 55).

II. BACKGROUND²

² The facts in this section are based upon allegations in the complaint, which the court accepts as

true for the purposes of the present motion for judgment on the pleadings. See *Umland v. Planco Fin. Servs.*, 542 F.3d 59, 64 (3d Cir. 2008). The court has not considered matters outside the pleadings in its Report and Recommendation. Therefore, Plaintiff's request to convert the motion for judgment on the pleadings to a motion for summary judgment based on Defendants' reliance on matters outside the pleadings is moot. (D.I. 48 at 18)

On May 3, 2018, plaintiff Debra Javens ("Plaintiff") filed this products liability action in the District of Massachusetts, alleging causes of action for: (1) strict liability for failure to warn, and (2) negligent failure to warn and negligent design and manufacturing of Defendants' gadolinium-based contrast agent, Omniscan. (D.I. 1) Pursuant to the parties' stipulation, the case was transferred to this court on July 12, 2018. (D.I. 13; D.I. 15-17) On October 19, 2018, Defendants filed their answer and affirmative defenses, including the affirmative defense of federal preemption. (D.I. 23 at ¶ 14) Defendants subsequently filed the pending motion for judgment on the pleadings on November 15, 2019. (D.I. 45)

Plaintiff alleges that she had normal kidney function until she underwent multiple magnetic resonance angiographies ("MRAs") and/or magnetic resonance imaging scans ("MRIs"). (D.I. 1 at ¶ 10) At the time of the procedures, Plaintiff was injected with a gadolinium-based contrast agent ("GBCA") called Omniscan,³ which is manufactured and sold by Defendants. (*Id.* at ¶¶ 1, 10) Thereafter, Plaintiff developed Gadolinium Deposition Disease ("GDD"), exhibiting symptoms including cognitive impairment, burning skin sensation, heart palpitations, and pain throughout her body. (*Id.* at ¶ 10) According to Plaintiff, these symptoms are consistent with the toxic effects of retained gadolinium, which is a highly toxic heavy metal that does not occur naturally in the human body. (*Id.* at ¶¶ 11, 13)

³ A gadolinium-based contrast agent is injected intravenously to enhance the imaging in a diagnostic study such as an MRI. (D.I. 1 at ¶¶ 2, 10)

Plaintiff's complaint outlines a substantial amount of clinical data allegedly establishing a connection between GBCAs and the deposition and long-term retention of toxic gadolinium in organ tissues. (*Id.* at ¶¶ 14, 24, 27-40, 43) The FDA issued a public safety alert in July 2015 in response to a 2014 study by the Mayo Clinic which found gadolinium deposits in the brains of deceased individuals who had normal renal function

and had received multiple injections of GBCAs in the years prior to their deaths. (*Id.* at ¶¶ 39, 41) In September 2017, the FDA’s medical advisory committee voted in favor of adding a warning on GBCA labels that gadolinium may be retained in some organs, even in patients with normal kidney function. (*Id.* at ¶ 42) Although Defendants corrected their label in 2012 to include contraindications for use in people with kidney disease or injury, the label does not contain a warning regarding the possibility of gadolinium retention in people with normal renal function. (*Id.* at ¶ 44)

III. LEGAL STANDARD

*2 Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). When deciding a Rule 12(c) motion for judgment on the pleadings based on an allegation that the plaintiff has failed to state a claim, the motion is analyzed under the same standards that apply to a Rule 12(b)(6) motion. *Revell v. Port Auth.*, 598 F.3d 128, 134 (3d Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011).

To state a claim upon which relief can be granted pursuant to Rule 12(b)(6), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required, the complaint must set forth sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Under this standard, the court must accept all well-pleaded factual allegations as true, and must draw all reasonable inferences in favor of the non-moving party. *See Turbe v. Gov’t of Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991). This determination is a context-specific task requiring the court “to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

IV. DISCUSSION

A. Strict Liability

In support of the motion for judgment on the pleadings, Defendants contend that Plaintiff’s cause of action for strict liability based on an alleged failure to warn fails as a matter of law because Pennsylvania, Delaware, and Massachusetts do not recognize strict liability claims in the context of prescription drugs. (D.I. 46 at 12) In response, Plaintiff offers to voluntarily dismiss her claim for product liability

based on a strict liability theory. (D.I. 48 at 3) Accordingly, I recommend that the court dismiss Count 1 of Plaintiff’s complaint with prejudice.

B. Negligence

1. Preemption of failure to warn claim

Plaintiff’s complaint alleges that Defendants were negligent in their use of labels which failed to adequately warn consumers and health care providers of the risks of injury associated with GBCAs such as *Omniscan*:

Defendants failed to exercise ordinary care in the labeling of gadolinium-based contrast agents (including *Omniscan*) and the labeling of MRI and MRA machines designed to be used in conjunction with gadolinium-based contrast agents and failed to issue to consumers and their health care providers adequate warnings concerning the risks of serious bodily injury due to the use of gadolinium-based contrast agents (including *Omniscan*) and the MRI and MRA machines designed to be used in conjunction with gadolinium-based contrast agents.

(D.I. 1 at ¶ 54) In support of their motion for judgment on the pleadings, Defendants contend that these allegations for failure to warn are preempted by the labeling regulations of the Food and Drug Administration (“FDA”). (D.I. 46 at 13) In this context, the court must consider “whether federal law (including appropriate FDA actions) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law.” *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1678 (2019).

Federal preemption occurs “when it is ‘impossible for a private party to comply with both state and federal requirements.’ ” *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672 (2019) (quoting *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013)). In accordance with the federal Food, Drug, and Cosmetic Act (“FDCA”), the

Food and Drug Administration (“FDA”) regulates the safety information included on the labels of prescription drugs marketed to consumers in the United States. *Id.* (citing 21 U.S.C. § 355(b)(1)(F); 21 C.F.R. § 201.57(a) (2018)). Accordingly, state common law and state statutes requiring drug manufacturers to warn consumers of the associated risks of a drug are preempted by the FDCA when there is “clear evidence” that the FDA would not have approved the warning required by state law. *Id.*; *Wyeth v. Levine*, 555 U.S. 555, 571 (2009). In *Albrecht*, the United States Supreme Court defined “clear evidence” as “evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug’s label to include that warning.” *Albrecht*, 139 S. Ct. at 1672.

*3 Under the FDCA, the FDA is responsible for ensuring that prescription drugs are “safe for use under the conditions prescribed, recommended, or suggested” in the drug’s labeling, 21 U.S.C. § 355(d), and “a manufacturer may only change a drug label after the FDA approves a supplemental application,” *Levine*, 555 U.S. at 568. Nonetheless, a state law failure-to-warn claim may survive a preemption challenge if the complaint alleges that new information became available to the drug manufacturer after the FDA’s initial approval and the drug manufacturer sought to amend the label under the “changes being effected” or “CBE” regulation, 21 C.F.R. § 314.70(c)(6)(iii). See *Levine*, 555 U.S. at 568; *Bell v. Boehringer Ingelheim Pharms., Inc.*, 2018 WL 2447788, at *6 (W.D. Pa. May 31, 2018). The CBE regulation allows drug manufacturers to make certain changes to drug labels without first obtaining FDA approval if the change is intended to “add or strengthen” a warning based on newly acquired information of a causal association between the drug and a risk of harm. *Albrecht*, 139 S. Ct. at 1673 (citing 21 C.F.R. § 314.70(c)(6)(iii)(A)). Because the CBE regulation permits drug manufacturers to change warning labels prior to FDA approval, drug manufacturers ordinarily will not be able to show an actual conflict between state and federal law that would make it impossible to comply with both, and the claim is not preempted. *Id.* at 1679; see also *Levine*, 555 U.S. at 568-72; *McGrath v. Bayer HealthCare Pharms., Inc.*, 393 F. Supp. 3d 161, 167 (E.D.N.Y. 2019).

According to Defendants, Plaintiff’s failure to warn claim is preempted because the complaint fails to identify newly acquired information to correct the alleged labeling deficiency in accordance with the CBE regulation. (D.I. 46

at 16-17) The Code of Federal Regulations defines “newly acquired information” to include:

data, analyses, or other information not previously submitted to the [FDA], which may include (but is not limited to) data derived from new clinical studies, reports of adverse events, or new analyses of previously submitted data ... if the studies, events, or analyses reveal risks of a different type or greater severity or frequency than previously included in submissions to FDA.

21 C.F.R. § 314.3(b). Thus, this requirement “accounts for the fact that risk information accumulates over time and that the same data may take on a different meaning in light of subsequent developments.” *Levine*, 555 U.S. at 569. Newly acquired information must reasonably establish a causal association between the drug and a clinically significant adverse reaction. *McGrath*, 393 F. Supp. 3d at 167 (citing 21 C.F.R. § 201.57(c)(6)(i)); see also *Utts v. Bristol-Myers Squibb Co.*, 251 F. Supp. 3d 644, 659 (S.D.N.Y. 2017). This is because “labeling that includes theoretical hazards not well-grounded in scientific evidence can cause meaningful risk information to lose its significance.” *Utts*, 251 F. Supp. 3d at 659 (internal citations and quotation marks omitted).

I recommend that the court grant Defendants’ motion for judgment on the pleadings regarding Plaintiff’s failure to warn claim because Plaintiff’s complaint fails to identify any newly acquired information causally associated with a safety risk to patients. The complaint refers to numerous studies focusing on gadolinium retention in animals and humans with normal renal function, but these allegations do not identify any specific risks associated with the retention of gadolinium. (D.I. 1 at ¶¶ 27-32, 38-39, 43) In an analogous case assessing the sufficiency of the pleading, the *McGrath* court concluded that “allegations focus[ing] on gadolinium retention” in patients with normal renal function were insufficient to establish the requisite causal link to a “clinically significant adverse reaction” experienced by the plaintiff. *McGrath*, 393 F. Supp. 3d at 168-69 (“[I]t helps precious little to mount scientific minutiae on top of technical jargon if that information ultimately does not plead a plausible causal association between *Magnevist* and adverse effects,

like fibrosis.”). Plaintiff’s complaint indicates that the FDA’s National Center for Toxicological Research team is currently “working on determining the exact consequences of these new findings” of gadolinium retention in patients with normal renal function. (D.I. 1 at ¶ 41) Consistent with *McGrath*, this allegation confirms that “the incidence of any risks associated with gadolinium retention is inconclusive.” *McGrath*, 393 F. Supp. 3d at 168 (considering allegations regarding the same 2004 and 2013 studies cited at paragraphs 38 and 43 of Plaintiff’s complaint in the instant litigation); see also *Sabol v. Bayer Healthcare Pharm., Inc.*, 2020 WL 705170, at *12 (S.D.N.Y. Feb. 12, 2020) (granting Rule 12(b)(6) motion to dismiss because complaint made “only conclusory allegations that gadolinium retention can cause the kind of debilitating symptoms [plaintiff] has suffered.”).

*4 The complaint also alleges that numerous patients with normal renal function reported adverse reactions to the FDA after receiving injections with GBAs. (D.I. 1 at ¶¶ 36-37) Under the federal regulations, such reports of adverse events may constitute newly acquired information. See 21 C.F.R. § 314.3(b). But the Supreme Court has cautioned that “the mere existence of reports of adverse events ... says nothing in and of itself about whether the drug is causing the adverse events.” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). Here, the complaint’s allegations regarding symptomatic patients likewise fail to establish a causal association between the reported symptoms and the receipt of GBA injections. See *Sabol*, 2020 WL 705170, at *13 (“[W]hile federal regulations define ‘newly acquired information’ to include items such as adverse event reports ... the CBE regulation still requires causation.”). Likewise, the complaint does not establish a causal association between Plaintiff’s use of *Omniscan* injections and her alleged symptoms of cognitive impairment, burning sensation on her skin, heart palpitations, and pain throughout her body. (D.I. 1 at ¶ 10) “The fact that a user of a drug has suffered an adverse event, standing alone, does not mean that the drug caused that event.” *Matrixx*, 563 U.S. at 44.

Because the complaint fails to identify studies or other evidence establishing the clinical consequences of gadolinium retention in patients with normal renal function, the requirements to invoke the CBE regulation are not met. See *McGrath*, 393 F. Supp. 3d at 169-70. Therefore, the court need not reach the analysis of whether Defendants have shown “clear evidence” that the FDA would not have approved a change to the drug’s label.⁴ See *id.* at 171 (“[B]ecause Bayer could not have amended the warning

under the CBE regulation, this Court need not even consider whether there is clear evidence the FDA would not have approved a change to *Magnevist*’s label.”); *Drescher v. Bracco Diagnostics, Inc.*, 2020 WL 699878, at *4 (D. Ariz. Jan. 31, 2020) (concluding that the clear evidence standard only applies if a label change is permitted under the CBE regulations).

4 The pleading in the instant case does not identify when Plaintiff was administered *Omniscan* in connection with any diagnostic imaging studies, beyond alleging that she discovered adverse effects in 2016. (D.I. 1 at ¶¶ 23-24) The parties do not dispute that, in 2018, the FDA issued a drug safety communication that contained the following pertinent language: “Gadolinium retention has not been directly linked to adverse health effects in patients with normal kidney function.” (D.I. 46, Ex. A at 2) Plaintiff “offers no persuasive reason why the Court should ignore” the FDA’s 2017 notice. *Sabol v. Bayer Healthcare Pharm., Inc.*, 2020 WL 705170, at *12 (S.D.N.Y. Feb. 12, 2020). Because the FDA found no causal connection between gadolinium retention and adverse health events in patients with normal renal function in 2018, there is no basis to suggest the FDA would have approved placement of a warning label stating otherwise at the time Plaintiff discovered her injury on or before 2016. See *Smith v. GE Healthcare, Inc.*, 2020 WL 1880787, at *7 (W.D. La. Mar. 31, 2020) (“The language of the [FDA’s 2018] label change, specifically stating facts contrary to the warning sought by [the plaintiff], is clear evidence that the FDA would not have approved a label change which warned of such adverse effects.”), *report and recommendation adopted by* 2020 WL 1875644 (W.D. La. Apr. 15, 2020); *Thomas v. Bracco Diagnostics, Inc.*, 2020 WL 1016273 (W.D. La. Feb. 27, 2020) (same), *report and recommendation adopted by* 2020 WL 1243389 (W.D. La. Mar. 13, 2020).

Plaintiff contends that, because preemption is an affirmative defense, Defendants should bear the initial burden of proof instead of improperly shifting the initial burden to Plaintiff to plead the existence of newly acquired information justifying the label change under the CBE regulation. (D.I. 48 at 4-5) The law is well-established that preemption is an affirmative defense on which the defendant bears the burden of proof, and the plaintiff need not anticipate affirmative defenses in

the pleadings. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (concluding there was no basis to impose a burden on the plaintiff to anticipate an affirmative defense). Nonetheless, a defendant may properly move for judgment on the pleadings based on the affirmative defense of preemption. See *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 645 (7th Cir. 2019) (citing *Bausch v. Stryker Corp.*, 630 F.3d 546, 561-62 (7th Cir. 2010)); see also *In re Asbestos Prods. Liability Litig. (No. VI)*, 822 F.3d 125, 133 n.6 (3d Cir. 2016) (recognizing that the “allocation of the burden of proof suggests that a motion under Rule 12(c) for judgment on the pleadings is a more appropriate procedural vehicle for dismissing cases on preemption grounds, instead of a motion under Rule 12(b)(6), except for cases in which preemption is manifest in the complaint itself.”). Because the affirmative defense of federal preemption primarily raises a legal issue, it is properly considered at the pleading stage in the context of a Rule 12(c) motion. See *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 344 (3d Cir. 2001).

*5 In the narrow context of failure to warn claims brought pursuant to the CBE regulation, numerous district courts have held that dismissal at the pleading stage is appropriate if the complaint fails to “present sufficient factual allegations to show that the manufacturer could unilaterally change its label in accordance with FDA regulations.” *Sabol v. Bayer Healthcare Pharm., Inc.*, 2020 WL 705170, at *6 (S.D.N.Y. Feb. 12, 2020) (citing *Utts v. Bristol-Myers Squibb Co.*, 251 F. Supp. 3d 644, 672 (S.D.N.Y. 2017)); see also *McGrath*, 393 F. Supp. 3d at 168; *Holley v. Gilead Scis., Inc.*, 379 F. Supp. 3d 809, 828-30 (N.D. Cal. 2019). If this preliminary showing is not made, the court need not reach a determination of whether the defendant has shown clear evidence that the FDA would have rejected the proposed label change. See *McGrath*, 393 F. Supp. 3d at 168 (“[B]ecause Bayer could not have amended the warning under the CBE regulation, this Court need not even consider whether there is clear evidence the FDA would not have approved a change to Magnevist’s label.”); *Drescher v. Bracco Diagnostics, Inc.*, 2020 WL 699878, at *4 (D. Ariz. Jan. 31, 2020) (concluding that the clear evidence standard only applies if a label change is permitted under the CBE regulations).

At least two Courts of Appeal have also held that the preemption determination may be properly resolved at the pleading stage. See *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 708 (2d Cir. 2019) (affirming the district court’s dismissal of a failure-to-warn claim where the complaint contained insufficient factual allegations to show

the existence of newly acquired information); *In re Celexa & Lexapro Marketing & Sales Practices Litig.*, 779 F.3d 34, 38, 42-43 (1st Cir. 2015) (affirming district court’s dismissal of failure-to-warn claim as preempted by FDA regulations). Applying Supreme Court case authorities, the Court of Appeals for the First Circuit determined that “a necessary step in defeating [the defendant’s] preemption defense is to establish that the complaint alleges a labeling deficiency that [the defendant] could have corrected using the CBE regulation.” *In re Celexa*, 779 F.3d at 41. The First Circuit affirmed dismissal of the complaint on preemption grounds after finding that the complaint challenged the accuracy and adequacy of studies which were known to the FDA at the time of approval. *Id.* at 38, 42-43. Similarly, the Court of Appeals for the Second Circuit upheld the dismissal of state law failure-to-warn claims as preempted when the “allegations ... d[id] not plausibly allege the existence of newly acquired information that could have justified Defendants’ revising the [drug’s] label through the CBE regulation.” *Gibbons*, 919 F.3d at 708. Allegations regarding post-approval reports and studies showing serious hemorrhaging in patients using the drugs did not constitute newly acquired evidence because they did not “reveal[] risks of a different type or greater severity or frequency than previously included in submissions to the FDA.” *Id.* (quoting 21 C.F.R. § 314.3(b)). Thus, the court may grant Defendants’ Rule 12(c) motion without improperly shifting the burden from Defendants to Plaintiff on the issue of federal preemption.

Plaintiff alleges that the Supreme Court’s decision in *Albrecht* superseded the Second Circuit’s decision in *Gibbons* by requiring a showing of “clear evidence” by the defendant and declining to “explicitly or impliedly lay any burden at the feet of the plaintiff in the impossibility preemption inquiry.” (D.I. 48 at 9-10) But the issue of newly acquired information was not before the Supreme Court in *Albrecht* because the drug manufacturer conceded that it could have changed the label under the CBE regulation: “Merck conceded that the FDA’s CBE regulation would have permitted Merck to try to change the label to add a warning before 2010, but Merck asserted that the FDA would have rejected that attempt.” *Albrecht*, 139 S. Ct. at 1675 (addressing preemption of failure-to-warn claims on summary judgment). In contrast, Defendants in this case allege that there is no scientific evidence that would have allowed them to strengthen the Omniscan labeling under the CBE regulation. (D.I. 49 at 4 n.1) Consistent with Defendants’ position, the Supreme Court in *Albrecht* acknowledged that “manufacturers cannot propose a change that is not based on reasonable evidence” in accordance with

21 C.F.R. § 314.70(c)(6)(iii)(A). *Albrecht*, 139 S. Ct. at 1679. Further confirming this point, courts have favorably applied *Gibbons* in decisions issued following the Supreme Court's decision in *Albrecht*. See *Holley v. Gilead Scis., Inc.*, 410 F. Supp. 3d 1096, 1107 (N.D. Cal. 2019); *McGrath*, 393 F. Supp. 3d at 168-69.

*6 For the foregoing reasons, I recommend that the court grant Defendants' motion for judgment on the pleadings as it pertains to Plaintiff's negligent failure-to-warn claim.

2. Preemption of design and manufacturing defect claim

Defendants also allege that Plaintiff's design and manufacturing defect claim is preempted because Defendants cannot alter Omniscan's FDA-approved design and manufacturing practices under the applicable federal regulations. (D.I. 46 at 18-19) In response, Plaintiff contends that its design defect claim is not preempted because it is not premised on a failure to warn theory. (D.I. 48 at 16) Instead, Plaintiff argues that the complaint pleads facts showing a safer alternative design to Omniscan already exists in Defendants' Clariscan product. (*Id.*)

I recommend that the court grant Defendants' motion for judgment on the pleadings with respect to Plaintiff's design and manufacturing defect claim. The law is well-established that, "[o]nce a drug—whether generic or brand-name—is approved, the manufacturer is prohibited from making any major changes to the 'qualitative or quantitative formulation of the drug product, including active ingredients, or in the specifications provided in the approved application.' " *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 477 (2013) (quoting 21 C.F.R. § 314.70(b)(2)(i)). The complaint acknowledges that Omniscan was approved by the FDA. (D.I. 1 at ¶ 31) Even assuming the truth of the complaint's allegations regarding the greater safety of the macrocyclic contrast agents over linear contrast agents like Omniscan (*id.* at ¶¶ 26, 29), Defendants would need to obtain FDA approval of such a change to the manufacture of Omniscan, see *Yates v. Ortho-McNeil-Janssen Pharms., Inc.*, 808 F.3d 281, 298 (6th Cir. 2015) (holding that post-approval design defect claims are "clearly preempted by federal law").

To the extent that Plaintiff argues Defendants should have marketed their Clariscan macrocyclic product in lieu of the linear Omniscan contrast agent, the Supreme Court has rejected the " 'stop-selling' rationale as incompatible with

our pre-emption jurisprudence." *Bartlett*, 570 U.S. at 488. Specifically, "an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability." *Id.*

C. Conversion to Motion for Summary Judgment and Leave to Amend

I recommend that the court deny Plaintiff's alternative request to convert Defendants' motion for judgment on the pleadings into a motion for summary judgment. The discovery Plaintiff requests in connection with the motion goes to the "clear evidence" inquiry, and does not advance the issue of whether newly acquired information exists:

- (1) whether, in fact, GEHC ever attempted to include in its product labeling those warnings implicated by Plaintiff's state-law claim;
- (2) whether, in fact, GEHC ever requested that FDA permit such warnings; and
- (3) whether, in fact, FDA ever took any action—formal or otherwise—to block, forbid, or deny GEHC's request to give such warnings.

(D.I. 48 at 17) Therefore, the discovery requested by Plaintiff would not alter the outcome of the present motion.

*7 I further recommend that the court deny Plaintiff's request for leave to amend the complaint. The deadline for amended pleadings expired on May 24, 2019, and Plaintiff offers no support for her request for leave to amend to explain how the deficiencies identified by Defendants could be overcome. (D.I. 37 at ¶ 2; D.I. 48 at 2, 18) For the reasons previously stated, it is not apparent that additional discovery would remedy these deficiencies. Consequently, leave to amend would be futile. See *Smith v. GE Healthcare, Inc.*, 2020 WL 1880787, at *1, 5, 7 (W.D. La. Mar. 31, 2020) (recommending dismissal with prejudice of the plaintiff's design defect and failure-to-warn claims on the basis of preemption), *report and recommendation adopted by* 2020 WL 1875644 (W.D. La. Apr. 15, 2020).

V. CONCLUSION

2020 1 W2L3873©

For the foregoing reasons, I recommend that the court GRANT Defendants' motion for judgment on the pleadings with prejudice. (D.I. 45)

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The objection and responses to the objections are limited to ten (10) pages each. The failure of a party to object to legal conclusions may result in the loss of the right to de

novo review in the District Court. See *Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987).

The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, <http://www.ded.uscourts.gov>.

All Citations

Slip Copy, 2020 WL 2783581

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 27

2015 WL 1120009

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.

Brandy JOHNSON, Plaintiff,

v.

ELI LILLY AND COMPANY, Defendant.

No. 1:14cv453.

|

Filed March 12, 2015.

Attorneys and Law Firms

J. Pierre Tismo, Seth W. Schanher, Dyer, Garofalo, Mann & Schultz, Dayton, OH, Joseph J. Zonies, Mark Premo-Hopkins, Reilly Pozner LLP, Denver, CO, Christopher L. Schnieders, Thomas P. Cartmell, Wagstaff & Cartmell, LLP, Kansas City, MO, for Plaintiff.

John Charles Hansberry, Pepper Hamilton LLP, Pittsburgh, PA, Martin Harry Lewis, Tucker Ellis & West LLP, Cleveland, OH, Anthony Vale, Pepper Hamilton LLP, Philadelphia, PA, for Defendant.

OPINION & ORDER

MICHAEL R. BARRETT, District Judge.

*1 This matter is before the Court upon Defendant's Motion to Dismiss Four Counts of the Complaint and for an Order Pursuant to Rule 9(b). (Doc. 8). Plaintiff filed a Response in Opposition (Doc. 9) and Defendant filed a Reply (Doc. 13).

I. BACKGROUND

Plaintiff alleges that while she was pregnant, she took [Prozac](#), which is a prescription medication sold by Defendant Eli Lilly and Company. Plaintiff claims [Prozac](#) caused her son to be born with certain [birth defects](#) which led to his death when he was less than one year old.

Defendant argues that Plaintiff's claims for breach of warranty—implied warranty of fitness for particular purpose (Count Five), breach of warranty—implied warranty of merchantability (Count Six) and fraudulent misrepresentation (Count Seven) are abrogated by Ohio's Product Liability Act

(“OPLA”). Defendant also moves for an order pursuant to [Federal Rule of Civil Procedure 9\(b\)](#) requiring Plaintiff to plead with specificity the facts relating to her allegations of fraudulent concealment, and if Count Seven is not dismissed, the circumstances of the fraud alleged. Finally, Defendant argues that Plaintiff's claim for defective manufacturing/construction (Count One) fails to state a claim

Plaintiff agrees that her claims for breach of warranty—implied warranty of fitness for particular purpose (Count Five) and breach of warranty—implied warranty of merchantability (Count Six) should be dismissed. (*See* Doc. 9, PAGEDID# 62, n. 2). However, Plaintiff disputes that her claim for fraudulent misrepresentation (Count Seven) falls within the scope of OPLA, and argues that it meets the requirements of [Rule 9\(b\)](#). Plaintiff also argues that she has adequately plead a claim for defective manufacturing/construction (Count One).

II. ANALYSIS**A. Standard of Review**

“[T]o survive a motion to dismiss, a complaint must contain (1) ‘enough facts to state a claim to relief that is plausible,’ (2) more than ‘a formulaic recitation of a cause of action's elements,’ and (3) allegations that suggest a ‘right to relief above a speculative level.’” *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir.2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). “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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). However, the factual allegations “must contain more than conclusions and an unsubstantiated recitation of the necessary elements of a claim.” *McCormick v. Miami Univ.*, 693 F.3d 654, 658 (6th Cir.2012).

[Federal Rule of Civil Procedure 9\(b\)](#) requires that “in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” As one district court has recently explained:

It is well-settled in the Sixth Circuit that circumstances constituting fraud include “the time, place, and content of the alleged misrepresentation” as well as the identity of the individual making the representation. *United States v. Ford Motor Co.*, 532 F.3d 496, 504 (6th Cir.2008) (internal

quotations omitted); *Sogevalor, SA v. Penn Central Corp.*, 771 F.Supp. 890, 893 (S.D.Ohio 1991) (citing *Michaels Bldg. Co. v. Ameritrust Co.*, N.A., 848 F.2d 674, 680 (6th Cir.1988)). The plaintiff must also allege “the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.” *Ford Motor*, 532 F.3d at 504.

*2 *MISC Berhard v. Advanced Polymer Coatings, Inc.*, No. 1:14 CV 1188, 2014 WL 5038001, at *2 (N.D.Ohio Oct.8, 2014).

B. Ohio Product Liability Act abrogation

The OPLA applies to “recovery of compensatory damages based on a product liability claim,” in addition to “[a]ny recovery of punitive or exemplary damages in connection with a product liability claim.” Ohio Rev.Code § 2307.72(A) & (B). “The OPLA has been held to abrogate claims for strict products liability, negligent failure to warn, breach of express warranty, and breach of implied warranty.” *Mitchell v. Proctor & Gamble*, No. 2:09–CV–426, 2010 WL 728222, at *3 (S.D.Ohio Mar.1, 2010) (and cases cited therein); see also Ohio Rev.Code § 2307.71(B) (“Sections 2307.71 to 2307.80 are intended to abrogate all common law product liability causes of action.”).

However, “[c]laims of active misrepresentation (as opposed to failure to warn) in connection with a product are not abrogated by the OPLA.” *Boroff v. Alza Corp.*, 685 F.Supp.2d 704, 711 (N.D.Ohio 2010) (citing *Hollar v. Philip Morris, Inc.*, 43 F.Supp. 2d 794, 809 (N.D.Ohio 1998) (holding that claims of active misrepresentation implicate a broader “duty not to deceive” and are thus not product liability claims barred by the OPLA)); see also *Hogue v. Pfizer, Inc.*, 893 F.Supp.2d 914, 918 (S.D.Ohio 2012) (explaining that “the OPLA does not abrogate fraud claims which are based on a general duty not to actively deceive; however, the OPLA does abrogate fraud claims arising from a duty to warn.”) (citing *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 348–49 (6th Cir.2000)).

Here, Plaintiff’s claim for fraudulent misrepresentation is based upon a duty to warn. In her Complaint, Plaintiff alleges Defendant knew or should have known about the adverse side effects and risks of *Prozac* as early as 1987. (Doc. 1, ¶¶ 29–31). Plaintiff alleges that instead of disclosing these risks, Defendant “made consistent and repeated misrepresentations ... in its promotional materials and marketing documents,” fraudulently proclaiming *Prozac*

“has no association with *teratogenicity* ... and is safe and effective for use during pregnancy and in woman of childbearing age.” (*Id.*, ¶¶ 44, 104, 106). Plaintiff also alleges that Defendant “fraudulently omitted” information regarding “the risks of *birth defects* revealed in Lilly’s animal studies on *Prozac*” breached its “duty to disclose material information” regarding *Prozac*. (*Id.*, ¶¶ 22, 29–31, 44, 103, 107–108).

These allegations show that Plaintiff’s fraud claim is based on a theory of omission and concealment. Accord *Hogue*, 893 F.Supp.2d at 919 (explaining that “claims of fraud based upon fraudulent misrepresentation and concealment are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion.”) (quoting *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 349 (6th Cir.2000)). Therefore, the Court finds that Plaintiff’s claim of fraudulent misrepresentation (Count Seven) falls within the scope of OPLA and is DISMISSED.

C. Defective manufacturing/construction

*3 Defendant argues that Plaintiff has failed to state a claim for defective manufacturing/construction (Count One). Plaintiff’s claim is brought pursuant to Ohio Revised Code § 2307.74, which provides:

A product is defective in manufacture or construction if, when it left the control of its manufacturer, it deviated in a material way from the design specifications, formula, or performance standards of the manufacturer, or from otherwise identical units manufactured to the same design specifications, formula, or performance standards. A product may be defective in manufacture or construction as described in this section even though its manufacturer exercised all possible care in its manufacture or construction.

Ohio Rev.Code § 2307.74. One court found the plaintiff adequately plead a claim under this section where the plaintiff alleged “specific problems with the product; namely, that test results showed the product was out of specification with regard to its primary compound, and that this was a deviation

2015 WL 1120009

from the product's intended characteristics.” *Friedman v. Intervet Inc.*, No. 3:09CV2945, 2010 WL 2817257, at *3 (N.D. Ohio July 16, 2010).

Here, Plaintiff has merely alleged that the *Prozac* “was not made in accordance with” Defendant’s “specifications or performance standards,” and Defendant “sold and/or distributed *Prozac* in a condition that posed unreasonable risks from reasonably anticipated use.” (Doc. 1, ¶¶ 57, 59(c)). Plaintiff argues that without discovery she cannot specify the manufacturing defect. However, this Court has previously rejected this argument. See *Frey v. Novartis Pharm. Corp.*, 642 F.Supp.2d 787, 792 (S.D. Ohio 2009) (finding that the plaintiffs failed to adequately plead claim under *Ohio Rev. Code* § 2307.74 even though the plaintiffs argued that “they cannot particularly allege that the scientific makeup of the drug is defective for a specific reason without conducting discovery, which requirement would exceed *Twombly*’s plausibility standard.”). Accordingly, the

Court finds that Plaintiff has failed to state a claim under *Ohio Revised Code* § 2307.74 and therefore, that claim is DISMISSED.

III. CONCLUSION

Based on the foregoing, Defendants’ Motion to Dismiss (Doc. 8) is **GRANTED** as to Plaintiff’s claim for claims for breach of warranty—implied warranty of fitness for particular purpose (Count Five), breach of warranty—implied warranty of merchantability (Count Six) and fraudulent misrepresentation (Count Seven) and claim for defective manufacturing/construction (Count One).

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1120009

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 28

2017 WL 4348997

United States District Court, N.D. Ohio.

Donald KODGER Plaintiff,

v.

ZIMMER BIOMET HOLDINGS,
INC., et al., Defendants.

Case No. 1:17-cv-1350

Signed 09/29/2017

Attorneys and Law Firms

Donald O. Kodger, Brunswick, OH, Plaintiff.

Andrew L. Campbell, Pro Hac Vice, Eldin Hasic, Faegre Baker Daniels, Indianapolis, IN, Stephen M. O'Bryan, Taft, Stettinius & Hollister, Cleveland, OH, Ryan C. Edwards, Taft Stettinius & Hollister, Cincinnati, OH, Defendants.

OPINION & ORDER

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE

OPINION & ORDER [Resolving Docs. 22, 29, 33, 35-1]

*1 This is a products liability case. Plaintiff Donald Kodger suffered injuries after a bearing in his right knee implant failed. Plaintiff now brings claims of negligence and strict liability against the manufacturers of his knee implant, Zimmer Biomet Holdings, Inc., Biomet Orthopedics LLC, and Zimmer Biomet ("Biomet Defendants").

Defendants move to dismiss Plaintiff's complaint.¹ Plaintiff opposes.² For the following reasons, the Court **DENIES** Defendants' motion to dismiss, but **GRANTS** Plaintiff leave to amend the complaint.

¹ Doc. 22.

² Doc. 29. Defendants replied. Doc. 33. Plaintiff filed a sur-reply. Doc. 35-1.

I. BACKGROUND**A. Plaintiff's Injuries**

On March 31, 2008, Plaintiff Kodger received a right knee Biomet Oxford Meniscal Unicompartmental Knee System ("Biomet knee implant").³ Three years later, Plaintiff began experiencing severe pain in his right knee.⁴ It was not until June 2015 that X-rays revealed that a component in his Biomet knee implant had collapsed.⁵ Plaintiff alleges that the bearing in his Biomet knee implant had collapsed into his knee joint.⁶ Plaintiff underwent surgery to obtain a full knee replacement.⁷

³ Doc. 16-1 at ¶ 8.

⁴ *Id.* at ¶ 10.

⁵ *Id.* at ¶¶ 12-16.

⁶ *Id.* at ¶¶ 30-33, 47-50.

⁷ *Id.* at ¶¶ 18-19.

According to data in the Manufacturer and User Facility Device Experience ("MAUDE") database, there were 26 total bearing failures for Biomet knee implants manufactured between 2007 and 2008, around the time Plaintiff received his Biomet knee implant.⁸ That represents 23% of all bearing failures in Biomet knee implants manufactured between 1999 and 2017.⁹

⁸ *Id.* at ¶¶ 32, 49.

⁹ *Id.*

B. FDA Regulation of the Biomet Knee Implant

Defendants are the developers, manufacturers, and marketers of the Biomet knee implant.¹⁰

¹⁰ *Id.* at ¶ 24.

Under the Food, Drug and Cosmetic Act (FDCA),¹¹ and the Medical Device Amendments of 1976 (MDA),¹² all medical devices, such as the Biomet knee implant, are subject to Food and Drug Administration (FDA)-imposed regulations concerning design, manufacture, labeling, marketing, and sale.

¹¹ 21 U.S.C. § 301 *et seq.*

¹² 21 U.S.C. § 360c *et seq.*

The MDA imposes different levels of federal oversight depending on the medical device's risks.¹³ As a Class III device, the Biomet [knee implant](#) is subject to the most stringent federal oversight.¹⁴ The Biomet [knee implant](#) is a Class III device because "it cannot be established that a less stringent classification would provide reasonable assurance of safety and effectiveness."¹⁵ It also received this classification because the Biomet [knee implant](#) is "purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health" or "presents a potential unreasonable risk of illness or injury."¹⁶

¹³ [§ 360c\(a\)\(1\)\(A\)–\(C\)](#).

¹⁴ Plaintiff does not specifically plead that the Biomet [knee implant](#) is a Class III device. *See* Doc. 16–1. However, the Court can take judicial notice of these facts from the FDA approval letter attached to Defendants' motion, *see* Doc. 13–1. Plaintiff incorporated it by reference in his complaint (Doc. 16–1 at ¶ 28). *See Armengau v. Cline*, 7 Fed.Appx. 336, 344 (6th Cir. 2001) ("If referred to in a complaint and central to the claim, documents attached to a motion to dismiss form part of the pleadings.").

¹⁵ [Riegel v. Medtronic, Inc.](#), 552 U.S. 312, 317 (2008).

¹⁶ [§ 360c\(a\)\(1\)\(C\)\(ii\)](#).

*2 As a result, before the Biomet [knee implant](#) could enter the market, it had to go through the FDA's Premarket Approval (PMA) process.¹⁷ To receive FDA approval, Defendants were required to submit information about their device's proposed design, manufacture, and labeling.¹⁸ Based on these submissions and a comprehensive review, the FDA had to determine whether the Biomet [knee implant](#) was suitable for the market. The FDA grants PMA only if there is "reasonable assurance" of the device's "safety and effectiveness."¹⁹

¹⁷ [21 U.S.C. § 360e](#).

¹⁸ *Id.*

¹⁹ [§ 360e\(d\)](#). This "safety and effectiveness" determination involves a risk-benefit analysis; the FDA "weig[hs] any probable benefit to health from

the use of the device against any probable risk of injury or illness from such use." [§ 360c\(a\)\(2\)\(C\)](#).

On April 21, 2004, the FDA approved the Biomet [knee implant](#) for commercial distribution.²⁰

²⁰ Doc. 16–1 at ¶¶ 26–28.

Even though PMA was granted, as manufacturers of the Biomet [knee implant](#), Defendants remain subject to FDA regulations. Among other requirements, manufacturers must follow FDA's Current Good Manufacturing Practice (CGMP) requirements.²¹ "To comply with CGMP requirements, a device manufacturer must adopt a variety of procedures and controls relating to areas such as: (1) design control, (2) quality assurance, (3) manufacturing and processing, (4) process validation, (5) device inspection, and (6) corrective and preventive action."²²

²¹ [Gelber v. Stryker Corp.](#), 788 F.Supp.2d 145, 152 (S.D.N.Y. 2011) (citing [21 U.S.C. § 360j\(f\)](#) and 21 C.F.R. §§ 820 *et seq.*); *id.* [§ 820.1\(c\)](#).

²² [Gelber](#), 788 F.Supp.2d at 152 (citing [21 C.F.R. §§ 820.1–.250](#)).

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" ²³ The plausibility requirement is not a "probability requirement."²⁴ Plaintiff need not try to prove his case in the complaint. But there must be "more than a sheer possibility that the defendant has acted unlawfully."²⁵

²³ [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (quoting [Bell Atlantic v. Twombly](#), 550 U.S. 544, 570 (2007)).

²⁴ *Id.* (quoting [Bell Atlantic](#), 550 U.S. at 556).

²⁵ *Id.*

[Federal Rule of Civil Procedure 8](#) provides the general pleading standard and only requires that a complaint "contain...a short and plain statement of the claim showing that the pleader is entitled to relief."²⁶ "Rule 8 marks a notable and generous departure from the hypertechnical,

code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”²⁷ In deciding a motion to dismiss under Rule 12(b)(6), “a court should assume the[] veracity” of “well-pleaded factual allegations,” but need not accept a plaintiff’s conclusory allegations as true.²⁸

²⁶ Fed. R. Civ. P. 8(a)(2).

²⁷ Iqbal, 556 U.S. at 678–79 (citations omitted).

²⁸ Id. at 679.

In resolving a motion to dismiss, the Court must confine its review to the matters in the pleadings.²⁹ If the Court reviews matters outside the pleadings, “the motion must be treated as one for summary judgment under Rule 56.”³⁰

²⁹ Fed. R. Civ. P. 12(d).

³⁰ Id.

In their reply to Plaintiff’s opposition, Defendants asked this Court to convert their motion to dismiss into a motion for summary judgment.³¹ Defendants submitted a declaration and two exhibits that are extrinsic to the pleadings.³² Because the Court has not given the parties prior notice of its decision to do this conversion, the Court declines Defendants’ request.³³ Accordingly, in deciding this motion, this Court excludes Defendants’ materials extrinsic to the pleadings.³⁴

³¹ See Doc. 33 at 3 n.5.

³² See Docs. 33–2; 34–1. These documents state that Plaintiff’s Biomet knee implant was not manufactured in 2007 or 2008, as Plaintiff alleges in his Complaint. See Doc. 34–1.

³³ See Armengau, 7 Fed.Appx. at 343 (“Because of the risk of prejudicial surprise arising from the court’s treating a motion to dismiss as a motion for summary judgment, Rule 12(b) further requires notice and an opportunity to supplement the record before the court enters summary judgment.”).

³⁴ The Court will also not take judicial notice of Defendants’ extrinsic materials because they concern adjudicative facts. See id. at 344–45 (finding that taking judicial notice of

“adjudicative facts” would “run afoul of Rule 12(b)’s admonition against considering matters outside the pleadings”).

III. ANALYSIS

*3 In this products liability case, Plaintiff brings claims of negligence and strict liability for manufacturing defects associated with his Biomet knee implant.³⁵

³⁵ Plaintiff says he does not allege any failure to warn claim. Doc. 29 at 2. We therefore do not consider the claim.

In seeking dismissal, Defendants argue that Plaintiff Kodger’s claims must be dismissed because they are (1) federally preempted and (2) abrogated by the Ohio Product Liability Act (OPLA).³⁶ Defendants also argue that Plaintiff fails to plead how Defendants’ alleged federal regulation violations caused his injuries.³⁷

³⁶ Doc. 22; Doc. 33.

³⁷ Doc. 33 at 2–3.

The Court finds that the claims are not federally preempted or abrogated by the OPLA. Plaintiff also sufficiently pleads causation.

The Court, however, directs Plaintiff to file an amended complaint to identify the specific OPLA provisions that form his product liability claims. The Court therefore will allow Plaintiff to amend his complaint to address the deficiency that this Court here describes.

A. Federal Preemption

The Court finds that Plaintiff’s claims are neither expressly nor impliedly preempted by federal law.

1. Express Preemption

The MDA does not expressly preempt Plaintiff’s product liability claims.

In support for their motion to dismiss, Defendants argue that Plaintiff’s negligence and strict liability claims are expressly preempted because Plaintiff’s claims suggest that Defendants should have “done something differently than

what was approved by the FDA.”³⁸ Defendants also argue that Plaintiff’s claims are expressly preempted because they do not identify specific CGMP manufacturing requirements that the Defendants violated.³⁹ Plaintiff asserts that his claims are not expressly preempted since they are based solely on federal regulation violations that he specifically identified.⁴⁰

³⁸ Doc. 22 at 9.

³⁹ Doc. 33 at 4–5.

⁴⁰ Doc. 29 at 5.

The MDA’s express preemption clause, in relevant part, states that:

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.⁴¹

⁴¹ 21 U.S.C. § 360k(a).

The Supreme Court in *Riegel v. Medtronic, Inc.* described a two-part test for determining whether a plaintiff’s products liability claims are expressly federally preempted.⁴² First, the Court asks whether the federal government has established any requirements applicable to the medical device in question.⁴³ If so, the Court next asks whether the state requirement at issue is related to safety and effectiveness and “different from, or in addition to,” any federal requirements.⁴⁴ If the answer is yes, the state law claim is federally preempted.⁴⁵

⁴² 552 U.S. at 321–22.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Under this test, most state common-law tort duties are expressly preempted. Nevertheless, the MDA provision “does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations.”⁴⁶ In such a case, the state claims are not preempted because the state duties run “ ‘parallel,’ rather than add to, federal requirements.”⁴⁷

⁴⁶ *Id.* at 330.

⁴⁷ *Id.*

*4 The first *Riegel* prong is satisfied here. As a Class III device, the Biomet knee implant underwent a required PMA process and is thus subject to FDA regulations.⁴⁸

⁴⁸ *See id.* at 321–22.

The second prong, however, is not satisfied.

In *Howard v. Sulzer Orthopedics, Inc.*, the Sixth Circuit found that a plaintiff’s negligence per se claim was not “different from, or in addition to” federal requirements, and was thus a parallel state law claim.⁴⁹ There, the plaintiff alleged a breach of duty based on the violation of an FDA regulation that generally required manufacturers to keep medical devices oil-free.⁵⁰ Without identifying the applicable state law, the court held that “a state may provide a damages remedy for violations of an identical [requirement as the FDA regulation].”⁵¹ The court also held that the plaintiff need not allege violations of device-specific federal regulations, in order to allege a parallel state law claim.⁵²

⁴⁹ 382 Fed.Appx. 436, 441 (6th Cir. 2010).

⁵⁰ *Id.*

⁵¹ *Id.*; *see also Bausch v. Stryker Corp.*, 630 F.3d 546, 555–58 (7th Cir. 2010) (citing to *Howard*, 382 F.App’x at 440) (finding that plaintiff’s negligence and strict liability claims based on a manufacturing defect in her hip replacement system were parallel state law claims).

⁵² *Howard*, 382 Fed.Appx. at 440 (reversing summary judgment on preemption grounds, as CGMP requirements relating generally to medical devices are “not so vague as to be incapable of enforcement”); see also *Bausch*, 630 F.3d at 555 (“Like the Sixth Circuit in *Howard*, we do not see a sound legal basis for defendants’ proposal to distinguish between general requirements and ‘concrete, device-specific’ requirements.”). Defendants’ case citations do not persuasively demonstrate that allegations of general CGMP violations are insufficient to survive preemption. See Doc. 33 at 4–5. Unlike Plaintiff Kodger, plaintiffs in those cases did not identify specific CGMPs violated by the defendants. See, e.g., *Warstler v. Medtronic, Inc.*, 238 F. Supp. 3d 978, 987–88 (N.D. Ohio 2017), reconsideration denied, No. 3:16CV00385, 2017 WL 3088037 (N.D. Ohio July 20, 2017); *Anthony v. Stryker Corp.*, No. 1:09–CV–2343, 2010 WL 1387790, at *3–5 (N.D. Ohio Mar. 31, 2010).

Here, safety and effectiveness are the core of Plaintiff’s manufacturing defect claims. And like the *Howard* plaintiff, Plaintiff Kodger has alleged Defendants’ violations of specific CGMP manufacturing requirements, even if those requirements are not specific to the Biomet knee implant itself.⁵³

⁵³ Plaintiff identifies Defendants’ failure to (1) comply with design controls under 21 C.F.R. § 820.30; (2) adequately conduct the inspecting and verification activities required under 21 C.F.R. § 820.80; (3) establish appropriate procedures to ensure they could take necessary corrective and appropriate action required under 21 C.F.R. § 820.100; and (4) conduct appropriate investigations into adverse incident reports and returned device parts required under 21 C.F.R. § 820.198. Doc. 16–1 at ¶¶ 34, 51.

Because Plaintiff entirely bases Defendants’ breach of duty on these CGMP violations, his claims do not “add to” federal requirements. They are therefore parallel state claims and are not expressly preempted by the MDA.⁵⁴

⁵⁴ Defendants’ arguments that we should not follow the holding in *Howard* are unpersuasive. See Doc. 22 at 10; Doc. 33 at 9–10. Defendants’ citation

to *Hafer v. Medtronic, Inc.* is not relevant because that case did not concern similar tort claims based on manufacturing defects. See 99 F. Supp. 3d 844, 853 (W.D. Tenn. 2015), reconsideration denied (June 17, 2015) (concerning tort claims based on off-label promotion that was within FDA’s exclusive right to enforce). And unlike in other cases Defendants cite, Plaintiff here has alleged specific violations of federal regulations to survive this motion to dismiss, as well as causation (as explained later). See *Aaron v. Medtronic, Inc.*, 209 F. Supp. 3d 994, 1000–01 (S.D. Ohio 2016); *Warstler*, 238 F. Supp. 3d at 987–88; *Anthony*, 2010 WL 1387790, at *3–5; *Potolicchio v. Medtronic, Inc.*, No. 1:15–CV–122, 2016 WL 3129186, at *4 (E.D. Tenn. June 2, 2016), appeal dismissed (Sept. 8, 2016); *Kitchen v. Biomet, Inc.*, No. CIV.A. 13–18–HRW, 2014 WL 694226, at *2, 5 (E.D. Ky. Feb. 21, 2014).

2. Implied Preemption

*5 Plaintiff’s claims are also not impliedly preempted.

Defendants argue that Plaintiff’s claims are impliedly preempted because Plaintiff is usurping the FDA’s responsibility to enforce FDA regulations.⁵⁵ Plaintiff mostly responds that his claims are based on common-law duties of care that exist independently of FDA regulations.⁵⁶

⁵⁵ Doc. 22 at 11–12.

⁵⁶ Doc. 29 at 9–11.

State law claims can be impliedly preempted when they conflict with federal law and stand in the way of congressional objectives.⁵⁷

⁵⁷ *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347–48 (2001).

In *Buckman Co. v. Plaintiffs’ Legal Comm.*, the Supreme Court found that plaintiff’s state law fraud claims against a defendant medical device manufacturer were impliedly preempted.⁵⁸ There, the court reasoned that “[p]olicing fraud against federal agencies” was purely within the FDA’s domain.⁵⁹ Thus, state law claims premised on such fraud was in conflict with federal law and stood in the way of congressional objectives for FDA regulations.⁶⁰

58 *Id.* at 349–50.

59 *Id.* at 347.

60 *Id.* at 349–50.

Unlike the plaintiff in *Buckman*, however, Plaintiff Kodger does not bring fraud claims. He brings manufacturing defect tort claims related to health and safety, which naturally fall under the state’s historic police powers.⁶¹ As a result, Plaintiff’s claims are grounded on common-law duties of care, and exist independently of the FDA regulations. Moreover, such tort law claims do not conflict with the FDA’s purpose – to ensure the safety and effectiveness of medical devices.⁶²

61 *See id.* at 348; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996) (“Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens;” and finding that courts begin with the presumption that federal law does not preempt such traditional police powers).

62 *Buckman*, 531 U.S. at 347–48; *see also Bausch*, 630 F.3d at 556–57.

Thus, Plaintiff’s claims are not impliedly preempted by the FDA regulatory scheme.

B. OPLA Abrogation

Defendants argue that Plaintiff’s common-law negligence and strict liability claims are abrogated by the OPLA. They are not.

In Ohio, product liability claims are governed by the statutory scheme laid out in the OPLA.⁶³ The OPLA abrogates “all common law product liability claims or causes of action.”⁶⁴ Product liability claims that are not brought under the OPLA must be dismissed.

63 Ohio Rev. Code Ann. §§ 2307.71 *et seq.*

64 Ohio Rev. Code Ann. § 2307.71(B).

Plaintiff does bring his claims under the OPLA. Plaintiff cites to OPLA provisions to state his claims for negligence⁶⁵ and strict liability,⁶⁶ as well as his entitlement to damages.⁶⁷

65 Doc. 16–1 at ¶ 37 (citing to Ohio Rev. Code Ann. § 2307.75).

66 *Id.* at ¶ 54 (citing to Ohio Rev. Code Ann. § 2307.75).

67 *Id.* at ¶¶ 42, 59 (citing to Ohio Rev. Code Ann. § 2307.72).

But the OPLA provisions Plaintiff cites relate to design defect claims⁶⁸ that are not obviously related to Plaintiff’s manufacturing defect claims.⁶⁹ “Claims that are authorized by the OPLA should be pled with reference to the applicable provision of the OPLA.”⁷⁰

68 *See Ohio Rev. Code Ann. § 2307.75.*

69 Doc. 29 at 2–3.

70 *Boroff v. Alza Corp.*, 685 F. Supp. 2d 704, 709 (N.D. Ohio 2010) (quoting *Stratford v. SmithKline Beecham Corp.*, No. 2:07–CV–639, 2008 WL 2491965, at *5 (S.D. Ohio June 17, 2008)); *Tolliver v. Bristol–Myers Squibb Co.*, No. 1:12 CV 00754, 2012 WL 3074538, at *3 (N.D. Ohio July 30, 2012) (“When bringing claims under the OPLA, plaintiffs should clarify which OPLA provision governs the claims in their complaint.”).

*6 Thus, although the Court does not find Plaintiff’s claims are abrogated by the OPLA,⁷¹ it is unclear to the Court which OPLA provisions are applicable to Plaintiff’s claims. The Court will therefore direct Plaintiff to amend his complaint to allege the precise basis for his OPLA claims.

71 *See Aaron*, 209 F. Supp. 3d at 1011–12 (finding product liability claims abrogated by the OPLA only because there was “no citation to, or even mention of, the [OPLA] in any of the sections of the Omnibus Complaint outlining the claims against Defendants”).

C. Pleading Sufficiency

Assuming that Plaintiff brings a manufacturing defect claim under the OPLA, Plaintiff has sufficiently plead causation.

To bring a products liability claim under the OPLA, Plaintiff must establish that the manufacturing defect was the proximate cause of his injuries.⁷² Under the OPLA,

proximate cause is established when Plaintiff's injuries are a "natural and probable consequence" of Defendants' wrongful conduct.⁷³

⁷² [Ohio Rev. Code Ann. § 2307.73.](#)

⁷³ See *Eastman v. Stanley Works*, 907 N.E.2d 768, 780 (Ohio Ct. App. 2009) (citation omitted).

Defendants are responsible for manufacturing the Biomet knee implant. Plaintiff alleged that 23% of bearing failures since 1999 occurred in Biomet knee implants manufactured in the short window between 2007 and 2008. According to Plaintiff's allegations, these manufacturing failures indicate Defendants' failure to abide by CGMP requirements.

Plaintiff alleges that his injuries likely resulted from Defendants' federal regulation violations because he received his Biomet knee implant in 2008, around the same time Defendants manufactured a large percentage of faulty bearings. The bearing in Plaintiff's Biomet knee implant also collapsed, causing Plaintiff to experience severe pain and undergo full knee replacement surgery.

Assumed as true, these alleged facts sufficiently plead that Plaintiff's injuries were a "natural and probable" consequence of Defendants' federal regulation violations.

IV. CONCLUSION

For the following reasons, the Court **DENIES** Defendants' motion to dismiss but orders Plaintiff to file an amended complaint to precisely identify the applicable OPLA provisions for his negligence and strict liability claims. The Court therefore **GRANTS** Plaintiff leave to amend the complaint to address this deficiency.

IT IS SO ORDERED

All Citations

Not Reported in Fed. Supp., 2017 WL 4348997, Prod.Liab.Rep. (CCH) P 20,172

TAB 29

2012 WL 124026

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

Candy KURY, on behalf of herself and
all others similarly situated, Plaintiff,

v.

ABBOTT LABORATORIES, INC. d/
b/a Abbott Sales, Marketing and
Distribution Co., et al., Defendants.

Civil Action No. 11–803 (FLW).

|

Jan. 17, 2012.

Attorneys and Law Firms

James Stuart Notis, Jennifer Sarnelli, Mark C. Gardy, Gardy
& Notis, Englewood Cliffs, NJ, William M. Audet, Audet &
Partners LLP, San Francisco, CA, for Plaintiff.

Peter C. Harvey, Patterson, Belknap, Webb & Tyler, LLP,
New York, NY, for Defendants.

OPINION

WOLFSON, District Judge.

*1 Numerous class action suits have been filed around the country against defendants, Abbott Laboratories, Inc. d/b/a Abbott Sales, Marketing and Distribution Co. and Abbott Laboratories d/b/a Abbott nutrition (collectively, “Defendants”), relating to Defendants’ September 2010 recall of certain Similac-brand infant formula products. The recall was precipitated by Defendants’ discovery of common warehouse beetles or beetle larvae in certain Similac powder formulas. In this case, Plaintiff Candy Kury (“Plaintiff”), a New Jersey resident, asserts claims involving fraud, product liability and unjust enrichment against Defendants based upon allegations that these infant formulas caused substantial harm. In addition, Plaintiff seeks to represent a class comprised of all New Jersey citizens who purchased Similac products during an unspecified class period. In response to these allegations, Defendants, in the instant matter, move to dismiss the Complaint in its entirety for failure to state a claim. For the reasons set forth herein, Plaintiffs’ Complaint is dismissed; in particular, Plaintiff’s claims pursuant to the New Jersey Consumer Fraud Act, breach of implied warranty,

fraudulent concealment and unjust enrichment are dismissed with prejudice. Plaintiff’s claim pursuant to the New Jersey Products Liability Act and breach of express warranty are dismissed without prejudice. In that regard, Plaintiff has leave to amend the Complaint with respect to those claims dismissed without prejudice within fifteen days from the date of the Order accompanying this Opinion.

BACKGROUND

On a motion to dismiss, the Court reviews the Complaint by taking its allegations as true. Defendants manufacture, market, advertise, sell and distribute Similac brand infant formula products¹, a leading brand “sold in grocery stores and pharmacies throughout the United States, including in New Jersey.” Compl., ¶¶ 25, 26. According to Plaintiff, Defendants specifically and extensively market Similac products to parents as a product that “moms can count on for trusted nutrition and the formula that’s right for their babies.” *Id.* at ¶ 27. In that connection, the packaging of Similac products promotes uses such as building “immune support,” “strong bones,” and “brain and eyes.” *Id.* at ¶ 28. In addition, Defendants’ marketing materials claim that “[e]ach of the formulas in [the Similac] line provides the balance of protein, minerals, and other nutrients that helps give babies a strong start in life. A baby’s first year is so important, so count on Similac for nutrition you can trust.” *Id.*

¹ According to Defendants, the Similac line consists of at least ten different products, each available in a variety of sizes.

In and around September 2010, during an internal quality review, Defendants discovered that pieces of common warehouse beetles or beetle larvae were present in certain finished Similac products, which were manufactured in a single facility. *Id.* at ¶¶ 30–31. Thereafter, Defendants announced a voluntary recall of those products. In that particular announcement, Defendants advised the public that “the United States Food and Drug Administration (“FDA”) has determined that while the formula containing these beetles poses no immediate health risk, there is a possibility that infants who consume formula containing the beetles or their larvae could experience symptoms of gastrointestinal discomfort and refusal to eat as a result of small insect parts irritating the GI tract.” Compl., ¶ 31. Defendants’ recall encompassed all Similac powdered formula sold in rectangular tubs, including certain Similac powder product

lines offered in plastic containers, and certain Similac powder product lines offered in sizes such as 8-ounce, 12.4-ounce and 12.9-ounce cans. *Id.* at ¶ 34.

*2 Plaintiff alleges that at an unspecified point in time, she purchased one or more unspecified Similac-brand products. *Id.* at ¶¶ 7, 39–40. Plaintiff further alleges that in purchasing the products, she “relied upon the misrepresentations made by Defendants about the quality and safety of Similac products, and that Similac products would not adversely affect her infant child’s health.” *Id.* at ¶ 39. Moreover, Plaintiff complains that Defendants “should have known that the failure to exercise proper safety standards and equipment management would have led to insects infiltrating Similac products, thereby creating formulas unsafe for infant consumption.” *Id.* at ¶ 45.

Based upon these allegations, Plaintiff, in her Complaint, asserts five causes of action arising out of statutory violations and common law: (1) New Jersey’s Consumer Fraud Act (“NJCFRA”); (2) New Jersey Products Liability Act (“NJPLA”); (3) Breach of Express and Implied Warranty; (4) Fraudulent Concealment; and (5) Unjust Enrichment. Because of these violations, Plaintiff claims that she suffered injury in fact, a loss of money or property, the personal expenditure of time and resources and/or other forms of injury, damage, mental anguish, and/or physical pain and suffering. *See* Compl., ¶¶ 54, 64, 71.

DISCUSSION

I. Standard of Review

When reviewing a motion to dismiss on the pleadings, courts “accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008) (citation and quotations omitted). In *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Supreme Court clarified the 12(b)(6) standard. Specifically, the Court “retired” the language contained in *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46). Instead, the factual allegations set

forth in a complaint “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. As the Third Circuit has stated, “[t]he Supreme Court’s *Twombly* formulation of the pleading standard can be summed up thus: ‘stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest’ the required element. This ‘does not impose a probability requirement at the pleading stage,’ but instead ‘simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of’ the necessary element.” *Phillips*, 515 F.3d at 234 (quoting *Twombly*, 550 U.S. at 555).

*3 In affirming that *Twombly* standards apply to all motions to dismiss, the Supreme Court has further explained the principles. First, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1948–49, 173 L.Ed.2d 868 (2009). Second, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* Therefore, “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 1949. Ultimately, “a complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir.2009). Moreover, in deciding a motion to dismiss, the court may consider the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of plaintiff’s claim. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n. 3 (3d Cir.2004).

The Third Circuit recently reiterated that “judging the sufficiency of a pleading is a context-dependent exercise” and “[s]ome claims require more factual explication than others to state a plausible claim for relief.” *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 2010 WL 4840093, at *8 (3d Cir.2010). This means that, “[f]or example, it generally takes fewer factual allegations to state a claim for simple battery than to state a claim for antitrust conspiracy.” *Id.* That said, the Rule 8 pleading standard is to be applied “with the same level of rigor in all civil actions.” 627 F.3d 85, *Id.* at *7 (quoting *Ashcroft*, 129 S.Ct. at 1953).

II. PLA: Subsumption

At the outset, before the Court reviews the sufficiency of the allegations, it first resolves a legal question: whether Plaintiff’s assertion of her NJFLA claim effectively subsumes

Plaintiff's other claims under the NJCFA, breach of implied warranty, fraudulent concealment and unjust enrichment. The Court answers in the affirmative.

The New Jersey Products Liability Act, N.J.S.A. 2A:58C-1, *et seq.*, was enacted "to limit the expansion of products-liability law" and "to limit the liability of manufacturers so as to balance[] the interests of the public and the individual with a view towards economic reality." *Zaza v. Marquess & Nell, Inc.*, 144 N.J. 34, 47, 675 A.2d 620 (1996) (quotations and citations omitted). The NJPLA, therefore, "established the sole method to prosecute a product liability action[.]" and after its enactment, "only a single product liability action remains." *Tirrell v. Navistar Int'l, Inc.*, 248 N.J.Super. 390, 398-99, 591 A.2d 643 (App.Div.), *certif. denied*, 126 N.J. 390, 599 A.2d 166 (1991). In that regard, the Third Circuit has long ago proclaimed that the NJPLA "effectively creates an exclusive statutory cause of action for claims falling within its purview." *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir.1991). Indeed, "the NJPLA generally subsumes common law product liability claims, thus establishing itself as the sole basis of relief under New Jersey law available to consumers injured by a defective product." *Id.*; see *In re Lead Paint Litig.*, 191 N.J. 405, 436, 924 A.2d 484 (2007) (the NJPLA accomplishes its liability-limiting function by creating "one unified, statutorily defined theory of recovery for harm caused by a product.").

*4 Generally, the NJPLA "encompass[es] virtually all possible causes of action relating to harms caused by consumer and other products," *In re Lead Paint*, 191 N.J. at 436-37, 924 A.2d 484, "except ... breach of an express warranty." N.J.S.A. 2A:58C-1b(3). Because of the breadth of the NJPLA, there is no question that New Jersey federal and state courts have consistently dismissed product liability claims based on common-law theories when the heart of those theories is the potential "harm caused by a product." See, e.g., *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 313 (3d Cir.1999) (dismissing negligence claim, stating that "under New Jersey law negligence is no longer viable as a separate claim for harm caused by a product"); *Thomas v. Ford Motor Co.*, 70 F.Supp.2d 521, 528-29 (D.N.J.1999) (dismissing common-law claim for negligent manufacture); *Reiff v. Convergent Techs.*, 957 F.Supp. 573, 583 (D.N.J.1997) (dismissing negligence and breach of warranty claims); *McWilliams v. Yamaha Motor Corp. USA*, 780 F.Supp. 251, 262 (D.N.J.1991) (dismissing claims of negligence and breach of implied warranty), *aff'd in part, rev'd in part on other grounds*, 987 F.2d 200 (3d

Cir.1993); *Green v. Gen. Motors Corp.*, 310 N.J.Super. 507, 517, 709 A.2d 205 (App.Div.1998) (stating that "causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action" under the NJPLA).

Moreover, courts have also found that the NJPLA subsumes common law and statutory fraud claims so long as the harm alleged was caused by a product. See *Brown v. Philip Morris, Inc.*, 228 F.Supp.2d 506, 517 (D.N.J.2002) (fraud claim preempted by the NJPLA when defendant's alleged misrepresentations resulted in "harm caused by a product"); *Sinclair*, 195 N.J. at 66, 948 A.2d 587 (statutory consumer fraud claim subsumed by the NJPLA when the "[t]he heart of plaintiff's case [was] the potential harm caused by Merk's drug"); *McDarby v. Merck & Co.*, 401 N.J.Super. 10, 95-96, 949 A.2d 223 (App.Div.2008) (statutory consumer fraud claim subsumed by the NJPLA because "the gravamen of [the] claim was that Merk marketed Vioxx fully aware of its cardiovascular risk [and] made misrepresentations[] and ... omis[sions]" in connection with its marketing). Indeed, this Court has previously, in *Lopienski v. Centocor, Inc.*, No. 07-4519, 2008 WL 2565065, at *1 n. 2 (D.N.J. Jun.25, 2008), found that claims of negligence, breach of implied warranty, negligent and fraudulent misrepresentation, statutory consumer fraud and fraudulent concealment are subsumed by the NJPLA when the theory of a case is premised upon product liability.

Here, there is no doubt that Plaintiff's case is based on a product liability theory. In fact, in the first paragraph of the Complaint, Plaintiff characterizes this case as involving Defendants' manufacturing and selling of various defective Similac brand infant powder formulas. Compl., ¶ 1. Simply, the heart of Plaintiff's complaints is that her or her child's injuries—economic and non-economic alike—resulted from ingesting the allegedly defective Similac products that Defendants marketed and sold. Plaintiff, however, argues that the causes of action, not involving the NJPLA or express warranty, are not subsumed by the NJPLA because in addition to "the type of damages [recoverable] under the [NJPLA]," such as personal injuries and emotional distress, "she is also seeking damages for the loss of the product itself," which are "specifically excluded [from recovery under] the [NJPLA]." Plaintiff's Opp. at p. 11. Significantly, Plaintiff implicitly acknowledges that each of her claims, which are not brought pursuant to the NJPLA or the breach of express warranty, are barred by the NJPLA, except to the extent those claims seek the lost value of the product itself.

*5 Nevertheless, even the claim of lost value in this case is not sufficiently distinguishable from the broad harm encompassed by the NJPLA. As the court has explained in *Felluer v. Tri-Union Seafoods, LLC*, No. 06-0688, 2010 U.S. Dist. LEXIS 36195, at *15, 2010 WL 1490927 (D.N.J. Apr. 13, 2010), “[t]he fact that [a plaintiff] ... seeks economic damages to reimburse her for the cost of the product (in addition to personal injury damages) does not change the fact that this is, in essence, a product liabilities claim.” The court, deriving its reasoning from the New Jersey appellate division decision in *McDarby*, went on to hold that because the NJPLA’s definition of harm covers virtually any economic harm caused by the allegedly defective product, a plaintiff should not be permitted to bring separate claims under the NJPLA and NJCFA “as the [NJPLA] was intended to unify product liabilities causes of action into a single claim.” *Id.* at *15-16, 949 A.2d 223 (citing *McDarby*, 401 N.J.Super. at 277-78, 950 A.2d 231). Moreover, a plaintiff should not be able to benefit from provisions—providing treble damages and attorney’s fees—contained in the NJCFA despite the fact that such provisions were intentionally excluded from the NJPLA. See *McDarby*, 401 N.J.Super. at 278, 950 A.2d 231. Indeed, this line of reasoning has been adopted by courts in this district. See *Arlandson v. Hartz Mountain Corp.*, No. 10-1050, 2011 WL 2112494, at *11 (D.N.J. May 25, 2011) (dismissing claim for unjust enrichment where the complaint’s “core issue” was the harmfulness of the defendant’s product); *O’Donnell v. Kraft Foods, Inc.*, No. 09-4448, 2010 WL 1050139, at *3 (D.N.J. Mar. 18, 2010) (plaintiffs’ claim of lost value from purchasing the hot dogs was preempted by NJPLA, because those products’ lost value resulted from “the increased risk of cancer [plaintiffs] allege[d] arises from consumption of [the] product ...”); *Levinson v. Johnson & Johnson Consumer Cos.*, 2010 U.S. Dist. LEXIS 8654, 2010 WL 421091 (D.N.J. Feb. 1, 2010); *Smith v. Merial Ltd.*, No. 10-439, 2011 U.S. Dist. LEXIS 56461, at *11-13, 2011 WL 2119100 (D.N.J. May 26, 2011) (“Plaintiffs attempt to classify their claims as non-product liability claims by alleging only economic damages related to the price of the product as opposed to damages related to the harm caused by the product. However, limiting a claim to economic injury and the remedy sought to economic loss cannot be used to obviate the PLA.” (citations and quotations omitted)).

Accordingly, based on the allegations here, any economic loss or non-economic loss—including the cost of purchasing the Similac products—Plaintiff allegedly suffered, resulted from

her infant ingesting the powder formulas, which arises solely under product liability. See *Smith*, 2011 U.S. Dist. LEXIS 56461 at *13, 2011 WL 2119100 (“Though Plaintiffs assert contract, quasi-contract, and consumer fraud claims, the core issue underlying Plaintiffs’ claims is that the chemicals in Frontline products are dangerous and caused physical damage to Plaintiffs’ property, in the form of harm to their pets’ health.”). This type of harm falls squarely within the exclusive purview of the NJPLA and as such, Plaintiffs’ claims pursuant to the NJCFA, breach of implied warranty, fraudulent concealment and unjust enrichment are subsumed by the NJPLA.² Plaintiff’s proper recourse is through the NJPLA and/or breach of express warranty, as explained below.

² Plaintiff relies on *Shannon v. Howmedica Osteonics Corp.*, No. 09-4171, 2010 U.S. Dist. LEXIS 8621, at *7, 2010 WL 421096 (D.N.J. Feb. 1, 2010), for the proposition that her claims based upon the lost value of the Similac products are separate and distinct from her NJPLA claim. The Court does not find the analysis of that case persuasive as the *Shannon* court provided little reasoning for its holding. Plaintiff does not advance any other authorities to support her position. Nonetheless, even if lost value is an exception to NJPLA’s purview, Plaintiff’s claims relating to the loss value of the products may also be dismissed on the ground that Plaintiff was offered a refund for the recalled products. Indeed, Defendants announced in a public notice that they would provide a refund to any purchaser of Similac products that were the subject of the recall. While Plaintiff does not allege in the Complaint that she has received a refund, the mere tender of relief moots her claim for the purchase price of the Similac products. See *Gates v. City of Chicago*, 623 F.3d 389, 413 (7th Cir. 2010); see, e.g., *Brown v. Abbott Labs., Inc.*, No. 10-6674, 2011 U.S. Dist. LEXIS 110175, at *15-16, 2011 WL 4496154 (N.D.Ill. Sep. 27, 2011); *Jovine v. Abbott Labs., Inc.*, 795 F.Supp.2d 1331 (S.D.Fla. 2011); *Tosh-Surryhne v. Abbott Labs. Inc.*, No. 10-2603, 2011 U.S. Dist. LEXIS 110107, at *10-11 (E.D.Cal. Sept. 26, 2011); *Jasper v. Abbott Labs., Inc.*, No. 11-229, 2011 U.S. Dist. LEXIS 73806, at *18-19, 2011 WL 2672519 (N.D.Ill. Jul. 8, 2011); *Bland v. Abbott*

Labs., No. 11–430, 2012 U.S. Dist. LEXIS 1732, at *6, 2012 WL 32577 (W.D.Ky. Jan. 6, 2012).

III. New Jersey's Products Liability Act

*6 To properly plead a cause of action under the NJPLA, a plaintiff must allege that the defendant manufactured the product, that a reasonably foreseeable user was injured, that the product was defective, that the defect existed when it left the defendant's control, and that the defect was the factual and proximate cause of the plaintiff's injury. *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84, 97, 723 A.2d 45 (1999); *Coffman v. Keene Corp.*, 133 N.J. 581, 593, 628 A.2d 710 (1993); *Michalko v. Cooke Color & Chem. Corp.*, 91 N.J. 386, 394, 451 A.2d 179 (1982). Importantly, the New Jersey Supreme Court has advised that the NJPLA requires a physical injury. *Sinclair*, 195 N.J. at 64, 948 A.2d 587 (under the NJPLA, “the word ‘injury’ is surrounded by ‘physical illness,’ which explicitly requires something physical, and ‘death,’ which inherently is physical.”).

In this case, Defendants challenge the sufficiency of Plaintiff's NJPLA claim based on Plaintiff's failure to plead any physical injury. The Court agrees; nothing in the allegations contained in the Complaint sets forth any physical injuries to Plaintiff or Plaintiff's infant child, who is not a party in this case.³ Other than conclusory and vague allegations that Plaintiff suffered damages, mental anguish and pain and suffering, the extent of any physical damages suffered by Plaintiff or Plaintiff's infant child are contained in these allegations: “Defendants discovered that Similac-brand formulas had been contaminated and contained beetles and beetle larvae, which if consumed by infant children, *could* lead to serious health concerns, including gastrointestinal problems, diarrhea and the like.” Compl., ¶ 1 (emphasis added). In that connection, Plaintiff alleges that “Defendants caused serious injury to Plaintiff and the putative Classes she seeks to represent.” *Id.* at ¶ 3, 948 A.2d 587. These are clearly insufficient under the *Iqbal* standard to allege a physical injury, and as a result, Plaintiff's NJPLA claim is dismissed.⁴

³ Having reviewed Plaintiff's Complaint, the Court finds that there are no allegations that the Similac products Plaintiff purchased were subject to the September 2010 recall. As Plaintiff avers in her Complaint that only certain types of Similac products were recalled, Plaintiff fails to identify that the products she purchased were subject to the recall. Rather, Plaintiff merely alleges

that “Defendants misled Plaintiff into purchasing the unsafe Similac products,” *see* Compl., ¶ 39, and that “Plaintiff and the members of the putative Classes would not have purchased the recalled Similac products had they known of their defective condition.” These bare allegations are insufficient under the *Iqbal* standard. Indeed, Plaintiff recognizes this deficiency and requests that “if given the opportunity to amend the Complaint, Plaintiff would be able to show that she purchased products that should have been recalled” Plaintiff's Opp., pp. 8–9.

4 As a final note, Defendants ask the Court dismiss the Complaint in its entirety because Plaintiff's allegations of injury do not suggest that Plaintiff suffered any injury. However, because the Court has already dismissed Plaintiff's claims on various grounds set forth above, it need not consider this question in connection with the other causes of action.

IV. Breach of Express Warranty

An express warranty claim is codified under N.J.S.A. 12A:2–313, which provides:

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warranty” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

*7 N.J.S.A. 12A:2–313; *Gupta v. Asha Enters., L.L.C.*, 422 N.J.Super. 136, 153 (App.Div.2011).

Here, Defendants argue that the Court should dismiss this claim for three reasons: (1) Plaintiff fails to allege that there was anything wrong with any unit of Similac she purchased; (2) all of Defendants' statements that Plaintiff pleads are actionable are either not actually alleged to be false or mere puffery; and (3) Plaintiff fails to plead that she provided the requisite pre-litigation notice of breach. Dispositive of the claim for breach of express warranty is Plaintiff's failure to provide a pre-litigation notice to Defendants regarding the alleged breach.

New Jersey has adopted the Uniform Commercial Code's ("UCC") notice requirement for an express warranty claim. *Luppino v. Mercedes-Benz USA, LLC*, No. 09–5582, 2011 U.S. Dist. LEXIS 65495, at *7, 2011 WL 2470625 (D.N.J. Jun. 20, 2011); *Joc, Inc. v. Exxonmobil Oil Corp.*, No. 08–5344, 2010 WL 1380750, at *4 (D.N.J. Apr. 1, 2010); *Slack v. Suburban Propane Partners, L.P.*, No. 10–2548, 2010 WL 5392845, at *4–5 (D.N.J. Dec. 22, 2010). It provides: "Where a tender has been accepted ... the buyer must within a reasonable time after [s]he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." N.J.S.A. 12A:2–607(3)(a). Based upon the language, this statutory notice is a "condition precedent to filing any suit for breach of warranty." *Joc*, 2010 WL 1380750 at *4.

There is no dispute that Plaintiff has failed to plead that she provided the pre-litigation notice of breach. Indeed, Plaintiff has not disputed this fact in her opposition. More importantly,

Plaintiff offers no excuse or explanation for her failure to do so. Accordingly, because Plaintiff has failed to allege that the condition precedent has been met—sending a pre-litigation notice—Plaintiff's express warranty claim necessarily fails. See *Luppino*, 2011 U.S. Dist. LEXIS 65495 at *7, 2011 WL 2470625 ("At no time has any court in this district or in the state of New Jersey found that a buyer is not required to provide a direct seller with pre-suit notice in an action for express breach of warranty. Thus, Stern and Casiero's admission that they have failed to provide notice to Defendant proves fatal to their breach of express warranty claims."). However, since the Court cannot determine whether Plaintiff in fact sent a notice to Defendants, or whether Plaintiff is excused from sending a notice, this claim is dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to dismiss. In sum, Plaintiff's claims pursuant to the NJCFA, breach of implied warranty, fraudulent concealment and unjust enrichment are dismissed as they are subsumed by NJPLA. Plaintiff's claim pursuant to the NJPLA and breach of express warranty are dismissed without prejudice. In that regard, Plaintiff has leave to amend the Complaint with respect to those claims dismissed without prejudice within fifteen days from the date of the Order accompanying this Opinion.

All Citations

Not Reported in F.Supp.2d, 2012 WL 124026, 76 UCC Rep.Serv.2d 584

TAB 30

2012 WL 12871963

2012 WL 12871963

Only the Westlaw citation is currently available.
 United States District Court, N.D. Florida,
 Tallahassee Division.

Margaret LAMB and Eileen M. Buser, etc., Plaintiffs,
 v.
 GRACO CHILDREN'S PRODUCTS INC.,
 and Newell Rubbermaid, Inc., Defendants.

CASE NO. 4:11cv477-RH/WCS

Signed 01/24/2012

Attorneys and Law Firms

Catherine H. McElveen, Thomas Christopher Tuck,
 Richardson Patrick Westbrook & Brickman LLC, Mount
 Pleasant, SC, Raymond Douglas Gentile, Douthitt Frets Rouse
 etc. LLC, Leawood, KS, William H. Garvin, III, Garvin Law
 Firm PA, Tallahassee, FL, for Plaintiffs.

Heidi Kern Oertle, Schiff Hardin LLP, Chicago, IL, for
 Defendants.

ORDER DISMISSING THE COMPLAINT

Robert L. Hinkle, United States District Judge

*1 This is a product-liability case. In their class-action complaint, the two plaintiffs allege that they each bought a “TurboBooster” child car seat that the defendants designed, manufactured, and distributed. The plaintiffs allege that the defendants warranted that the car seat conformed to federal safety standards even though the defendants knew it did not. The plaintiffs assert claims for breach of express warranty and fraud—or, as they label it, fraudulent concealment; they do not allege that their car seats were involved in a wreck or that anyone suffered a bodily injury. The defendants have moved to dismiss for lack of standing and failure to state a claim on which relief can be granted. This order rejects the standing contention but grants the motion to dismiss for failure to state a claim. The basis for the dismissal is that the plaintiffs have not alleged that they gave the defendants notice as required for an express-warranty claim and have not alleged reliance as required for a fraud claim. The order grants leave to amend to cure the deficiencies.

I

The defendants first assert that because the car seats did not malfunction or cause a bodily injury, each plaintiff got what she bargained for—a car seat that performed to expectations. The defendants thus say that the plaintiffs suffered no legally cognizable injury and lack standing. The assertion is incorrect.

The reason is this. A car seat that complies with federal safety standards is worth more than one that does not. Or so the plaintiffs claim and a reasonable juror might conclude. *Cf. Smith v. WM. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1339-41 (S.D. Fla. 2009) (stating that a gum manufacturer's allegedly false guarantee that its gum killed bad-breath germs increased the product's price and served as a basis for a damages claim under the Florida Deceptive and Unfair Trade Practices Act). On this view the plaintiffs overpaid for the car seats.

This is the very gravamen of an express warranty claim under Florida law. *See Fla. Stat. § 672.714 (2011)* (“The measure of damages ... is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.”). *See also Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990 (Fla. 5th DCA 2004) (stating a similar principle under FDUTPA). The plaintiffs have standing.

II

The defendants next argue that the plaintiffs have failed to state a claim for breach of express warranty. Under Florida law, an express-warranty plaintiff must show: (1) a purchase of goods; (2) an express warranty; (3) breach of the warranty; (4) notice to the seller of the breach; and (5) injury as a result of the breach. *See Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1339-40 (S.D. Fla. 2011) (citing *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351, 353 (Fla. 4th DCA 1977)). The defendants say that Florida law also requires privity between the plaintiff and defendant.

The defendants say that the plaintiffs' complaint falls short because it does not allege privity—indeed, the complaint explicitly alleges that the plaintiffs are not in privity with the defendants—and because it does not allege that the plaintiffs gave the defendants notice of the breach.

2012 WL 12871963

*2 It is unclear whether Florida law requires privity for an express-warranty claim of this kind. See *WM. Wrigley*, 663 F. Supp. 2d at 1341-1343 (discussing the unsettled law of express warranty in Florida and denying a motion to dismiss despite the lack of privity between the plaintiffs and the defendant); see also John W. Reis, *The Magic of Privity in Express Warranty Claims: A Plaintiff's Perspective*, 79 Fla. Bar J. 50 (2005).

It is clear, though, that a plaintiff must give notice of the claim. See Fla. Stat. § 672.607(3)(a) (“When a tender has been accepted the buyer must within a reasonable time after he or she discovers or should have discovered any breach notify the seller of breach or be barred from any remedy”); see also *Jovine*, 795 F. Supp. 2d at 1340 (citing *Gen. Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262, 1263 (Fla. 2d DCA 1980)). The plaintiffs have not alleged that they gave notice or even that they complied generally with conditions precedent. In the absence of such an allegation, the complaint fails to state an express-warranty claim on which relief can be granted.

In reaching this conclusion, I have not overlooked that the statute requires a buyer to notify “the seller” of a breach of express warranty; the statute does not speak of notice to the product’s *manufacturer*. This is so because the statute assumes privity. But even if, as the plaintiffs assert, an express warranty claim can be brought in the absence of privity, a buyer who is *not* in privity surely has no *greater* right than a buyer who *is* in privity. To rule otherwise would stand the applicable law on its head. And the point of the notice requirement is to allow the warrantor an opportunity to cure the problem rather than defend a lawsuit. The reason for requiring notice applies to a manufacturer every bit as much as to a seller. In short, under Florida law, a buyer must give notice of a breach of an express warranty and, in the absence of notice, cannot recover.

III

Finally, the defendants argue that the plaintiffs have failed to state a claim for fraud—or, as the plaintiffs put it, fraudulent concealment. To state a fraudulent-concealment claim, a plaintiff must allege: (1) the defendant concealed or failed to disclose a material fact; (2) the defendant knew or should have known the material fact should be disclosed; (3) the defendant knew its concealment of or failure to disclose the material fact would induce the plaintiff to act; (4) the defendant had a duty

to disclose the material fact; (5) the plaintiff detrimentally relied on the misinformation; and (6) the plaintiff’s reliance was reasonable. See *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1068 (Fla. 1st DCA 2010); *Artec Group, Inc. v. Chugach Mgmt, Servs., Inc.*, 470 F. Supp. 2d 1353, 1356 (M.D. Fla. 2006). The defendants assert that they had no duty to disclose known defects and, even if they did, the plaintiffs have failed to plead reliance.

The parties’ attention to a manufacturer’s duty to disclose is curious. Although the plaintiffs refer to “fraudulent concealment,” what they have alleged is that the defendants affirmatively *made* a false statement, not that the defendants *failed to make* a statement they were duty-bound to make. But either way, part of what the plaintiffs must show is reliance. The complaint does not allege that either plaintiff relied on the representation that the car seat complied with federal safety standards.

*3 The plaintiffs say that the court should draw the inference that the plaintiffs must have relied in deciding to purchase the car seats. But if a plaintiff cannot allege reliance under the strictures of *Federal Rule of Civil Procedure 11*, there is little basis for a court to infer it. A district court should grant a motion to dismiss unless “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed. 2d 868 (2009). This is not a situation in which the plaintiff lacks information needed to assert a claim; if a plaintiff relied, she surely knows it. Absent an affirmative allegation of reliance, the complaint fails to state a claim for fraud—or fraudulent concealment—on which relief can be granted.

IV

For these reasons,

IT IS ORDERED:

The motion to dismiss, ECF No. 6-1, is GRANTED. The plaintiffs may file an amended complaint by February 7, 2012. SO ORDERED on January 24, 2012.

All Citations

Not Reported in Fed. Supp., 2012 WL 12871963

2012 WL 12871963

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 31

2020 WL 871521

United States District Court, S.D. New York.

Michelle LUGONES; Tricia Rizzi; Marcus Siezing; Claudia Vassallo; Denise Alvarado; Minoee Modi; Isabelle Gray; Karine Sewell; [Anne Flournoy](#); and Sonja Romano, Plaintiffs,

v.

[PETE AND GERRY'S ORGANIC, LLC](#) and Nellie's Free Range Eggs, Defendants.

19 Civ. 2097 (KPF)

|

Signed 02/21/2020

Synopsis

Background: Egg purchasers brought putative class action against egg seller alleging that purchases were made based on seller's advertisements indicating that hens were given ample access to open spaces and that advertising concealed facts that hens were kept in tightly constricted spaces with no real access to the outdoors and hens were subject to numerous husbandry practices that purchasers opposed. Seller filed motions to dismiss for lack of personal jurisdiction and for failure to state a claim.

Holdings: The District Court, [Katherine Polk Failla, J.](#), held that:

[1] claims of purchasers who were not from New York were not connected to New York;

[2] purchasers were not entitled to jurisdictional discovery regarding court's lack of personal jurisdiction over non-New York purchasers;

[3] purchasers failed to allege any actual intent to purchase seller's eggs again;

[4] purchasers failed to allege they viewed seller's website prior to purchasing eggs;

[5] purchasers' interpretation of egg seller's advertising was unreasonable;

[6] purchasers plausibly alleged that they believed seller's statement on egg containers; and

[7] purchasers plausibly alleged they reasonably relied on seller's statements on egg containers regarding its hens' access to the outdoors.

Motions granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Lack of Personal Jurisdiction; Motion to Dismiss for Failure to State a Claim.

West Headnotes (50)

[1] **Federal Courts** 🔑 **Necessity of Objection; Power and Duty of Court**

A court facing challenges as to both its jurisdiction over a party and the sufficiency of any claims raised must first address the jurisdictional question.

[2] **Federal Courts** 🔑 **Presumptions and burden of proof**

On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant. *Fed. R. Civ. P. 12(b)(2)*.

[3] **Federal Courts** 🔑 **Weight and sufficiency**

To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff need only provide legally sufficient allegations of jurisdiction. *Fed. R. Civ. P. 12(b)(2)*.

[4] **Federal Courts** 🔑 **Weight and sufficiency**

A plaintiff makes a showing of jurisdiction sufficient to survive a motion to dismiss for lack of personal jurisdiction through an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant. *Fed. R. Civ. P. 12(b)(2)*.

[5] Federal Courts 🔑 Presumptions and burden of proof

On a motion to dismiss for lack of personal jurisdiction, the plaintiff's jurisdictional allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor. *Fed. R. Civ. P. 12(b)(2)*.

[6] Federal Courts 🔑 Evidence; Affidavits
Federal Courts 🔑 Hearing

On a motion to dismiss for lack of personal jurisdiction, where a court does not hold an evidentiary hearing on the jurisdictional question, it may, nevertheless, consider matters outside the pleadings. *Fed. R. Civ. P. 12(b)(2)*.

[7] Process 🔑 Nature and necessity in general

For a court to exercise personal jurisdiction, the plaintiff's service of process upon the defendant must have been procedurally proper.

[8] Federal Courts 🔑 How Established; Grounds**Federal Courts** 🔑 Notice

For a court to exercise personal jurisdiction, there must be a statutory basis for personal jurisdiction that renders a plaintiff's service of process effective.

[9] Constitutional Law 🔑 Personal jurisdiction in general

For a court to exercise personal jurisdiction, the exercise of personal jurisdiction must comport with constitutional due process principles. *U.S. Const. Amend. 5*.

1 Cases that cite this headnote

[10] Constitutional Law 🔑 Non-residents in general

In order to assure that personal jurisdiction comports with constitutional due process

principles, a court must determine both whether a nonresident defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction over the defendant and whether the assertion of personal jurisdiction over the defendant comports with traditional notions of fair play and substantial justice under the circumstances of the particular case. *U.S. Const. Amend. 5*.

2 Cases that cite this headnote

[11] Federal Courts 🔑 Purpose, intent, and foreseeability; purposeful availment**Federal Courts** 🔑 Related contacts and activities; specific jurisdiction

There are three conditions that must be met for the exercise of specific personal jurisdiction: (1) the defendant must have purposefully availed itself of the privileges of conducting activities within the forum State or have purposefully directed its conduct into the forum State, (2) the plaintiff's claims must arise out of or relate to the defendant's forum conduct, and (3) the exercise of jurisdiction must be reasonable under the circumstances.

[12] Federal Courts 🔑 Related contacts and activities; specific jurisdiction

Where there is no connection between the forum and the underlying controversy, specific personal jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.

[13] Federal Courts 🔑 Fraud, racketeering, and deceptive practices

Claims of egg purchasers who were not from New York were not connected to New York, and thus court lacked specific personal jurisdiction over non-New York purchasers in putative class action against egg seller alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were given ample access to open spaces, where non-New York purchasers did not purchase eggs in New

York and were not exposed to seller's marketing or advertising in New York.

[14] Federal Civil Procedure 🔑 Jurisdictional discovery

Egg purchasers were not entitled to jurisdictional discovery regarding court's lack of personal jurisdiction over non-New York purchasers, for purposes of purchasers' putative class action against egg seller alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were given ample access to open spaces; seller's contracting with a New York-based advertising agency for its marketing was insufficient to meet threshold showing required for jurisdictional discovery.

[15] Federal Civil Procedure 🔑 Jurisdictional discovery

Whether to grant jurisdictional discovery when plaintiffs fail to make a prima facie showing of personal jurisdiction is within the court's discretion.

[16] Federal Civil Procedure 🔑 Jurisdictional discovery

A federal court may order limited discovery to establish personal jurisdiction so long as plaintiff has made a threshold showing of jurisdiction and established that his jurisdictional position is not frivolous.

[17] Federal Civil Procedure 🔑 Jurisdictional discovery

A defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction, as required for jurisdictional discovery.

[18] Federal Courts 🔑 Dismissal or other disposition

A case is properly dismissed for lack of subject matter jurisdiction on a motion to dismiss when the district court lacks the statutory or constitutional power to adjudicate it. *Fed. R. Civ. P. 12(b)(1)*.

[19] Federal Courts 🔑 Pleadings and motions

A facial motion to dismiss for lack of subject matter jurisdiction is one based solely on the allegations of the complaint or the complaint and exhibits attached to it. *Fed. R. Civ. P. 12(b)(1)*.

[20] Federal Courts 🔑 Presumptions and burden of proof

A plaintiff opposing a facial motion to dismiss for lack of subject matter jurisdiction bears no evidentiary burden. *Fed. R. Civ. P. 12(b)(1)*.

[21] Federal Courts 🔑 Pleadings and motions

To resolve a facial motion to dismiss for lack of subject matter jurisdiction, a district court must determine whether the complaint and its exhibits allege facts that establish subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1)*.

[22] Federal Courts 🔑 Pleadings and motions

To make determination whether the complaint and its exhibits allege facts that establish subject matter jurisdiction, as required to resolve a facial motion to dismiss for lack of subject matter jurisdiction, a court must accept the complaint's allegations as true and draw all reasonable inferences in favor of the plaintiff. *Fed. R. Civ. P. 12(b)(1)*.

[23] Federal Courts 🔑 Evidence; Affidavits

A defendant is permitted to make a fact-based motion to dismiss for lack of subject matter jurisdiction, proffering evidence beyond the complaint and its exhibits. *Fed. R. Civ. P. 12(b)(1)*.

[24] Federal Courts 🔑 Presumptions and burden of proof

In opposition to a fact-based motion to dismiss for lack of subject matter jurisdiction, a plaintiff must come forward with evidence of their own to controvert that presented by the defendant, or may instead rely on the allegations in their pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing. *Fed. R. Civ. P. 12(b)(1)*.

[25] Federal Courts 🔑 Findings and conclusions

If a defendant supports a fact-based motion to dismiss for lack of subject matter jurisdiction with material and controverted extrinsic evidence, a district court will need to make findings of fact in aid of its decision as to subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1)*.

[26] Federal Courts 🔑 Limited jurisdiction; jurisdiction as dependent on constitution or statutes

Federal courts are courts of limited jurisdiction, and lack the power to disregard such limits as have been imposed by the Constitution or Congress.

[27] Federal Courts 🔑 Case or Controversy Requirement**Federal Courts** 🔑 Nature of dispute; concreteness

Article III of the Constitution limits the jurisdiction of federal courts to cases and controversies, thereby restricting the authority of federal courts to resolving the legal rights of litigants in actual controversies. *U.S. Const. art. 3, § 2, cl. 1*.

[28] Federal Civil Procedure 🔑 In general; injury or interest**Federal Civil Procedure** 🔑 Causation; redressability**Federal Courts** 🔑 Case or Controversy Requirement

The cases and controversies requirement for standing places the burden on those who invoke the power of a federal court to demonstrate standing, which is a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *U.S. Const. art. 3, § 2, cl. 1*.

[29] Federal Civil Procedure 🔑 In general; injury or interest

In order to satisfy injury-in-fact requirement for standing, the plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *U.S. Const. art. 3, § 2, cl. 1*.

[30] Injunction 🔑 Persons entitled to apply; standing

To establish standing to obtain prospective relief, a plaintiff must show a likelihood that he will be injured in the future. *U.S. Const. art. 3, § 2, cl. 1*.

[1 Cases that cite this headnote](#)

[31] Injunction 🔑 Persons entitled to apply; standing

To establish standing to obtain prospective relief, either there must be a substantial risk that the future injury will occur, or the threatened injury must be certainly impending. *U.S. Const. art. 3, § 2, cl. 1*.

[1 Cases that cite this headnote](#)

[32] Injunction 🔑 Persons entitled to apply; standing

To establish standing to obtain prospective relief, allegations of possible future injury are not sufficient, nor is past exposure to illegal conduct. *U.S. Const. art. 3, § 2, cl. 1*.

2 Cases that cite this headnote

[33] **Antitrust and Trade Regulation** 🔑 Private entities or individuals

Federal Civil Procedure 🔑 Consumers, purchasers, borrowers, and debtors

Egg purchasers failed to allege any actual intent to purchase seller's eggs again, and thus purchasers failed to establish a likelihood of future injury sufficient to show standing to pursue injunctive relief against purchaser in putative class action alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were given ample access to open spaces. *U.S. Const. art. 3, § 2, cl. 1.*

2 Cases that cite this headnote

[34] **Antitrust and Trade Regulation** 🔑 Nature and Elements

Antitrust and Trade Regulation 🔑 Advertising, marketing, and promotion

Under New York law, in order to plead a sufficient claim under sections governing deceptive acts and false advertising, a plaintiff must allege that the defendant: (1) engaged in consumer-oriented conduct, (2) that the conduct was materially misleading, and (3) that the plaintiff suffered injury as a result of the allegedly deceptive act or practice. *N.Y. General Business Law §§ 349, 350.*

1 Cases that cite this headnote

[35] **Antitrust and Trade Regulation** 🔑 Advertising, marketing, and promotion

Egg purchasers failed to allege they viewed egg seller's website prior to purchasing eggs, and thus purchasers failed to state claims for deceptive acts and false advertising under New York law based on statements on website in purchasers' putative class action alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were

given ample access to open spaces *N.Y. General Business Law §§ 349, 350.*

[36] **Antitrust and Trade Regulation** 🔑 Advertising, marketing, and promotion

Egg purchasers' interpretation of egg seller's advertising stating that "WE LOVE OUR HENS, YOU'LL LOVE OUR EGGS," "WE LOVE OUR HENS," and "BETTER LIVES FOR HENS MEAN BETTER EGGS FOR YOU," to mean that seller's hens were free from numerous husbandry practices that purchasers opposed was unreasonable, and thus purchasers failed to state claims for deceptive acts and false advertising under New York law based on those statements in purchasers' putative class action alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were given ample access to open spaces; statements were puffery that did not provide any concrete representations. *N.Y. General Business Law §§ 349, 350.*

1 Cases that cite this headnote

[37] **Antitrust and Trade Regulation** 🔑 Fraud; deceit; knowledge and intent

Antitrust and Trade Regulation 🔑 Advertising, marketing, and promotion

To establish that conduct is materially misleading, as required to state claims for deceptive acts and false advertising under New York law, a plaintiff must demonstrate that a reasonable consumer would likely be misled by the alleged misrepresentation. *N.Y. General Business Law §§ 349, 350.*

[38] **Antitrust and Trade Regulation** 🔑 Fraud; deceit; knowledge and intent

Antitrust and Trade Regulation 🔑 Advertising, marketing, and promotion

When determining whether a plaintiff demonstrated that a reasonable consumer would

likely be misled by an alleged misrepresentation, as required to state claims for deceptive acts and false advertising under New York law, courts view each allegedly misleading statement in light of its context on the product label or advertisement as a whole. *N.Y. General Business Law* §§ 349, 350.

1 Cases that cite this headnote

[39] **Antitrust and Trade Regulation** 🔑 Questions of law or fact

The reasonable consumer inquiry for claims for deceptive acts and false advertising under New York law is typically a question of fact and thus best decided at a stage in the proceeding later than the motion to dismiss stage. *N.Y. General Business Law* §§ 349, 350.

[40] **Antitrust and Trade Regulation** 🔑 Fraud; deceit; knowledge and intent

Antitrust and Trade Regulation 🔑 Advertising, marketing, and promotion

Statements and practices that are mere puffery are not actionable, for purposes of claims for deceptive acts and false advertising under New York law, and courts can determine that a statement is puffery as a matter of law. *N.Y. General Business Law* §§ 349, 350.

1 Cases that cite this headnote

[41] **Antitrust and Trade Regulation** 🔑 Fraud; deceit; knowledge and intent

Antitrust and Trade Regulation 🔑 Advertising, marketing, and promotion

For purposes of claims for deceptive acts and false advertising under New York law, “puffery” includes generalized or exaggerated statements which a reasonable consumer would not interpret as a factual claim upon which he could rely. *N.Y. General Business Law* §§ 349, 350.

[42] **Antitrust and Trade Regulation** 🔑 Fraud; deceit; knowledge and intent

Antitrust and Trade

Regulation 🔑 Advertising, marketing, and promotion

For purposes of claims for deceptive acts and false advertising under New York law, “puffery” can include an exaggeration or overstatement expressed in broad, vague, and commendatory language, as distinguished from misdescriptions or false representations of specific characteristics of a product.

[43] **Antitrust and Trade Regulation** 🔑 Particular cases

Egg purchasers plausibly alleged that they believed egg seller's statement on egg containers that most “hens don't have it as good as” seller's hens, which can “peck, perch, and play on plenty of green grass” to mean that seller's hens had “space to move around both indoors and outdoors,” which was far from alleged conditions for seller's hens, as required to state claims for deceptive acts and false advertising under New York law based on that statement in purchasers' putative class action alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were given ample access to open spaces. *N.Y. General Business Law* §§ 349, 350.

[44] **Fraud** 🔑 Elements of Actual Fraud

Under New York law, fraud and fraudulent misrepresentation claims are identical.

[45] **Fraud** 🔑 Relations and means of knowledge of parties

Egg purchasers plausibly alleged they reasonably relied on egg seller's statements on egg containers regarding its hens' access to the outdoors, as required to state fraud and fraudulent misrepresentation claims under New York law in purchasers' putative class action alleging that purchases were made based on

seller's allegedly false advertisements indicating that hens were given ample access to open spaces; containers gave purchasers no reason to be on alert as to potential misrepresentations, and purchasers would have had no independent means of ascertaining the truth of seller's misrepresentations short of driving themselves to purchaser's facilities and sleuthing about the grounds for the truth.

[46] **Fraud** 🔑 Duty to Investigate

Fraud 🔑 Relations and means of knowledge of parties

For purposes of fraud and fraudulent misrepresentation claims under New York law, although reasonable reliance is often a fact-intensive question, it is a condition which cannot be met where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means.

[47] **Fraud** 🔑 Duty to Investigate

Fraud 🔑 Relations and means of knowledge of parties

To plead reasonable reliance for purposes of fraud and fraudulent misrepresentation claims under New York law, a plaintiff must show minimal diligence or care that negates its own recklessness unless matters are held to be peculiarly within defendant's knowledge and the plaintiff would have no independent means of ascertaining the truth.

[48] **Sales** 🔑 Notice as condition precedent

Egg purchasers failed to provide any notice to egg seller of any breach of express warranty, and thus failed to state claim for breach of express warranty under New York law in purchasers' putative class action alleging that purchases were made based on seller's allegedly false advertisements indicating that hens were given ample access to open spaces. *N.Y. Uniform Commercial Code* § 2-607(3)(a).

[49] **Sales** 🔑 Breach and elements thereof in general

Under New York law, breach of express warranty claims require: (1) a material statement amounting to a warranty, (2) the buyer's reliance on this warranty as a basis for the contract with his immediate seller, (3) the breach of this warranty, and (4) injury to the buyer caused by the breach.

[50] **Sales** 🔑 Notice as condition precedent

Under New York law, in order to assert a breach of express warranty claim, a buyer must provide the seller with timely notice of the alleged breach of warranty. *N.Y. Uniform Commercial Code* § 2-607(3)(a).

Attorneys and Law Firms

Asher Smith, Peta Foundation, Washington, DC, *Jeanne-Marie Bates Christensen*, Wigdor LLP, New York, NY, for Plaintiffs.

Nathan Reed Fennessy, Preti, Flaherty, Beliveau & Pachios, PLLP, Concord, NH, *Peter T. Shapiro*, Lewis Brisbois Bisgaard & Smith LLP, New York, NY, for Defendants.

OPINION AND ORDER

KATHERINE POLK FAILLA, District Judge:

*1 Plaintiffs bring this action, on behalf of themselves and as proposed representatives of a putative class of similarly situated individuals, against Defendant Pete and Gerry's Organic, LLC.¹ Plaintiffs allege that they purchased Defendant's eggs, branded as Nellie's Free Range Eggs, based on Defendant's advertisements indicating that Defendant's hens are loved and are given ample access to open, green spaces in which they can peck, perch, and play. However, Plaintiffs allege that this advertising is a lie, and conceals the facts that (i) Defendant's hens are kept in tightly constricted spaces, with no real access to the outdoors, and (ii) the hens

are subject to numerous husbandry practices that Plaintiffs oppose, such as beak-cutting and culling. Plaintiffs bring a wide variety of state-law statutory claims relating to false and deceptive advertising, as well as claims for fraud, fraudulent misrepresentation, and breach of express warranty, and request damages and injunctive relief. Defendant moves, pursuant to [Federal Rules of Civil Procedure 12\(b\)\(2\) and 12\(b\)\(6\)](#), both to dismiss the claims brought by the non-New York plaintiffs and putative class members for lack of personal jurisdiction and to dismiss the complaint as a whole for failure to state a claim for relief. For the reasons set forth in the remainder of this Opinion, Defendant's motion to dismiss for lack of personal jurisdiction is granted in part and denied in part, and Defendant's motion to dismiss for failure to state a claim is granted in part and denied in part.

¹ Although both Pete and Gerry's Organic, LLC and Nellie's Free Range Eggs are named as Defendants, Pete and Gerry's has represented that Nellie's Free Range Eggs is no more than a registered trademark and is therefore not a separate legal entity that can be sued. (Dkt. #18). Plaintiffs have not challenged Pete and Gerry's representation. Therefore, given the lack of any showing that Nellie's Free Range Eggs is an entity that can be sued, the Court dismisses it as a Defendant.

BACKGROUND²

² The facts contained in this Opinion are drawn principally from Plaintiff's Second Amended Class Action Complaint, which is the operative pleading in this case and is referred to in this Opinion as the "SAC." (Dkt. #29). The Court has also, in its consideration of Defendant's [Rule 12\(b\)\(2\)](#) motion, evaluated certain exhibits attached to the Declaration of Jeanne Christensen in Opposition to Defendants' Motion to Dismiss Under [Rule 12\(b\)\(2\)](#) (Dkt. #33), although the Court does not cite to them in this Opinion.

For ease of reference, the Court refers to the parties' briefing as follows: Defendant's opening brief as "Def. Br." (Dkt. #31); Plaintiffs' opposition brief as "Pl. Opp." (Dkt. #32); and Defendant's reply brief as "Def. Reply" (Dkt. #34).

A. Factual Background

Plaintiffs are residents of New York, California, Massachusetts, Georgia, Maryland, and North Carolina. (SAC ¶¶ 16-24). Defendant is a limited liability company formed and headquartered in New Hampshire. (*Id.* at ¶ 25). Plaintiffs purchased Defendant's Nellie's Free Range Eggs in their respective states. (*Id.* at ¶¶ 16-24). In making their respective decisions to purchase the eggs, Plaintiffs relied on a combination of slogans, descriptions, and images on the Nellie's Free Range Eggs containers. (*Id.*). The slogans included such statements as: "WE LOVE OUR HENS, YOU'LL LOVE OUR EGGS"; "WE LOVE OUR HENS"; "BETTER LIVES FOR HENS MEAN BETTER EGGS FOR YOU!"; and "OUTDOOR FORAGE." (*Id.*). The container also claimed that "[m]ost hens don't have it as good as Nellie's," because Nellie's hens "can peck, perch, and play on plenty of green grass." (*Id.*). Finally, the containers all included imagery highlighting young children playing with hens in an open field. (*Id.* at ¶ 46). Based on these slogans, statements, and images, Plaintiffs believed that Nellie's Free Range Eggs were "sourced from small farms providing all chickens with space to move around both indoors and outdoors, as well as freedom from chick culling, beak-cutting, [calcium](#) depletion[,] and sale to commercial slaughterhouses and live markets." (*Id.* at ¶ 16). Defendant's website, it is alleged, only reinforced these beliefs. (*Id.*).

*² Plaintiffs allege that Defendant's hens face a far different and grimmer reality than Defendant's advertising indicates. (SAC ¶¶ 7-8). In contrast to Defendant's idyllic images of happy hens in green pastures, Defendant's hens are instead crammed "into sheds up to 20,000 at a time ... prevent[ing] them from extending their wings, foraging or making their way to the outdoor space [Defendant] advertises so prominently." (*Id.* at ¶ 7). In addition, Defendant mutilates its hens' beaks. (*Id.* at ¶ 8). And once Defendant's hens have laid so many eggs that they are depleted of the [calcium](#) "needed to lay eggs strong enough to make it to market," Defendant "sells them to slaughterhouses and live markets that kill them." (*Id.*). Plaintiffs allege that if they had known the truth about Defendant's practices, they would not have paid premium prices for Defendant's eggs. (*Id.* at ¶¶ 16-24). Moreover, Plaintiffs "would only consider purchasing Nellie's eggs in the future if Defendant[] were to treat chickens in a manner consistent with [its] advertising." (*Id.* at ¶¶ 16-24).

B. Procedural Background

Plaintiffs initiated this action and filed their original Complaint on March 6, 2019. (Dkt. #1). Plaintiffs then amended their Complaint and added additional parties on

May 7, 2019, prior to Defendant responding. (Dkt. #10). On May 20, 2019, Defendant requested a conference to discuss its anticipated motion to dismiss (Dkt. #18), to which Plaintiffs responded on May 30, 2019 (Dkt. #22). The parties appeared before the Court for a pre-motion conference on June 27, 2019, at which the Court set both a date by which Plaintiffs could again amend their complaint and a briefing schedule for Defendant's motion to dismiss. (Minute Entry of June 27, 2019).

Plaintiffs filed their SAC on July 29, 2019. (Dkt. #29). The SAC alleged violations of New York General Business Law ("GBL") Sections 349 and 350; California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 to 17210; California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 to 17509; Maryland's Unfair or Deceptive Trade Practices Law, Md. Code Ann., Com. Law § 13-301; North Carolina's Unfair & Deceptive Trade Practices Law, N.C. Gen. Stat. § 75-1.1; Massachusetts's Consumer Protection Act, Mass. Gen. Laws Ann. Ch. 93A, §§ 1 to 11; and Georgia's Fair Business Practices Act, Ga. Code Ann. §§ 10-1-390 to 10-1-408. (SAC ¶¶ 128-88). The SAC also alleged common-law claims for fraud, fraudulent representation, and breach of express warranty, without specifying any particular state statutes. (*Id.* at ¶¶ 189-208).

Defendant filed its motion to dismiss, with an accompanying memorandum of law, on September 16, 2019. (Dkt. #30, 31). Plaintiffs responded with an opposing memorandum and supporting declaration on October 25, 2019. (Dkt. #32, 33). Defendant filed its reply brief on November 8, 2019. (Dkt. #34).

DISCUSSION

A. The Court Grants in Part Defendant's Motion to Dismiss for Lack of Personal Jurisdiction

1. Motions to Dismiss Under Rule 12(b)(2)

[1] "A court facing challenges as to both its jurisdiction over a party and the sufficiency of any claims raised must first address the jurisdictional question." *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 148 (E.D.N.Y. 2017) (citing *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 221 (2d Cir. 1963)). Therefore, the Court will first address Defendant's motion to dismiss the claims of the named Plaintiffs and putative class members residing outside New York for lack of personal jurisdiction.

[2] [3] [4] [5] [6] "On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). To survive a motion to dismiss, a plaintiff need only provide "legally sufficient allegations of jurisdiction." *Id.* A plaintiff makes such a showing through "an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." *Id.* at 567 (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)). Plaintiff's jurisdictional allegations "are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor[.]" *Elsevier, Inc. v. Grossman*, 77 F. Supp. 3d 331, 341 (S.D.N.Y. 2015) (quoting *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993)). Where a court does not hold an evidentiary hearing on the jurisdictional question, it may, nevertheless, consider matters outside the pleadings. *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 86 (2d Cir. 2013).

*3 [7] [8] [9] [10] There are three requirements that must be met in order for a court to exercise personal jurisdiction: "First, the plaintiff's service of process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective.... Third, the exercise of personal jurisdiction must comport with constitutional due process principles." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 327 (2d Cir. 2016) (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012)). In order to assure that the last prong has been satisfied, a court must determine both "whether a defendant has sufficient minimum contacts with the forum to justify the court's exercise of personal jurisdiction over the defendant and whether the assertion of personal jurisdiction over the defendant comports with traditional notions of fair play and substantial justice under the circumstances of the particular case." *Johnson v. UBS AG*, 791 Fed.Appx. 240, 242 (2d Cir. 2019) (internal quotation marks omitted) (citing *Waldman*, 835 F.3d at 331).

[11] [12] "In analyzing the minimum contacts requirement, courts have distinguished between two bases for personal jurisdiction: specific jurisdiction and general jurisdiction." *Johnson*, 791 Fed.Appx. at 242. There are three conditions that must be met for the exercise of specific jurisdiction: (i) "the defendant must have purposefully availed itself of

the privileges of conducting activities within the forum State or have purposefully directed its conduct into the forum State,” *U.S. Bank N.A. v. Bank of America N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (quoting *Bristol-Myers Squibb Co. v. Superior Court of California*, — U.S. —, 137 S. Ct. 1773, 1785, 198 L.Ed.2d 395 (2017)); (ii) “the plaintiff’s claims must arise out of or relate to the defendant’s forum conduct,” *id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1786); and (iii) “the exercise of jurisdiction must be reasonable under the circumstances,” *id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1786). Where there is no connection between the forum and the underlying controversy, “specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State.” See *Bristol-Myers*, 137 S. Ct. at 1781 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)).

2. The Court Lacks Specific Jurisdiction over the Non-New York Named Plaintiffs’ Claims

[13] Defendant argues that the Court lacks personal jurisdiction over the claims asserted by any of the Plaintiffs or putative class members not residing in New York. (Def. Br. 19). Neither side claims that the Court has general jurisdiction over Defendant, a company based in New Hampshire. Moreover, Defendant does not contest that this Court can exercise specific jurisdiction over the claims of the New York-based Plaintiffs, which include Michelle Lugones, Tricia Rizzi, Marcus Siezing, Claudia Vassallo, and Anne Flournoy (hereinafter, the “New York Plaintiffs”). The relevant inquiry is whether the Court can exercise specific jurisdiction over the claims brought by Plaintiffs and putative class members who are not based in New York.

The Supreme Court’s analysis in *Bristol-Myers* convinces the Court that it cannot exercise specific jurisdiction over the claims brought by the named Plaintiffs who lack ties to New York. In *Bristol-Myers*, a collection of California and non-California residents brought a mass tort claim regarding *Plavix*, a prescription drug, in California against Bristol-Myers Squibb, a non-California company. See 137 S. Ct. at 1777-78. The non-California plaintiffs did not allege that they either obtained *Plavix* in California or that they were injured by *Plavix* in California. See *id.* at 1778. The Supreme Court held that, under such circumstances, there could be no specific jurisdiction in California over the non-California plaintiffs’ claims, given the lack of any connection between the forum and the claims. See *id.* at 1782.

*4 Similarly here, Plaintiffs Denise Alvarado, Minoee Modi, Isabelle Gray, Karine Sewell, and Sonja Romano do not allege any facts that connect their claims to New York. These non-New York Plaintiffs do not claim that they purchased Defendant’s eggs in New York or that they were exposed to Defendant’s marketing or advertising in New York. The SAC does allege that Defendant “market[s] and sell[s] thousands, if not millions, of eggs throughout New York and Manhattan on a daily basis” (SAC ¶ 13), but that merely shows that Defendant has established a connection to New York, and not that the non-New York Plaintiffs’ claims arise out of or relate to that connection. Given the absence of any facts establishing a connection between the non-New York Plaintiffs’ claims and the forum, *Bristol-Myers* must control here.

[14] [15] [16] [17] Plaintiffs argue that *Bristol-Myers* does not apply in this case because this is a putative class action in federal court, as opposed to a non-class action in state court. (See Pl. Opp. 23). Although there is disagreement as to whether and to what extent *Bristol-Myers* applies in the class action context, see *Bank v. CreditGuard of America*, No. 18 Civ. 1311 (PKC) (RLM), 2019 WL 1316966, at *12 n.11 (E.D.N.Y. Mar. 22, 2019), “[t]he overwhelming majority of federal courts have held that *Bristol-Myers* applies to claims brought by named plaintiffs in class actions,” *Sloan v. General Motors LLC*, No. 16 Civ. 7244 (EMC), 2019 WL 6612221, at *9 (N.D. Cal. Dec. 5, 2019). Indeed, even *Suarez v. California Natural Living, Inc.*, on which Plaintiffs rely (see Pl. Opp. 23), notes that “[s]pecific jurisdiction in a class action arises from the named plaintiff’s causes of action.” No. 17 Civ. 9847 (VB), 2019 WL 1046662, at *6 (S.D.N.Y. Mar. 5, 2019) (emphasis in original). Plaintiffs have cited to no case, and certainly no case in the Second Circuit, that holds that *Bristol-Myers* does not apply to named plaintiffs’ claims in a class action. The Court agrees with the weight of authority that *Bristol-Myers* controls, and dismisses the non-New York named Plaintiffs’ claims.³

3 Plaintiffs argue that if the Court finds that it lacks personal jurisdiction over the non-New York named Plaintiffs, the Court should permit Plaintiffs to engage in jurisdictional discovery. (Pl. Opp. 24). “[W]hether to grant jurisdictional discovery when plaintiffs fail to make a *prima facie* showing of personal jurisdiction is within the court’s discretion.” *Williams v. Summit Marine, Inc.*, No. 18 Civ. 0216 (GLS) (ATB), 2019 WL 4142635, at *6 (N.D.N.Y. Aug. 30, 2019) (citing *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255

(2d Cir. 2007)). Indeed, a federal court may “order limited discovery to establish personal jurisdiction so long as plaintiff has made a threshold showing of jurisdiction and established that his jurisdictional position is not frivolous.” *Newbro v. Freed*, No. 03 Civ. 10308 (PKC), 2004 WL 691392, at *3 (S.D.N.Y. Mar. 31, 2004). However, Plaintiffs here have made no threshold showing upon which the Court would be warranted in granting jurisdictional discovery. All that Plaintiffs point to is that Defendant has generally contracted with a New York-based advertising agency for its marketing. (See Pl. Opp. 24). But as the Supreme Court has made clear, “a defendant’s relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction.” See *Walden v. Fiore*, 571 U.S. 277, 286, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014). Plaintiffs’ request for jurisdictional discovery is denied.

Additionally, Defendant asked, in the alternative to its Rule 12(b)(2) motion, that the Court transfer this action to the District of New Hampshire. (See Def. Br. 26). As the Court has dismissed the non-New York named Plaintiffs, the Court will not consider the alternative motion to transfer.

With that said, the Court will not at this stage in the litigation dismiss the claims of *potential* class members who may not reside in New York. At this point, any claims brought by the putative class are hypothetical, and the Court has no knowledge of who will be asserting such claims or what the bases for specific jurisdiction might be. The Court concludes that it is wiser to follow the course of its sister courts and defer any assessment of whether there is specific jurisdiction over the claims of putative non-New York class members until the class certification stage. See *Suarez*, 2019 WL 1046662, at *6 (finding that “the Court need not assess personal jurisdiction over plaintiff’s putative out-of-state class action claims unless and until the Court decides a class comprising out-of-state class members merits classification”); *Gonzalez v. Costco Wholesale Corp.*, No. 16 Civ. 2590 (NGG) (JO), 2018 WL 4783962, at *8 (E.D.N.Y. Sept. 29, 2018) (deferring resolution of issue regarding out-of-state class members to class certification stage). Therefore, Defendant’s motion to dismiss the claims of putative non-New York class members is denied without prejudice to renewal at the class certification stage.

B. The Court Dismisses Plaintiffs’ Claims for Injunctive Relief

1. Motions Under Rule 12(b)(1)⁴

⁴ Given that the personal jurisdiction issue was straightforward and presented no complex question of state law, this Court does not abuse its discretion by addressing that jurisdictional issue before addressing its subject matter jurisdiction over Plaintiffs’ claims for injunctive relief. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).

*5 Defendant argues further that Plaintiffs⁵ lack standing to seek injunctive relief. (Def. Br. 18-19). Although standing challenges have been brought under Rule 12(b)(6), “the proper procedural route is under Rule 12(b)(1).” See *All. For Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006). Therefore, the Court will analyze Defendant’s argument as if it were made in a motion pursuant to Rule 12(b)(1).

⁵ From this point forward, “Plaintiffs” refers solely to the remaining New York Plaintiffs. Given the dismissal of the non-New York named Plaintiffs, only the New York Plaintiffs’ claims remain relevant. See *Chufen Chen v. Dunkin’ Brands, Inc.*, No. 17 Civ. 3808 (CBA) (RER), 2018 WL 9346682, at *8 (E.D.N.Y. Sept. 17, 2018) (finding that the court lacks jurisdiction over the state-law claims of unnamed putative class members where the corresponding named plaintiffs’ claims have been dismissed). Specifically, the New York Plaintiffs have alleged violations of N.Y. Gen. Bus. Law §§ 349-50, as well as New York state-law claims sounding in fraud, fraudulent misrepresentation, and breach of express warranty.

[18] Rule 12(b)(1) permits a party to move to dismiss a complaint for “lack of subject-matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). “A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.” *Lyons v. Litton Loan Servicing LP*, 158 F. Supp. 3d 211, 218 (S.D.N.Y. 2016) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)).

[19] [20] [21] [22] The Second Circuit has identified two types of Rule 12(b)(1) motions: facial and fact-based. See

Carter v. HealthPort Technologies, LLC, 822 F.3d 47, 56-57 (2d Cir. 2016); see also *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 119 (2d Cir. 2017). A facial Rule 12(b)(1) motion is one “based solely on the allegations of the complaint or the complaint and exhibits attached to it.” *Carter*, 822 F.3d at 56. A plaintiff opposing such a motion bears “no evidentiary burden.” *Id.* Instead, to resolve a facial Rule 12(b)(1) motion, a district court must “determine whether [the complaint and its exhibits] allege[] facts that” establish subject matter jurisdiction. *Id.* (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) (per curiam)). And to make that determination, a court must accept the complaint’s allegations as true “and draw[] all reasonable inferences in favor of the plaintiff.” *Id.* at 57 (internal quotation marks and citation omitted).

[23] [24] [25] “Alternatively, a defendant is permitted to make a fact-based Rule 12(b)(1) motion, proffering evidence beyond the complaint and its exhibits.” *Carter*, 822 F.3d at 57; see also *MMA Consultants I, Inc. v. Rep. of Peru*, 719 F. App’x 47, 49 (2d Cir. 2017) (summary order) (defining fact-based Rule 12(b)(1) motion as one where “the defendant puts forward evidence to challenge the factual contentions underlying the plaintiff’s assertion of subject-matter jurisdiction”). “In opposition to such a motion, [a plaintiff] must come forward with evidence of their own to controvert that presented by the defendant, or may instead rely on the allegations in the[ir] pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing.” *Katz*, 872 F.3d at 119 (internal citations and quotations omitted). If a defendant supports his fact-based Rule 12(b)(1) motion with “material and controverted” “extrinsic evidence,” a “district court will need to make findings of fact in aid of its decision as to subject matter jurisdiction.” *Carter*, 822 F.3d at 57.

2. Plaintiffs Lack Standing to Pursue Injunctive Relief

*6 [26] [27] [28] Federal courts are courts of limited jurisdiction, “and lack the power to disregard such limits as have been imposed by the Constitution or Congress.” *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 616 (2d Cir. 2019). Article III of the Constitution “limits the jurisdiction of federal courts to ‘Cases’ and ‘Controversies,’ ” thereby “restrict[ing] the authority of federal courts to resolving ‘the legal rights of litigants in actual controversies.’ ” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013) (internal quotation marks omitted)

(quoting *Valley Forge Christian College v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). The “Cases and Controversies” requirement places the burden on “those who invoke the power of a federal court to demonstrate standing — a ‘personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.’ ” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013).

[29] [30] [31] [32] In order to satisfy the first prong of standing — that the plaintiff has suffered an “injury in fact” — the plaintiff “must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ ” *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1548, 194 L.Ed.2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Moreover, “[t]o establish standing to obtain prospective relief, a plaintiff ‘must show a likelihood that he will be injured in the future.’ ” *Carver v. City of New York*, 621 F.3d 221, 228 (2d Cir. 2010) (quoting *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004)). Either there must be a “substantial risk” that the future injury will occur, or the threatened injury must be “certainly impending.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). “[A]llegations of possible future injury” are not sufficient,” *Amnesty Int’l*, 568 U.S. at 409, 133 S.Ct. 1138, nor is “past exposure to illegal conduct,” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal brackets omitted) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

[33] Defendant argues that Plaintiffs cannot show that they are likely to suffer any future injury because they have alleged that they do not intend to purchase Nellie’s Free Range Eggs unless Defendant changes its practices to mirror its advertising. (See Def. Br. 18-19; SAC ¶¶ 16-18, 24). Plaintiffs contend that this misstates the law, and point to *Petrosino v. Stearn’s Prod., Inc.*, No. 16 Civ. 7735 (NSR), 2018 WL 1614349 (S.D.N.Y. Mar. 30, 2018), for support. (Pl. Opp. 22). It is indeed the case that the *Petrosino* court found that “a Plaintiff certainly has standing when they ... assert that they will purchase a product in the future if the ingredients are changed so that the product is not mislabeled.” 2018 WL 1614349, at *5. However, a more thorough survey of authority in the Second Circuit suggests that *Petrosino* is an outlier in the Circuit’s jurisprudence.

See, e.g., *Holve v. McCormick & Co., Inc.*, 334 F. Supp. 3d 535, 553 n.10 (W.D.N.Y. 2018) (collecting cases finding that conditional promises to purchase product if product is altered are insufficient to allege future injury). Indeed, the Second Circuit has held that where a plaintiff has failed to allege that he intends to use the offending product in the future, there is no likelihood of future harm. See *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016). Plaintiffs have failed to allege any actual intent to purchase Nellie's Free Range Eggs again, and therefore they have not established a likelihood of future injury sufficient to show standing. Plaintiffs' claims for injunctive relief are dismissed.⁶

⁶ “Moreover, because Plaintiffs do not individually have standing to seek injunctive relief, they do not have standing to seek injunctive relief on behalf of a putative ... class.” *O'Neill v. Standard Homeopathic Co.*, 346 F. Supp. 3d 511, 527 (S.D.N.Y. 2018) (internal quotation marks and brackets omitted) (quoting *Buonasera v. Honest Co., Inc.*, 208 F. Supp. 3d 555, 565 (S.D.N.Y. 2016)).

C. The Court Grants in Part Defendant's Rule 12(b)(6) Motion

1. Motions to Dismiss Under Rule 12(b)(6)

*7 Having dismissed the non-New York named Plaintiffs' claims for lack of personal jurisdiction and the claims seeking injunctive relief for lack of standing, the Court now turns to whether the remaining Plaintiffs have stated a claim upon which relief can be granted. When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must “draw all reasonable inferences in Plaintiff's favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief.” *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks omitted); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A plaintiff is entitled to relief if he alleges “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); see also *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (“While *Twombly* does not require heightened fact pleading of specifics, it does require enough facts to nudge plaintiff's claims across the line from conceivable to plausible.” (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955)).

“Where a complaint pleads facts that are ‘merely consistent with’ a defendant's liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’ ” *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955). Moreover, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

2. Plaintiffs Have Stated Claims Under GBL Sections 349 and 350

[34] Plaintiffs have brought consumer protection claims under GBL §§ 349 and 350. (SAC §§ 128-41). “The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349,” *Goshen v. Mutual Life Insurance Co. of New York*, 98 N.Y.2d 314, 324 n.1, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002), and therefore the Court will merge its analysis of the two claims. In order to plead a sufficient claim under either § 349 or § 350, “a plaintiff must allege that the defendant [i] engaged in consumer-oriented conduct; [ii] that the conduct was materially misleading; and [iii] that the plaintiff suffered injury as a result of the allegedly deceptive act or practice.” *Weisblum v. Prophase Labs. Inc.*, 88 F. Supp. 3d 283, 292 (S.D.N.Y. 2015). Plaintiffs are not required to meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) for their claims. See *Daniel v. Mondelez Int'l, Inc.*, 287 F. Supp. 3d 177, 186 (E.D.N.Y. 2018).

[35] Defendant primarily argues that Plaintiffs have failed to plead that Defendant's conduct was materially misleading. (See Def. Br. 6, 11-12). Although Defendant challenges the materiality of virtually all statements that appear on its containers (see *id.* at 6-11), the universe of relevant alleged misrepresentations is considerably smaller. In order to plead a § 349 or § 350 claim successfully, Plaintiffs must allege that they saw the misleading statements of which they complain before they purchased or came into possession of Defendant's eggs. See *Tyman v. Pfizer, Inc.*, No. 16 Civ. 6941 (LTS) (BCM), 2017 WL 6988936, at *24 (S.D.N.Y. Dec. 27, 2017), report and recommendation adopted, No. 16 Civ. 6941 (LTS) (BCM), 2018 WL 481890 (S.D.N.Y. Jan. 18, 2018); *Goldemberg v. Johnson & Johnson Consumer Cos., Inc.*, 8 F. Supp. 3d 467, 480 (S.D.N.Y. 2014).⁷ Thus, Plaintiffs' claims can only be based on alleged statements and images that Plaintiffs claim to have viewed before they purchased the eggs. These include statements such as: “WE LOVE OUR

HENS, YOU'LL LOVE OUR EGGS"; "WE LOVE OUR HENS"; "BETTER LIVES FOR HENS MEAN BETTER EGGS FOR YOU"; "OUTDOOR FORAGE"; and images of young children playing with hens in green, open fields. (SAC ¶¶ 16-18, 24, 46). Plaintiffs' also allege that they relied on the following paragraph, which was printed on the container, prior to purchasing Defendant's eggs:

***8 Most hens don't have it as good as Nellie's.** 9 out of 10 hens in the U.S. are kept in tiny cages at giant egg factories housing millions of birds. Sadly, even "cage-free" is now being used to describe hens that are crowded into large, stacked cages on factory farms, who never see the sun. Nellie's small family farms are all Certified Humane Free-Range. Our hens can peck, perch, and play on plenty of green grass.

(*Id.* at ¶ 46). Importantly, this also means that the alleged representations that Plaintiffs do not claim to have seen before purchasing the eggs are non-actionable. Plaintiffs allege that they checked Defendant's website, but they do not allege that they viewed it prior to purchasing Nellie's Free Range Eggs. (See *id.* at ¶ 16). Plaintiffs cannot show either that they relied on Defendant's website prior to purchasing the eggs or that the various statements on Defendant's website caused their injury, and therefore the only relevant alleged misrepresentations are those that were presented on the containers.

⁷ Section 350 requires a plaintiff to plead that they relied on a defendant's statements at the time of purchase, *Horowitz v. Stryker Corp.*, 613 F. Supp. 2d 271, 288 (E.D.N.Y. 2009), but § 349 does not require reliance, see *Belfiore v. Procter & Gamble Co.*, 94 F. Supp. 3d 440, 446 (E.D.N.Y. 2015). Section 349 does, however, require that a plaintiff plead causation, see *Belfiore*, 94 F. Supp. 3d at 446, and thus the pleading requirements end up being much the same, see *Tyman v. Pfizer, Inc.*, No. 16 Civ. 6941 (LTS) (BCM), 2017 WL 6988936, at *24 (S.D.N.Y. Dec. 27, 2017), *report and recommendation adopted*, No. 16 Civ. 6941

(LTS) (BCM), 2018 WL 481890 (S.D.N.Y. Jan. 18, 2018).

[36] [37] [38] Much of the conduct that Plaintiffs allege to be materially misleading is non-actionable. "To establish that conduct is materially misleading, a plaintiff must demonstrate that a reasonable consumer would likely be misled by the alleged misrepresentation." *Sitt v. Nature's Bounty, Inc.*, No. 15 Civ. 4199 (MKB), 2016 WL 5372794, at *8 (E.D.N.Y. Sept. 26, 2016). "Courts view each allegedly misleading statement in light of its context on the product label or advertisement as a whole." *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29, 53 (E.D.N.Y. 2015) (internal quotation marks omitted) (quoting *Delgado v. Ocwen Loan Servicing, LLC*, No. 13 Civ. 4427 (NGG) (RLM), 2014 WL 4773991, at *8 (E.D.N.Y. Sept. 24, 2014)). "The entire mosaic is viewed rather than each tile separately." *Id.* (internal quotation marks omitted) (quoting *Time Warner Cable, Inc. v. DIRECTV, Inc.*, No. 06 Civ. 14245 (LTS) (MHD), 2007 WL 1138879, at *4 (S.D.N.Y. Apr. 16, 2007)).

[39] [40] [41] [42] The "reasonable consumer" inquiry is typically a question of fact, see *Sitt*, 2016 WL 5372794, at *8 (quoting *Hidalgo v. Johnson & Johnson Consumer Cos., Inc.*, 148 F. Supp. 3d 285, 295 (S.D.N.Y. 2015), and thus best decided at a later stage in the proceeding. But "[s]tatements and practices that are mere puffery are not actionable," *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 644 (S.D.N.Y. 2011), and "[c]ourts can determine that a statement is puffery as a matter of law," *Kommer v. Ford Motor Co.*, No. 17 Civ. 296 (LEK) (DJS), 2017 WL 3251598, at *3 (N.D.N.Y. July 28, 2017) (citing *Leonard v. Abbott Labs., Inc.*, No. 10 Civ. 4676 (ADS) (WDW), 2012 WL 764199, at *21 (E.D.N.Y. Mar. 5, 2012)). "Puffery includes generalized or exaggerated statements which a reasonable consumer would not interpret as a factual claim upon which he could rely." *Id.* It can also include "an exaggeration or overstatement expressed in broad, vague, and commendatory language, as distinguished from misdescriptions or false representations of specific characteristics of a product." *Id.* (internal brackets omitted) (quoting *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993)).

*9 Defendant's advertising, "WE LOVE OUR HENS, YOU'LL LOVE OUR EGGS," or more simply, "WE LOVE OUR HENS," or even that "BETTER LIVES FOR HENS MEAN BETTER EGGS FOR YOU" are paradigmatic examples of puffery. Such statements "do not provide any concrete representations," *Fink*, 810 F. Supp. 2d at 644, but are instead "subjective claims about products, which

cannot be proven either true or false,” *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 159 (2d Cir. 2007) (internal brackets omitted) (citing *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995)). Indeed, “[s]uch sales talk ... is considered to be offered and understood as an expression of the seller's opinion only.... The ‘puffery’ rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.” *Id.* (quoting *Pennzoil Co.*, 987 F.2d at 945). Insofar as Plaintiffs interpreted such statements to mean that Defendant's hens were free “from chick culling, beak-cutting, calcium depletion[,] and sale to commercial slaughterhouses and live markets” (SAC ¶¶ 16-18, 24), such an interpretation was unreasonable. See *Kommer*, 2017 WL 3251598, at *3 (finding statement that car was “Built Ford-Tough” was puffery where plaintiff interpreted statement to mean that the car's door handles would work in below-freezing temperatures). Plaintiffs cannot make out cognizable claims under GBL §§ 349 and 350 based on such statements.

[43] Plaintiffs have, however, alleged a viable claim in regards to Defendant's statement that “[m]ost hens don't have it as good as Nellie's.... Our hens can peck, perch, and play on plenty of green grass.” (See SAC ¶¶ 16-18, 24). Unlike Defendant's other statements, which make vague claims about love, this statement makes a factual claim — namely, that Defendant's hens have better lives than other hens because they have more access to the outdoors — upon which a reasonable consumer could rely. This statement is only reinforced by references to “OUTDOOR FORAGE” and images of hens frolicking in elysian pastures. (See *id.* at ¶ 46). In contrast to the cases on which Defendant relies, such as *Pizza Hut, Inc. v. Papa John's International, Inc.*, 227 F.3d 489 (5th Cir. 2000), and *Cablevision Systems Corp. v. Verizon New York, Inc.*, 119 F. Supp. 3d 39 (E.D.N.Y. 2015) (see Def. Br. 8), Defendant's statement provides enough specificity to elevate itself beyond puffery and into potential materiality, see *Cablevision*, 119 F. Supp. 3d at 53 (finding that a claim that Cablevision's data network was “better” than Verizon's was puffery when it lacked “more specificity”).

Defendant argues that even if these statements are not puffery, they are still not materially misleading to a reasonable consumer. (See Def. Br. 11). As Defendant notes (see *id.* at 12), “plaintiffs must do more than plausibly allege that a ‘label might conceivably be misunderstood by some few consumers.’” *Jessani v. Monini N. Am., Inc.*, 744 F. App'x 18, 19 (2d Cir. 2018) (summary order) (quoting *Ebner v. Fresh Inc.*, 838 F.3d 958, 965 (9th Cir. 2016)). Instead, “Plaintiffs must plausibly allege ‘that a significant portion of the general

consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’” *Id.*

There is significant authority supporting the idea that it is inappropriate for a court to decide whether a reasonable consumer could be misled at the Rule 12(b)(6) stage, see, e.g., *Kacocha v. Nestle Purina Petcare Co.*, No. 15 Civ. 5489 (KMK), 2016 WL 4367991, at *14 (S.D.N.Y. Aug. 12, 2016) (collecting cases), and the Court finds that authority persuasive here. In *Kacocha*, the court declined to find as a matter of law that a reasonable consumer would not be misled about the amount of bacon in the defendant's Beggin' Strips Original Bacon Flavor dog food due to the defendant's repeated references to bacon on the product's packaging and in its television commercials. See 2016 WL 4367991, at *15. Similarly, this Court cannot conclude as a matter of law that a significant portion of the general consuming public would not read Defendant's claims about its hens having plenty of green space to peck, perch, and play in — together with its verdant images and slogans of “OUTDOOR FORAGE” — and not believe that Defendant's hens have significant access to the outdoors. Plaintiffs have alleged that they believed this advertising to mean that Defendant's hens had “space to move around both indoors and outdoors” (SAC ¶¶ 16-18, 24), and that this portrait of a free range lifestyle is far from the cramped reality alleged in the SAC (see *id.* at ¶¶ 85-98). These allegations are all that is needed for Plaintiffs' § 349 and § 350 claims to survive a motion to dismiss.

3. Plaintiffs Have Stated Claims for Fraud and Fraudulent Misrepresentation

*10 [44] Plaintiffs have also brought common-law claims for fraud and fraudulent misrepresentation. (SAC ¶¶ 189-202). As this Court sits in diversity and the only remaining Plaintiffs are New York residents that allege conduct transpiring in New York, the Court applies New York's substantive law in analyzing Plaintiffs' common-law claims. See *Pal v. Sinclair*, 90 F. Supp. 2d 393, 397 (S.D.N.Y. 2000) (citing *Holm v. Shilensky*, 388 F.2d 54, 56 n.2 (2d Cir. 1968)). As a preliminary matter, the Court notes that under New York law, fraud and fraudulent misrepresentation claims are identical. See *Sprint Sols., Inc. v. Sam*, 206 F. Supp. 3d 755, 764 (E.D.N.Y. 2016). In order to establish either or both claims, Plaintiffs must allege: “[i] Defendant made a material false representation; [ii] Defendant intended to defraud Plaintiffs thereby; [iii] Plaintiffs reasonably relied on the representation; and [iv] Plaintiffs suffered damage as a result of such reliance.” *Id.*

Defendant begins by arguing that Plaintiffs have not alleged any material false representations. (*See* Def. Br. 15). As already determined above, while Defendant's statements regarding "love" and "BETTER LIVES FOR HENS MEAN BETTER EGGS FOR YOU" are non-actionable puffery, *see EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265, 276 (S.D.N.Y. 2004) (explaining that puffery does not amount to actionable misrepresentation in fraud claims), its statements and images concerning its hens' access to the outdoors are adequately alleged to be material and false. Defendant therefore cannot challenge these claims of misrepresentations as satisfying the first element of Plaintiffs' fraud claim.

[45] [46] [47] However, Defendant argues in the alternative that Plaintiffs have failed to plead that they "reasonably relied on the representation." (*See* Def. Br. 15). "[A]lthough reasonable reliance is often a 'fact-intensive' question, it 'is a condition which cannot be met where ... a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means.'" *Ward v. TheLadders.com, Inc.*, 3 F. Supp. 3d 151, 166 (S.D.N.Y. 2014) (internal citation omitted) (quoting first *DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 15 N.Y.3d 147, 155, 905 N.Y.S.2d 118, 931 N.E.2d 87 (2010), and then quoting *Arfa v. Zamir*, 76 A.D.3d 56, 905 N.Y.S.2d 77, 79 (1st Dep't 2010)). "[A] plaintiff 'must show minimal diligence or care that negates its own recklessness,'" *id.* (internal quotation marks and brackets omitted) (quoting *Amusement Indus. Inc. v. Buchanan Ingersoll & Rooney, P.C.*, No. 11 Civ. 4416 (LAK), 2013 WL 628533, at *12 (S.D.N.Y. Feb. 15, 2013)), unless "matters are held to be peculiarly within defendant's knowledge" and "the plaintiff would have 'no independent means of ascertaining the truth,'" *see id.* (quoting *Crigger v. Fahnestock & Co.*, 443 F.3d 230, 234 (2d Cir. 2006)).

Defendant seems to understand the "reasonable reliance" element to mean that Plaintiffs' interpretation of the alleged misrepresentations must have been reasonable. (*See* Def. Br. 16). But Defendant misperceives the law. As made clear above, the "reasonable reliance" element is focused on whether it was foolish or not for the plaintiff to believe the defendant's fraudulent statement. *See Banque Franco-Hellenique de Commerce Int'l et Mar., S.A. v. Christophides*, 106 F.3d 22, 26 (2d Cir. 1997) ("While the law does not require that a defrauded party go to the ends of the earth to discover the falsity of a statement, patent foolishness is not excused."). As an illustrative example, the plaintiffs in *Ward*

alleged that they purchased resume rewriting services based on "expert resume critiques" that the plaintiffs mistook to be bona fide critiques, as opposed to comments designed to induce purchasing the defendant's product. *See* 3 F. Supp. 3d at 165. The court found that there was no reasonable reliance because the resume critiques "were followed immediately in the same document by advertisements, which made it abundantly clear that, in offering the critiques, the defendant was attempting to sell its resume writing services." *See id.* at 166. There could be no reasonable reliance when plaintiffs were so on notice as to the defendant's misrepresentation. *See id.*

*11 Within this proper framing, it is clear that Plaintiffs have sufficiently alleged reasonable reliance. Unlike in *Ward*, Defendant's containers gave Plaintiffs no reason to be on alert as to potential misrepresentations. Moreover, Plaintiffs would have had no independent means of ascertaining the truth of Defendant's misrepresentations — short of driving themselves to Defendant's facilities and sleuthing about the grounds for the truth. Such an effort would go far beyond the "minimal diligence" required. *See id.* Therefore, on the basis of the same representations found actionable in their GBL §§ 349 and 350 claims, Plaintiffs have successfully alleged fraud and fraudulent misrepresentation under New York law.

4. Plaintiffs Have Failed to State a Breach of Express Warranty Claim

[48] [49] [50] Plaintiffs' final claim alleges that Defendant breached its express warranty by implying that its chickens are "loved, happy, healthy, and [live] low-stress lives on small farms in which they can freely roam," when in fact these affirmations are false. (SAC ¶¶ 204-05). "New York breach of express warranty claims require [i] a *material statement* amounting to a warranty; [ii] the buyer's *reliance* on this warranty as a basis for the contract with his immediate seller; [iii] the *breach* of this warranty; and [iv] injury to the buyer *caused* by the breach." *Brady v. Basic Research, L.L.C.*, 101 F. Supp. 3d 217, 235 (E.D.N.Y. 2015) (quoting *Avola v. Louisiana-Pacific Corp.*, 991 F. Supp. 2d 381, 391 (E.D.N.Y. 2013)). However, in order to assert a breach of express warranty claim under New York law, "a buyer must provide the seller with timely notice of the alleged breach of warranty." *Quinn v. Walgreen Co.*, 958 F. Supp. 2d 533, 544 (S.D.N.Y. 2013) (citing N.Y. U.C.C. § 2-607(3)(a)).

Defendant argues that Plaintiffs have not alleged that they provided any notice to Defendant, much less timely notice, and therefore dismissal is required. (*See* Def. Br. 18).

Plaintiffs respond to this potentially dispositive argument by claiming that the Complaint they filed in this action qualifies as sufficient notice. (See Pl. Opp. 21). For support, Plaintiffs cite to a single case, *Panda Capital Corp. v. Kopo Int'l, Inc.*, 242 A.D.2d 690, 662 N.Y.S.2d 584 (2d Dep't 1997). (See *id.*).⁸ Insofar as Plaintiffs believe that *Panda Capital* stands for a broad rule that a filed complaint qualifies as sufficient and timely notice, Plaintiffs are mistaken. All that the *Panda Capital* court found was that where the plaintiff had both filed a complaint and an amended complaint and “had repeatedly made its objections to Kopo's pattern of deficient performance known ... it [was] at the very least an issue of fact as to whether reasonably timely notice of breach was given.” See 662 N.Y.S.2d at 586-87. The Court does not believe that such an equivocal statement amounts to a binding rule that Plaintiffs' filed complaint, regardless of its temporal distance from the alleged breach of the warranty, satisfies N.Y. U.C.C. § 2-607(3)(a).

⁸ Plaintiffs also cite to *In re Hydroxycut Mktg. & Sales Practices Litig.*, 801 F. Supp. 2d 993 (S.D. Cal. 2011) (see Pl. Opp. 21), but that case is from outside New York and outside this Circuit and therefore has little persuasive authority in its analysis of New York law.

This belief is supported by the Court's inability to locate any authority, from either a New York State court or from within this Circuit, that relies on *Panda Capital* for such a broad rule. Indeed, *Mid Island LP v. Hess Corp.*, 983 N.Y.S.2d 204 (Table), 2013 WL 6421281 (Sup. Ct. Dec. 2, 2013), a New York state court case that cites to *Panda Capital*, see *id.* at *4, makes clear that “timely notice is a condition *precedent* to bringing an action for breach of warranty,” *id.* (emphasis added). Lacking any more persuasive authority, the Court follows the lead of its sister courts and finds that Plaintiffs must allege some form of timely, pre-litigation notice. See, e.g., *Colella v. Atkins Nutritionals, Inc.*, 348 F. Supp. 3d 120, 144 (E.D.N.Y. 2018) (finding that plaintiff failed to state a breach of warranty claim where the complaint made “no allegations and state[d] no facts showing that notice was provided to defendant”); *Singleton v. Fifth Generation, Inc.*, No. 15 Civ. 0474 (BKS) (TWD), 2016 WL 406295, at *12 (N.D.N.Y. Jan. 12, 2016) (same); *Quinn*, 958 F. Supp. 2d at 544 (same).

*12 Plaintiffs also contend that “notice is not required when a plaintiff is a retail customer of a product ‘for human consumption, particularly those that are edible.’ ” (Pl. Opp.

21). However, even the case to which Plaintiffs cite notes that this exception to the notice requirement only seems to apply in circumstances where “a breach of a contract claim amounted to a tort claim in which the plaintiff suffered some personal injury.” See *Tomasino v. Estee Lauder Cos., Inc.*, No. 13 Civ. 3692 (ERK) (RML), 2015 WL 4715017, at *4 (E.D.N.Y. Aug. 7, 2015). The *Colella* court similarly noted that this “exception appears to be exclusively applied where a party alleges physical, in addition to economic, injury.” 348 F. Supp. 3d at 144. The Court agrees with its sister courts' analysis of the New York cases regarding this exception, and finds that it is inapplicable where, as here, Plaintiffs have not alleged any physical or personal injury as a result of Defendant's alleged breach. Plaintiffs' breach of express warranty claim must be dismissed for failure to provide timely notice.

In sum, the Court finds that Plaintiffs have stated claims for fraud and fraudulent misrepresentation and claims pursuant to GBL §§ 349 and 350 on the basis of Defendant's statements on its containers regarding its hens' access to the outdoors, and therefore denies Defendant's motion to dismiss as to those specific claims. However, the Court grants Defendant's motion to dismiss insofar as it relates to any representations made on Defendant's website, or to representations on its egg container involving love, or to the statement “BETTER LIVES FOR HENS MEAN BETTER EGGS FOR YOU,” and grants Defendant's motion to dismiss as to the entirety of Plaintiffs' breach of express warranty claim. The Court likewise dismisses Plaintiffs' claims for injunctive relief for failure to allege standing, and dismisses the non-New York named Plaintiffs' claims for lack of personal jurisdiction. The Court denies Defendant's motion to dismiss for lack of personal jurisdiction insofar as it relates to non-New York putative class members.

CONCLUSION

For the reasons set forth in this Opinion, Defendant's motion to dismiss is GRANTED IN PART and DENIED IN PART.

Defendant Nellie's Free Range Eggs is dismissed from the case.

Defendant Pete and Gerry's Organic, LLC's motion is GRANTED with respect to all claims brought on behalf of the non-New York named Plaintiffs, and to Plaintiffs' claims for injunctive relief. Defendant's motion is further

2020 1 4 WL7627, 707 8 3 3 UCC Rep.C.S.2r vd7

GRANTED with respect to Plaintiffs' breach of express warranty claim and with respect to Plaintiffs' fraud, fraudulent misrepresentation, and GBL §§ 349 and 350 claims that rely on statements identified as non-actionable puffery in this Opinion.

Defendant's motion is DENIED with respect to claims that may be brought on behalf of non-New York putative class members at a later stage in this litigation. Defendant's motion is further DENIED with respect to the Plaintiff's fraud, fraudulent misrepresentation and GBL §§ 349 and 350 claims that rely on statements identified as actionable in this Opinion.

The Clerk of Court is directed to terminate the motion at docket entry 30. The Clerk of Court is further directed

to dismiss Denise Alvarado, Minoee Modi, Isabelle Gray, Karine Sewell, and Sonja Romano as Plaintiffs in this action.

On or before **March 13, 2020**, Defendant shall file a responsive pleading.

On or before **March 23, 2020**, the parties shall submit a proposed Case Management Plan, as well as the joint status letter contemplated by the Plan.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 871521, 101 UCC Rep.Serv.2d 341

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 32

2015 WL 630259

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.UNPUBLISHED
Court of Appeals of Michigan.MERCANTILE BANK OF MICHIGAN, Plaintiff/
Counter-Defendant/Appellee/Cross-Appellant,

v.

CLMIA, LLC, Defendant/Third-Party Plaintiff/
Cross-Defendant/Appellant/Cross-Appellee,

and

Daniel B. Longman, Defendant/Third-
Party Plaintiff/Appellant/Cross-Appellee,

and

CLIA, Inc., Defendant,

and

Wells Fargo Bank, N.A., Defendant/
Counter-Plaintiff/Cross-Plaintiff/Appellee,

and

Wells Fargo Advisors, LLC, William Ockerlund, and
Michael Driver, Third-Party Defendants/Appellees,

and

Wachovia Bank and Wachovia Securities,
LLC, Third-Party Defendants.

Docket No. 316777.

|

Feb. 12, 2015.

Kent Circuit Court; LC No. 09-001639-CZ.

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO,
JJ.

Opinion

PER CURIAM.

*1 CLMIA, LLC and Daniel B. Longman appeal as of right the trial court's orders granting summary disposition in favor of Wells Fargo Advisors, William Ockerlund, and Michael Driver on CLMIA's third-party claims against them, denying CLMIA's motion to dismiss Wells Fargo Bank's breach of contract claim against it, and granting summary disposition in favor of Mercantile Bank and against CLMIA and Longman

for breach of contract. Mercantile Bank cross-appeals as of right from the trial court's order granting CLMIA's motion for summary disposition in its favor as to Mercantile's equitable claims against CLMIA. We affirm.

In 2006, Daniel Longman, owner of CLMIA, LLC (a marine insurance agency) met William Ockerlund ("Ockerlund") and Michael Driver ("Driver"), stockbrokers who were employed by Wells Fargo Advisors, LLC (f/k/a Wachovia Securities, LLC) and they advised and assisted him in obtaining financing to purchase a marina in Florida. Longman obtained the financing through the purchase of variable rate bond securities in the amount of \$6,150,000. In November 2006, the bond sale took place with Mercantile Bank of Michigan ("Mercantile") providing a letter of credit in support of the bonds and Longman signing a personal guarantee to Mercantile.

Approximately one month after the sale of the variable rate bonds, Driver recommended that CLMIA enter into an interest rate swap agreement as a purported way to "fix" the interest rate on the bonds. Acting upon this advice, CLMIA executed a Master Swap Agreement with Wachovia Bank (later known as Wells Fargo Bank and which shall hereafter be referred to as "Wells Fargo") in December 2006. Under the Master Swap Agreement, Mercantile was to act as a credit support provider (defined in the swap agreement as "each party to a Credit Support Document that provides or is obligated to provide security, a guaranty or other credit support for [CLMIA's] obligations under this Agreement, including, without limitation, Mercantile Bank of Michigan") for CLMIA in any swap transactions entered into by Wells Fargo and CLMIA pursuant to the agreements. At the same time, and unbeknownst to CLMIA, Mercantile also executed a "Master Swap Participation Agreement" with Wells Fargo obligating it to pay Wells Fargo any amounts that CLMIA became required to pay under the swap transactions but failed to pay.

Wells Fargo and CLMIA immediately entered into a swap transaction under the terms of the Master Swap Agreement and from December 2006 to June 2007 the swap transaction resulted in monthly payments of approximately \$1,000 from Wells Fargo to CLMIA. The swap transaction was terminated around June 2007, and CLMIA received a termination fee, as required under the Master Swap Agreement, from Wells Fargo. Driver then recommended that CLMIA enter into another swap transaction with Wells Fargo in August of 2007 and CLMIA agreed. This transaction was not profitable

to CLMIA and resulted in CLMIA paying significant monthly amounts to Wells Fargo. In the spring of 2008, CLMIA indicated to Driver that it wanted to terminate the swap transaction and was advised that it could not do so without paying a significant termination fee to Wells Fargo. According to CLMIA, it still wanted to terminate the swap transaction and advised Driver of the same. In November 2008, Longman advised Wells Fargo that it would no longer be making the monthly swap transaction payments owed. Rather than terminate the contract, or accept CLMIA's termination, however, Wells Fargo accepted the monthly payments from Mercantile that CLMIA failed to make.

*2 Mercantile thereafter initiated this action against CLMIA and Longman seeking repayment of the monies it had paid to Wells Fargo under its Master Swap Participation Agreement on theories of subrogation, reimbursement, exoneration rights as guarantor and subrogee, and breach of guaranty. Mercantile further sought enforcement of its indemnification rights against CLMIA, and pursued claims of unjust enrichment and implied contract and sought a declaration that Mercantile is entitled to be subrogated to Wells Fargo's current and potential right to future payments.

On CLMIA and Longman's motion, the trial court granted summary disposition in favor of CLMIA with respect to the equitable relief sought in Mercantile's complaint (equitable subrogation, equitable indemnification, unjust enrichment, and implied contract) and further granted summary disposition in favor of Longman, but allowed Mercantile to amend its complaint. In its amended complaint, Mercantile claimed breach of contract, and sought declaratory relief regarding the breach of contract and the guaranty obligations of Longman.

CLMIA filed a third-party complaint against Wells Fargo, Wells Fargo Securities, LLC, Ockerlund, and Driver alleging fraud, fraudulent inducement, negligent misrepresentation, negligence per se, and breach of fiduciary duty. Wells Fargo filed a counter-complaint against Mercantile and a cross-claim against CLMIA. In its counter-complaint, Wells Fargo asserted that CLMIA did not make payments as it was supposed to under the Master Swap Agreement and swap transaction and that Wells Fargo terminated the agreement on August 24, 2010. Wells Fargo claimed that according to the participation agreement, Mercantile is obligated to pay CLMIA's termination amount to Wells Fargo, which is \$624,656.46 and that it did not pay the same, thus breaching its contract with Wells Fargo. In its cross-claim against

CLMIA, Wells Fargo asserted that CLMIA's failure to pay the termination amount set forth in the Master Swap Agreement amounts to a breach of contract.

The trial court ultimately dismissed all of CLMIA's third-party claims against Wells Fargo, Wells Fargo Securities, LLC, Ockerlund, and Driver. The trial court further determined that the Master Swap Agreement was valid and enforceable, that an "event of default" under the definition set forth in Master Swap Agreement was CLMIA's nonpayment of the August 2010 monthly payment due under the relevant swap transaction and that August 24, 2010, was the early termination date of the Master Swap Agreement. The trial court also declared that when CLMIA and Longman failed to tender the amounts due after notified by Wells Fargo, Mercantile became obligated to pay the same. Upon payment by Mercantile of the swap liabilities, Wells Fargo would be obligated to assign to Mercantile all of its rights under the swap agreement. The trial court gave the parties 30 days upon which to agree to the actual amount of the swap liabilities owed.

*3 After extensive briefing concerning the swap transaction early termination fee calculation, the trial court entered an order setting forth the termination fee under the master swap agreement as \$624,656.46 plus interest of \$11,724.73 and ordering CLMIA to pay Wells Fargo the same. Under the order, if CLMIA did not pay the amount ordered, Mercantile was to pay the fees and Wells Fargo was to assign all of its rights under the swap to Mercantile. Mercantile was thereafter substituted for Wells Fargo given that Wells Fargo had assigned its rights under the Master Swap Agreement to it and Longman had executed an amended and restated guaranty in favor of Mercantile. The trial court thereafter entered a judgment in favor of Mercantile and against CLMIA and Longman, jointly and severally, in the amount of \$624,656.46 plus \$11,724.73 interest.

CLMIA and Longman's Appeal

On appeal, CLMIA first argues that the trial court erred in granting summary disposition in favor of Ockerlund and Driver on CLMIA's third-party claims of fraud against them. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v. Ameribank*, 468 Mich. 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)

(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson v. Kleiman*, 447 Mich. 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v. Dep't of Corrections*, 215 Mich.App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.*

Pursuant to MCR 2.112(B)(1), “[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity.” “Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of ‘fraud’—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation.” *Titan Ins. Co. v. Hyten*, 491 Mich. 555; 817 NW2d 562 (2012). These include, among others, fraudulent misrepresentation (actionable fraud), innocent misrepresentation, and silent fraud, all of which contain separate elements. *Id.* at 557. As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc. v. W.B. McConkey*, 231 Mich.App 22, 27; 585 NW2d 33 (1998). Further, an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact; future promises are contractual in nature and do not constitute actionable fraud. *Kamalath v. Mercy Memorial Hosp. Corp.*, 194 Mich.App 543, 554; 487 NW2d 499 (1992); *Hi-Way Motor Co. v. Int'l Harvester Co.*, 398 Mich. 330, 336; 247 NW2d 813 (1976).

*4 In its third-party complaint, CLMIA asserted that “[a]fter Longman, on behalf of Charter lakes, executed the Master Swap Agreement and Schedule of Master Swap Agreement, Driver [and Ockerlund] made material representations to Longman regarding the referenced Swap Agreement. Driver [and Ockerlund] made these misrepresentations to Longman and Charter Lakes with knowledge that said representations were false, or were made with reckless disregard of the truthfulness of the statements.” CLMIA further alleged that the representations “which are specified in the factual

circumstances pled above” were, in fact, false, and that Longman and CLMIA acted in reliance on the representations and were harmed as a result. The complaint contained a “factual allegations” sections indicating that Ockerlund and Driver acted as financial advisors to CLMIA. According to the complaint, Driver faxed Longman two pages of a Master Swap Agreement with Wells Fargo to sign and he did so, without receiving the remaining pages of the agreement until 18 months later. CLMIA alleged in the complaint that it entered into the Swap Agreement based solely on the advice of Driver and Ockerlund and on their representations that CLMIA would likely benefit from the agreement, that its risk of financial exposure was minimal, that it would only have to pay sums to the bank if CLMIA effected an early termination under the agreement, and that they would watch over the accounts and could unwind the agreement if CLMIA had to pay too much, when, in fact, none of the above were true.

As indicated by the trial court, CLMIA did not specify any particular statements that Ockerlund or Driver made after the Master Swap Agreement was entered into and upon which CLMIA relied. All identified statements were statements made prior to the execution of the swap agreement. Because CLMIA has set forth a separate claim for fraudulent inducement, that type of fraud is not at issue in the claims presented here and entitled simply “fraud.” CLMIA's reference to an allegation in its complaint wherein it asserted that if Ockerlund and Driver had disclosed the actual terms and potential risk of entering into the swap agreement, CLMIA would not have entered into the swap agreement is relevant only to its fraudulent inducement claim. Similarly, CLMIA's reference to allegations in its complaint that Ockerlund and Driver were fiduciaries and thus CLMIA reasonably relied upon their representations is relevant only to its separately pleaded breach of fiduciary duty claims.

CLMIA must have pleaded all of the necessary elements of some type of fraud other than fraud in the inducement in these counts to survive summary disposition. CLMIA realizes as much, having predicated these fraud claims on statements made “[a]fter Longman, on behalf of Charter lakes, executed the Master Swap Agreement and Schedule of Master Swap Agreement” Yet, CLMIA's general allegations appear to relate solely to its entry into the Master Swap Agreement in the first place. As noted by the trial court, CLMIA could not have reasonably relied on statements made to it after the swap agreement was entered into when deciding whether to enter into the swap agreement in the first place. Lacking identification of any post-execution statements made

by Ockerlund and Driver in these counts, CLMIA has failed to establish that it acted in reliance on any such statements sufficient to meet element (5) of a fraudulent misrepresentation claim. *M & D, Inc.*, 231 Mich.App at 27.

*5 While CLMIA relates, in a single paragraph, that false representations were made after the Master Swap Agreement was executed and refers to statements produced and transcribed during discovery, third-party defendants' motion was based upon MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson*, 447 Mich. at 432. Reference to anything produced during discovery is thus inappropriate and irrelevant. The trial court's ruling was based on the pleadings alone.

The trial court indicated that CLMIA's position appeared to be that third-party defendants were liable for silent fraud because they did not disclose at a July 2008 meeting that the prior misrepresentations created an automatic right to terminate the agreement and further failed to disclose that the agreement was "materially flawed." To prove silent fraud, the plaintiff must show that the defendant suppressed the truth with the intent to defraud the plaintiff and that the defendant had a legal or equitable duty of disclosure. *Lucas v. Awaad*, 299 Mich.App 345, 363–364; 830 NW2d 141(2013). "A plaintiff cannot merely prove that the defendant failed to disclose something; instead, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id.* at 364 (internal quotation omitted). And, as with other types of fraud, silent fraud requires reasonable reliance by the defrauded party. See *UAW–GM Human Resource Ctr. v. KSL Recreation Corp.*, 228 Mich.App 486, 504; 579 NW2d 411 (1998).

Assuming, without deciding, that third-party defendants had a duty to disclose that they made prior misrepresentations to third-party plaintiffs and that such misrepresentations created a right to terminate the agreement, or that the agreement was flawed and was unenforceable, not only did third-party plaintiffs fail to specifically plead that they relied on these misrepresentations, but they cannot establish that they did. To prove that they relied on the misrepresentations, third-party plaintiffs would necessarily have to show that they did not terminate the agreement, i.e., that they continued with the agreement because they relied on third-party defendants withholding of information that third-party plaintiffs could terminate the agreement. According to third-party plaintiffs, however, at the July 2008 meeting and afterwards, they

indicated their intent to terminate the agreement to third-party defendants and Wells Fargo Bank. This termination was, according to third-party plaintiffs, simply not recognized by third-party defendants or Wells Fargo Bank. Thus reasonable reliance cannot be demonstrated.

Because CLMIA asserted in its third-party complaint that it was given only two pages of the Master Swap Agreement to sign, it could perhaps be claimed that CLMIA's fraud claims against Ockerlund and Driver were based upon fraud in the execution. Fraud in the execution occurs when a party does not know the contents of the instrument. *Stefanac v. Cranbrook Ed Community*, 435 Mich. 155, 165–166; 458 NW2d 56 (1990). This type of fraud occurs when the proponent of the instrument told the signatory thereof that the instrument really didn't mean what it clearly said, and that the signatory relied on this fraud to his detriment. *Paul v. Rotman*, 50 Mich.App 459, 463–464; 213 NW2d 588 (1973). All fraud requires that a plaintiff establish reasonable reliance on an alleged material misrepresentation. *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 280 Mich.App 16, 39; 761 NW2d 151 (2008). And, "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v. Bell Industries, Inc.*, 204 Mich.App 459, 464; 517 NW2d 235 (1994). "As this Court has explained, that general rule is only applied when the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed." *Alfieri v. Bertorelli*, 295 Mich.App 189, 195; 813 NW2d 772 (2012)(quotation and citation omitted).

*6 Here, the fact is that Longman signed an agreement for CLMIA allegedly without reading it or understanding the transaction. He had already received the financing that he sought for the marina through variable rate bonds. He did not have to agree to the interest rate swap agreement. Longman claims that he was faxed only the signature pages of the agreement to sign. However, the first signature page containing Longman's signature bears page number "18" at the bottom. The second signature page bears the page number "8" at the bottom. Clearly, then, these were lengthy documents. The length of the documents was an indication that further inquiry was needed. *Alfieri*, 295 Mich.App at 195. This Court has held that "a person who signs and executes an instrument without inquiring as to its contents cannot have the instrument set aside on the ground of ignorance of the contents." *Christensen v. Christensen*, 126 Mich.App 640, 645; 337 NW2d 611, (1983). A related and equally settled principle of Michigan contract law is that "one who signs a

contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in its terms.” *Shay v. Aldrich*, 487 Mich. 648, 680–681; 790 NW2d 629 (2010) (citation omitted). Moreover, while Longman claims to have received only the two signatory pages of the documents, the entire Master Swap Agreement was attached as an exhibit to CLMIA’s appeal brief, was signed by Longman on December 1, 2006, and contains what appears to be facsimile stamps on the top of each page containing the name “CHARTER LAKES INSURANCE” as well as the date of “Dec–04–2006” and a time. This indicates that CLMIA did receive the entirety of the Master Swap Agreement. The trial court properly dismissed the fraud claims against Ockerlund and Driver.

Because the fraud claim against Wells Fargo Bank is based only upon its “review and ratification” of the misrepresentations by Ockerlund and Driver, a failure of the fraud claims against those third-party defendants requires a failure of the fraud claim against Wells Fargo Bank. The trial court thus properly dismissed this claim as well.

CLMIA and Longman next claim that the trial court erred in dismissing their negligent misrepresentation claim against Ockerlund, Driver, and Wells Fargo Advisors. We disagree.

“A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Unibar Maintenance Servs., Inc. v. Saigh*, 283 Mich.App 609, 621; 769 NW2d 911 (2009) (citations and quotation marks omitted). Our Supreme Court has defined “duty” as a “question of whether the defendant is under any obligation for the benefit of the particular plaintiff and concerns the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.” *Brown v. Brown*, 478 Mich. 545, 552–553; 739 NW2d 313 (2007) (internal citation omitted). According to *Brown*, “duty” is “an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.” *Id.* Whether a duty exists depends on (1) the relationship of the parties, (2) the foreseeability of the harm, (3) the degree of certainty of injury, (4) the closeness of the connection between the conduct and the injury, (5) the moral blame attached to the conduct, (6) the policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Rakowski v. Sarb*, 269 Mich.App 619, 629; 713 NW2d 787 (2006).

*7 This negligent misrepresentation theory of relief is a means for holding a party liable for the negligent performance of a contract to third parties who are foreseeably injured by the negligent performance. See *Williams v. Polgar*, 391 Mich. 6, 20–23, 215 NW2d 149 (1974). Again, however, “[t]here can be no fraud where a person has the means to determine that a representation is not true,” *Nieves*, 204 Mich.App at 464, such as “when the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed.” *Alfieri*, 295 Mich.App at 195.

The trial court dismissed the negligent misrepresentation claims against Ockerlund, Driver, and Wells Fargo Advisors under MCR 2.116(C)(8) without analysis or explanation.

In their specific claim for negligent misrepresentation, CLMIA and Longman alleged that:

76. Wachovia Bank, Wachovia Securities, Ockerlund, and Driver made and/or adopted or ratified material misrepresentations regarding the referenced Swap Agreement before and after its execution to Longman and [CLMIA] with negligent disregard for the truthfulness of the statements.

77. These representations, which are specified in the factual circumstances plead above, are in fact false.

78. Longman acted in reliance on these material misrepresentations of fact when he executed the last page of the Master Swap Agreement and the Schedule to the Master Swap Agreement on behalf of Charter Lakes.

79. Charter Lakes, as a result of acting on the negligently made material misrepresentations of the Third-party Defendants, has incurred damages

In their factual allegations, CLMIA and Longman asserted that Driver and Ockerlund acted as their financial advisors, and represented that they could stabilize the rate of the variable rate bonds by way of a swap agreement. They further alleged that Ockerlund and Driver advised that Charter Lakes “would likely benefit from the contract and that the agreement did not impose an undue financial risk” and assured Longman that “Charter Lakes would not suffer significant losses under the Swap Agreement,” indicating that, at most, Charter Lakes would have to pay around \$2,000 per month and that Ockerlund and Driver would unwind the swap if it proved unbeneficial. CLMIA and Longman alleged that contrary to

201WL 8 9502V@

the representations, the swap agreement did and has exposed Charter Lakes to significant financial risk (i.e., Charter Lakes' liability to Wachovia Bank). They also alleged that:

41. Ockerlund, Driver, and Wachovia Securities, as the fiduciaries for Charter Lakes, had an obligation to assure that the conditions required under the contract to enter into the Swap Agreement were complied with and failed to do so.

42. These provisions were material to Charter Lake's best interests and [third-party defendants] all acted in concert to deprive Charter Lakes of these protections in order to obtain its participation in the Swap Agreement.

*8 No party has directed this Court to authority indicating that a financial advisor who has no control over a client's money has a fiduciary duty to a client. Under New York law, (which the Master Swap Agreement states is to be applied, but which the parties often ignore), it has been held that professionals, such as investment advisors, who owe fiduciary duties to their clients may be subject to tort liability for failure to exercise reasonable care. *Bullmore v. Ernst & Young Cayman Is.*, 45 AD3d 461, 463 (1st Dept 2007). However, it appears that only a financial advisor with discretionary authority to manage a client's investment accounts owes a fiduciary duty to the client. See, *Brooks v. Key Trust Co. Natl Assn*, 26 AD3d 628, 630 (3d Dept 2006). There has been no such allegation here.

Even assuming that third-party defendants were acting in the official capacity of financial advisors when they spoke to CLMIA and Longman concerning the interest swap, and assuming, without deciding, that they could be deemed to owe a fiduciary duty to CLMIA and Longman, we must still examine the statements attributed to third-party defendants as misrepresentations to determine whether they were prepared without reasonable care and whether CLMIA and Longman justifiably relied on the same to their detriment.

CLMIA and Longman's allegations that Ockerlund and Driver's statements that Charter Lakes "would likely benefit from the contract and that the agreement did not impose an undue financial risk" are not actionable as they are expressions of opinion or salesman's talk in promoting a sale, i.e., puffery. Expressions of opinion are not false statements of independently verifiable facts. *Mable Cleary Trust v. Edward-Marlah Muzyl Trust*, 262 Mich.App 485, 502; 686 NW2d 770 (2004). An action for fraud cannot be predicated upon an expression of opinion or upon puffery. *Van Tassel*

v. McDonald Corp., 159 Mich.App 745, 750; 407 NW2d 6 (1987); *High Tides, LLC v. DeMichele*, 88 AD 3d 954, 958; 931 N.Y.S.2d 3771 (2011). The statements likewise concerned future events. In general, an action for fraud cannot be based on the failure of future events to transpire as represented or predicted. See *Foreman v. Foreman*, 266 Mich.App 132, 143; 701 NW2d 167 (2005); *Marrero v. McDonnell Douglas Capital Corp.*, 200 Mich.App 438, 444; 505 NW2d 275 (1993); *Cerabono v. Price*, 7 AD3d 479, 480 (2nd Dept 2004) ("[t]he general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct").

The same holds true for statements that Charter Lakes would not suffer significant losses under the Master Swap Agreement. The alleged misrepresentation that third-party defendants would monitor interest rates and unwind the swap agreement if it appeared Charter Lakes would have to pay an interest rate differential and that, at most, Charter Lakes would have to pay around \$2,000 per month, concerned future events and thus were not actionable. *Foreman*, 266 Mich.App at 143; *Marrero*, 200 Mich.App at 444.

*9 Additionally, CLMIA and Longman did not allege that any of the alleged misrepresentations were based upon on "information prepared without reasonable care" by third-party defendants. *Unibar Maintenance Servs, Inc.*, 283 Mich.App at 621. There is no assertion, for example, that third-party defendants had the means to determine whether the representations were true, any more than CLMIA and Longman did, and failed to undertake the proper determination as to the truth of their representations or that they did not, in fact, ascertain whether the representations were true when made. Some intervening circumstance could, after all, have made the perhaps once-true representations false (a change in the market, etc.).

Finally, as previously indicated, Longman signed the Master Swap Agreement for CLMIA, binding it to the terms, without reading it. Having only allegedly received two pages, one bearing a page "18" and one bearing a page "8", Longman was on notice that that the documents were lengthy and that was a clear indication that further inquiry was needed. *Alfieri*, 295 Mich.App at 195. CLMIA and Longman's reliance on any representations made by third-party defendants concerning the Agreement's terms, the risks it posed, etc., when Longman did not read the Agreement and was aware that it was lengthy, vitiates a claim of reasonable reliance. This is particularly

201WL 8 9502W©

so, given that the Master Swap Agreement was between CLMIA and *Wells Fargo Bank*-not third-party defendants. Had CLMIA and Longman required further information concerning the Agreement's terms, the best provider of information, including a copy of the entirety of the Agreement they claimed they did not originally receive, would have been Wells Fargo Bank. The trial court properly dismissed the third-party claim of negligent misrepresentation.

CLMIA and Longman next assert that the trial court erred in finding that the swap agreement at issue was unrelated to a security and in dismissing CLMIA's claim for negligence per se based on violations of the Michigan Uniform Securities Act. We disagree.

A plaintiff may establish negligence per se by proving that a defendant violated a statutory duty. *McKinney v. Anderson*, 373 Mich. 414, 419; 129 NW2d 851 (1964). For a court to determine that a statutory violation amounted to negligence per se certain elements must exist. (1) The statute must be "intended to protect against the result of the violation," (2) the plaintiff must be "within the class intended to be protected by the statute," and (3) the statutory violation must be a proximate cause of the plaintiff's injury. *Klanseck v. Anderson Sales & Serv., Inc.*, 426 Mich. 78, 87; 393 NW2d 356 (1986).

In their claim of negligence per se against Ockerlund and Driver, CLMIA and Longman alleged that these third-party defendants were "investment advisors" as defined in the Michigan Uniform Securities Act ("MUSA") and that they violated MCL 451.502¹ (now MCL 451.2501). CLMIA and Longman alleged that these statutory violations created a presumption of negligence per se. The trial court, however, opined that both the definition of investment advisor under MUSA and MCL 451.502 require the involvement of a security in the transaction and that the swap agreement is not a security such that the MUSA is inapplicable. We agree.

¹ Repealed by P.A.2008, No. 551 § 702, Eff. October 1, 2009. At the time the trial court issued its opinion, on October 9, 2009, the new Michigan Uniform Securities Act had come into effect.

*10 Under the MUSA, at MCL 451.2102a:

(e) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation

and as a part of a regular business, issues or promulgates analyses or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include any of the following:

- (i) An investment adviser representative.
- (ii) A lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession.
- (iii) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice.
- (iv) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation.
- (v) A federal covered investment adviser.
- (vi) A depository institution.
- (vii) Any other person that is excluded by the investment advisers act of 1940 from the definition of investment adviser.
- (viii) Any other person excluded by rule or order under this act.
- (ix) A finder registered as a broker-dealer under this act.

The former version of this rule (relied upon by the trial court) defined "investment adviser" at MCL 451.801(1) as "any person who, for consideration, engages in the business of advising others, either directly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing, or selling securities, who, for consideration and as part of a regular business, issues or promulgates analyses or reports concerning securities, or who acts as a finder in conjunction with the offer, sale or purchase of a security...." Excluded from this definition is a "broker-dealer or registered agent acting on behalf of a broker-dealer whose performance of these services is solely incidental to the conduct of his or her business as a broker-dealer and who receives no special compensation for the services." MCL 451.801(1)(3).

MCL 451.502(a)(1) and (2) prohibited an investment advisor from employing a device, scheme, or artifice to defraud a client or prospective client or to engage in an act, practice, or course of business that operates or could operate as a fraud or deceit upon a client or prospective client. MCL 451.2501 represents the prior MCL 451.502 and provides:

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, to directly or indirectly do any of the following:

*11 (a) Employ a device, scheme, or artifice to defraud.

(b) Make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

(c) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit on another person.

MCL 451.2502 similarly provides:

(1) It is unlawful for a person that advises others for compensation, either directly or indirectly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities, or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities, to do any of the following:

(a) Employ a device, scheme, or artifice to defraud another person.

(b) Engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

The MUSA currently defines security as follows:

(c) "Security" means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest in or based on the value of

that put, call, straddle, option, or privilege on that security, certificate of deposit, or group or index of securities; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; an investment in a viatical or life settlement agreement; or, in general, an interest or instrument commonly known as a "security"; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. All of the following apply to the term security:

(i) The term includes a contractual or quasi-contractual arrangement that meets all of the following:

(A) A person furnishes capital, other than services, to an issuer under the arrangement.

(B) A portion of the capital furnished under sub-subparagraph (A) is subjected to the risks of the issuer's enterprise.

(C) The furnishing of capital under sub-subparagraph (A) is induced by representations made by an issuer, promoter, or the issuer's or promoter's affiliates which give rise to a reasonable understanding that a valuable tangible benefit will accrue to the person furnishing the capital as a result of the operation of the enterprise.

(D) The person furnishing the capital under sub-subparagraph (A) does not intend to be actively involved in the management of the enterprise in a meaningful way.

*12 (E) At the time the capital is furnished, a promoter or its affiliates anticipate that financial gain may be realized as a result of the furnishing.

(ii) The term includes both a certificated and an uncertificated security.

(iii) The term does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

(iv) The term does not include an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974.

(v) The term includes an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the

201WL 8 9502W@

investor. As used in this subparagraph, a “common enterprise” means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.

(vi) The term may include, as an investment contract, an interest in a limited partnership, a limited liability company, or a limited liability partnership. [MCL 451.2102c](#)

“Security” was previously defined, in part, at [MCL 451.801\(z\)](#) as:

[A]ny note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a “security”, or any certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

As noted by the trial court, all of the elements of negligence per se pleaded by third-party plaintiffs require, at their core, the involvement of a security. Clearly, the MUSA does not include a swap transaction of any kind in its definition of “security.” The MUSA substantially tracks the language of the Uniform Securities Act (*People v. Dempster*, 396 Mich. 700, 704; 242 NW2d 381 (1976)), which is a model law authored in 1956 by the National Conference of Commissioners on Uniform State Laws, a group of state legislators, judges and legal scholars. *Bennett v. Durham*, 683 F 3d 734, 736 (CA 6 2012). The Uniform Securities Act similarly does not include the term “swap” in its definition of “security.” See Unif Securities Act 2002 § 102(28). The Uniform Securities Act, in turn, “is borrowed substantially” from the Securities Act of 1933. *Bennett*, 683 F 3d 734 at 737.

This is notable because, the Securities Act of 1933, at [15 USC § 77b\(a\)\(1\)](#) defines “security” as “any note, stock, treasury stock, security future, *security-based swap*” (emphasis added). Thus, it can be inferred that if a swap agreement of any kind were intended to be included within the meaning of a security, that specific term would have been included within the MUSA’s (and the Uniform Security Act’s) definition. Its conspicuous absence leads to the conclusion that a swap agreement was not intended to be considered a security for purposes of MUSA.

*13 That being the case, CLMIA and Longman’s assertion that third-party defendants were liable for negligence per se because they violated [MCL 451.2501](#) (the prior [MCL 451.502](#)) fails to state claim for which relief could be granted. That statute prohibits a person from engaging in certain acts “in connection with the offer, sale, or purchase of a security....” The swap agreement was not a security under the relevant definition and third-party defendants thus could not have violated this statute with respect to the swap agreement.

As pointed out by CLMIA, a bond falls within the MUSA’s statutory definition of a security and the notional value in the swap agreement at issue was based upon the value of CLMIA’s bonds. However, that does not mean that the swap agreement at issue was a “security based swap.” New York law indicates that security-based swap agreements are “privately negotiated contracts that provide for the exchange of payments based on the value of the securities, and the transfer of the financial risks associated with changes in the value of the securities without the conveyance of any ownership interest.” *Viking Global Equities, LP v. Porsche Automobil Holding*, 36 Misc.3d 1233 (2012)(r’v’sed on other grounds). Under this definition, the payment exchange and the transfer of financial risk are associated with changes in the value of the security. While the notional value in this case was based on the bonds (i.e., security, according to CLMIA), the payment exchange was not based on the value of the bonds and there was no transfer of financial risk associated with a change in the value of the bonds. The bonds had already been issued in a separate transaction, any risk associated with the value in the bonds stayed with CLMIA, and even if CLMIA paid off the bonds in full, the swap agreement would remain in full force. In addition, the payment exchange was always based on the fixed rate set forth in the swap agreement. The variable rate was based on the LIBOR, which fluctuated, and was the only factor that changed the payment amount. This was thus not a security based swap.

CLMIA and Longman next claim that the trial court erroneously dismissed CLMIA's claims for fraudulent inducement and breach of fiduciary duty against Ockerlund, Driver, and Wells Fargo Advisors. We disagree.

"Fraud in the inducement ... addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct " *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 209 Mich.App 365, 373, 532 NW2d 541 (1995). It arises where "the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior." *Id.* at 373.

To prove a claim of fraud in the inducement, a plaintiff must establish the following elements: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that [it] was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich.App 146, 161; 742 NW2d 409 (2007).

*14 Although not explicitly stated as such, Michigan caselaw appears to support the premise that a fraud in the inducement claim is applicable only to the parties to a contract. For example, when explaining why the economic loss doctrine does not apply to a fraudulent inducement claim, *Huron Tool and Engineering Co.*, 209 Mich.App at 372, stated, "[f]raud in the inducement presents a special situation where parties to a contract appear to negotiate freely-which normally would constitute grounds for invoking the economic loss doctrine-but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior." (emphasis added).

New York caselaw, on the other hand, which is supposed to govern the Master Swap Agreement, supports a contrary conclusion. "A misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud." *Selinger Enters, Inc. v. Cassuto*, 50 AD3d 766, 768 (2008); *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 528 (2001). This cause of action is not duplicative of a cause of action to recover damages for breach of contract

where the plaintiff sues individuals who were not parties to the contract, and seeks compensatory damages which are not recoverable for breach of contract. *Selinger Enters, Inc.* 50 AD3d at 768.

In any event, regardless of any representation made by Ockerlund or Driver, Longman signed the Master Swap Agreement and corresponding schedule. The Agreement provides, at paragraph 9.(a) that "This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto." The schedule to the Master Swap Agreement further provides at part 5. (c)(i):

Relationship Between Parties. Each party will be deemed to represent to the other party on the date on which it enters into a Relevant Agreement that:

(1) *Non-Reliance.* It is acting for its own account, and it has made its own independent decisions to enter into the Relevant Agreement and as to whether the Relevant Agreement is appropriate or proper for it based solely upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party or any of its affiliates (or its respective representatives) as investment advice or as a recommendation to enter into the Relevant Agreement, it being understood that information and explanations related to the terms and conditions of any Relevant Agreement will not be considered investment advice or a recommendation to enter into the Relevant Agreement. No communication (written or oral) received from the other party or any of its affiliates (or its respective representatives) will be deemed to be an assurance or guarantee as to the expected results of the Relevant Agreement.

*15 (2) *Assessment and Understanding.* It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of the Relevant Agreement based solely upon its own evaluation of the Relevant Agreement (including the present and future results, consequences, risks, and benefits thereof, whether financial, accounting, tax, legal, or otherwise) or that of its own advisers. It is also capable of assuming, and assumes, the risks of the Relevant Agreement. It also understands that the terms under which any Transaction may be terminated early are set forth in

this Agreement (or in the relevant Confirmation), and any early termination of a Transaction other than pursuant to such terms is subject to mutual agreement of the parties confirmed in writing, the terms of which may require one party to pay an early termination fee to the other party based upon market conditions prevailing at the time of early termination.

(3) *Status of Parties*. The other party is not acting as a fiduciary for an adviser to it in respect of the Relevant Agreement, and any agency, brokerage, advisory or fiduciary services that the other party (or any of its affiliates) may otherwise provide to the party (or any of its affiliates) excludes the Relevant Agreement.

The above agreement was entered into between Wachovia Bank and CLMIA (through Longman). It is undisputed that Ockerlund and Driver were employed by Wachovia Securities, LLC at the time the agreement was entered into. In Wachovia Corporation's 2006 annual report submitted to the SEC, Wachovia Securities, LLC is identified as Wachovia Corporations "retail securities brokerage subsidiary." Wachovia Bank is identified as its "primary banking affiliate." Black's Law Dictionary (7th ed.) defines "affiliate" as "a corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." "Affiliate" is also defined in section 14 of the Master Swap Agreement as "subject to the Schedule, in relation to any person, any entity controlled, directly or indirectly, by the person, any entity that controls, directly or indirectly, the person or any entity directly or indirectly under common control with the person. For this purpose, 'control' of any entity or person means ownership of a majority of the voting power of the entity or person."

CLMIA and Longman, in fact, alleged in their complaint that Wachovia Securities was a "wholly owned subsidiary of Wachovia Bank." Under any pertinent definition, Wachovia Securities was an affiliate of Wachovia Bank. And, CLMIA and Longman alleged that Ockerlund and Driver were employees or agents of Wachovia Securities. By signing the agreement, Longman expressly agreed, on behalf of CLMIA, that he was not "relying on any communication (written or oral) of [Wachovia Bank] or any of its affiliates (or its respective representatives) as investment advice or as a recommendation to enter into the Relevant Agreement"

*16 Because Longman affirmatively disclaimed that he acted under the advice of any affiliate of Wells Fargo

in entering into the agreement, his claims of fraudulent inducement and breach of fiduciary duty fail. "It is beyond cavil that one cannot sign a writing explicitly disclaiming reliance on representations not contained in a contract and later aver that the court should disregard such a disclaimer ... a claim for fraud is barred by the existence of a specific disclaimer and failure to exercise reasonable diligence." *Holzer v. Mondadori*, 40 Misc.3d; 980 N.Y. S2d 276 (2013).

Even absent the disclaimer, the statements attributed to Ockerlund and Driver and which CLMIA and Longman assert were false statements were, as previously indicated, expressions of opinion, puffery, and concerned future events. An action for fraud cannot be predicated on any of these. *Van Tassel*, 159 Mich.App at 750; *Foreman*, 266 Mich.App at 143; *Marrero*, 200 Mich.App at 444; *High Tides, LLC*, 88 AD 3d at 958.

The breach of fiduciary duty claim was also properly dismissed, even in the absence of the disclaimer. CLMIA and Longman contend that because third-party defendants were not parties to the Master Swap Agreement, Michigan law should apply to analysis of this issue. A fiduciary duty arises when the relationship between two parties is "of such character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith." *Portage Aluminum Co. v. Kentwood Nat'l Bank*, 106 Mich.App 290, 294; 307 NW2d 761 (1981); see also *The Meyer & Anna Prentis Foundation, Inc. v. Barbara Ann Karmanos Cancer Institute*, 266 Mich.App 39, 43; 698 NW2d 900 (2005). When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship. *Id.* Examples of fiduciary relationships are attorneys to clients, doctors to patients, trustees to beneficiaries, and guardians to wards. *Portage*, 106 Mich.App at 294. Third-party plaintiffs have identified no Michigan law indicating that an investment advisor owes a fiduciary duty to a client.

And, if third-party defendants owed fiduciary duties to CLMIA and Longman, they failed to establish a material question of fact that third-party defendants breached these duties. CLMIA and Longman do not particularize how the recommendation to enter into the swap agreement constituted a deviation from the standard of care owed by an investment advisor. It cannot be ignored that Longman signed the Master Swap Agreement in December 2006 and that a swap transaction thereafter ensued from that date until July of 2007. CLMIA profited from the transaction due to prevailing

interest rates and made no complaint. That transaction was terminated and Wells Fargo paid him a termination fee. CLMIA then entered into *another* swap transaction in August 2007 with Wells Fargo and it was only when interest rates were unprofitable to it and CLMIA had to start paying Wells Fargo money on a monthly basis that Longman raised objections and questions to the Master Swap Agreement. The original Master Swap Agreement governed both transactions.

*17 In a November 27, 2007, recorded conversation with Driver, Longman stated that he had been watching interest rates and it did not look good. He said they were going to have to wait and it might turn around at the end of the year but if they “closed that position out” it would cost a lot of money. Longman stated that he thought the bond was going to go back up and when it did, he wanted to get out of the swap and that he just hoped they could get out of it with minimal losses. Longman, then, clearly understood the volatile nature of the market and the fact that there were risks involved. There is no indication that Driver did not act for the benefit of Longman in recommending the interest rate swap when he did, in 2006. The claims of breach of fiduciary duty were appropriately dismissed pursuant to [MCR 2.116\(C\)\(10\)](#).

CLMIA and Longman next argue that Wells Fargo waived its cross-claim against CLMIA for breach of contract when it elected to continue to behave as though no breach had occurred for a period of 21 months and that the trial court thus erred in denying CLMIA's motion to dismiss Wells Fargo's breach of contract claim against it. We disagree.

Wells Fargo's breach of contract claim against CLMIA was premised upon CLMIA's failure to pay an August 2010 payment and the resulting termination fee allegedly owed under the terms of the Master Swap Agreement. CLMIA, however, asserted that because it breached the contract in December 2008 when it stopped paying the monthly payments owed and Wells Fargo continued under the contract with Mercantile performing in CLMIA's stead and did not provide notice of the breach to CLMIA within 6 months of CLMIA's December 2008 breach, Wells Fargo waived its breach of contract claim against CLMIA. The Master Swap Agreement provides specific parameters of what will constitute a default, or breach, of the agreement. Section 5 of the Master Swap Agreement governs Events of Default and Termination Events, providing in relevant part as follows:

(a) **Events of Default.** The occurrence at any time with respect to a party or, if applicable, any Credit Support provider of such party or any Specified Entity of such

party of any of the following events constitutes an event of default (an “Event of Default”) with respect to such party:

—

(i) **Failure to Pay or Deliver.** Failure by the party to make, when due, any payment under this Agreement or delivery under Section 2(a)(i) or 2(e) required to be made by it if such failure is not remedied on or before the third Local Business Day after notice of such failure is given to the party;

From the above language, it is clear that a failure to pay a due payment does not, in and of itself, trigger a default event. Rather, the failure to pay, when due, *and* if not remedied within three days after notice of the failure to pay is given to the non-paying party gives rise to an event of default. “To interpret a contract, the reviewing court must confine itself to the four corners of the document and only consider extrinsic proof if the contract is ambiguous; if the contract is not ambiguous, it must be enforced according to the plain meaning of its terms.” [Mid-State Industries, Ltd. v. State](#), 986 N.Y. S2d 637, 639 (2014). Thus, contrary to CLMIA's assertion, its failure to pay in December 2008 and thereafter did not automatically constitute a recognizable breach of the swap agreement (i.e., default). While the failure to pay was technically a breach of its obligation under the Master Swap Agreement, under the relevant swap agreement language, Wells Fargo was not *required* to deem the non-payment by CLMIA in December 2008 (or thereafter) as a “default” unless and until it gave CLMIA notice of the default and three days to cure. It was not asserted that the above occurred.

*18 Additionally, an event of default does not automatically terminate the Master Swap Agreement and give rise to the imposition of the early termination fee (the non-payment of which upon Wells Fargo's breach of contract action was primarily based). Section 6. of the Master Swap Agreement, entitled “Early Termination” provides:

(a) **Right to Terminate Following Event of Default.** If at any time an Event of Default with respect to a party (the “Defaulting Party”) has occurred and is then continuing, the other party (the “Non-defaulting Party”) *may*, but not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a

day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions (emphasis added).

Section 6(e)(i) of the swap agreement provides for a payment made on early termination in the event of default and the various calculation methods that may be employed to determine the amount of such payment.

The word “may” is treated as permissive, under its general and usual meaning. See, e.g., *Babcock v. Rose*, 169 Misc.2d 162, 168; 643 N.Y.S.2d 903 (1996). The non-defaulting party, in this case Wells Fargo Bank, “may” upon an event of default designate an early termination date, but it has no obligation to do so. Wells Fargo's continuation with the swap agreement, even after CLMIA discontinued making payments in December 2008 therefore provides no basis for CLMIA's claim that Wells Fargo Bank waived its breach of contract claim against it for failing to pay the termination fee. Wells Fargo was not limited under the Master Swap Agreement to wait, as it did, to declare an event of default when Mercantile discontinued paying the monthly fees and seek a termination fee from CLMIA after that time.

Moreover, while CLMIA asserts that Wells Fargo's claim should be precluded because it ignored CLMIA's December 2008 breach and continued performance of the Master Swap Agreement, CLMIA's assertion is incorrect. Wells Fargo could not have continued performance of the swap agreement because the only two participants in the agreement were Wells Fargo and CLMIA and CLMIA admittedly refused to participate in the agreement after December 2008. However, Wells Fargo and Mercantile had entered into a separate Master Swap Participation Agreement in December 2006. Under the terms of the participation agreement, Mercantile:

irrevocably and unconditionally agrees to pay on demand by Swap Bank, without counterclaim or setoff, a percentage share, as set forth on a Participation Supplement (the “Percentage Share”) of all Swap Liabilities (as defined below). As used herein, “Swap Liabilities” means, without duplication, with respect to each Counterparty and each

Counterparty Transaction, (a) all amounts payable by such Counterparty to Swap Bank under Section 6(e) of the Counterparty Swap Agreement with respect to such Counterparty Transaction ... (c) all unpaid interest due from such Counterparty to Swap Bank in respect of such Counterparty Transaction, and (d) all other amounts owing by such Counterparty to Swap Bank in respect of such Counterparty Transaction....

*19 Under the above, Mercantile agreed to pay to Wells Fargo any amounts that CLMIA owed to Wells Fargo under the swap transaction. This included the monthly payments. Thus, Wells Fargo simply enforced its separate Master Swap Participation Agreement with Mercantile, who complied with its own agreement for a time.

In its argument, and its cases cited, CLMIA appears to confuse the principles of waiver and election of remedies. “The doctrines of waiver and election of remedies are complementary rather than competing common law contract principles. Under the doctrine of waiver, a party may, by words or conduct, waive a provision in a contract or eliminate a condition in a contract which was inserted for [its] benefit.” *ESPN, Inc. v. Office of Com'r of Baseball*, 76 F Supp 2d 383, 389 (1999) (citation omitted). The swap agreement here required CLMIA to pay Wells Fargo a monthly amount based upon the floating and fixed interest rates. CLMIA refused to pay that amount, and Wells Fargo had a separate contract with Mercantile requiring it to pay any amounts CLMIA did not pay. Mercantile indicated that it would pay the monthly amounts due and Wells Fargo could, conceivably, waive the contractual provision in the swap agreement requiring CLMIA to pay the monthly amount.

And, as indicated in *ESPN, Inc. v. Office of Com'r of Baseball*, 76 F Supp 2d 383, 389 note 4 (1999), a party's waiver of a contract provision is not absolute. That is, a previously waived provision may be restored “ ‘by a reasonable notice demanding performance and stating that the contract will be rescinded if the notice is not complied with.’ ” quoting *Oleg Cassini, Inc. v. Couture Coordinates, Inc.*, 297 F Supp 821, 831 (1969). On August 13, 2010, Wells Fargo sent CLMIA a notice that it failed to make a payment as required under the transaction and that if it did not make the payment within

3 days, the failure to pay would become an event of default under the swap agreement. Thus it arguably restored any previously waived provision.

An election of remedies, on the other hand, is simply a choice among remedies by the party. “It is a decision by that party as to how it should proceed in the wake of the breaching party's nonperformance. In other words, an election is not a waiver of any rights under the contract but rather a choice between two inconsistent remedies for breach of the contract.” *Id.* at 389.

Here, assuming that Wells Fargo treated CLMIA's December 2008 failure to pay as a breach or event of default, it would have to make a choice. It could send notice to CLMIA specifying the date of the event of default and designate an early termination date for the swap agreement, then calculate the termination fee. Then it would have elected termination and Wells Fargo could not continue to perform under the Master Swap Agreement or expect CLMIA's continued performance under the contract. It then could terminate the agreement and sue for damages stemming from a total breach. Alternatively, Wells Fargo could elect to continue the Master Swap Agreement despite CLMIA's December 2008 breach. In that case, it could not later decide to terminate the contract based upon the December 2008 breach, or treat the December 2008 breach as a default event. If we opt to look at this issue as an election of remedies issue, then Wells Fargo clearly chose the second option here. It did *not*, according to its pleadings or otherwise, base its breach of contract action on CLMIA's December 2008 non-payment. Wells Fargo specified that CLMIA breached the swap agreement by failing to make an August 2010 payment and failing to pay the swap agreement termination fee. The fact that the final judgment awarded Wells Fargo only the termination fee supports that Wells Fargo did not treat the December 2008 failure to pay as a breach or default. In either scenario, the trial court appropriately determined that Wells Fargo did not waive its breach of contract claim.

***20** CLMIA and Longman's final argument is two-fold. First, they argue that the trial court erred in granting summary judgment in favor of Mercantile because Mercantile had primary liability to pay the termination fee debt to Wells Fargo and, as such, could not hold a valid assignment of the debt from Wells Fargo. Second, CLMIA and Longman argue that because Wells Fargo held no personal guaranty from Longman, the trial court erred in imposing personal liability for the termination debt upon Longman.

Based on previous discussions of pertinent language in the Master Swap Agreement, an event of default did not occur until CLMIA failed to pay a monthly amount due as required and then after notice from Wells Fargo, did not cure within three business days. At that point, Wells Fargo could declare an event of default, terminate the contract, and calculate a termination fee. That is what happened here in August 2010. Once the termination fee was calculated, Wells Fargo had the right to collect that fee from CLMIA under the terms of the swap agreement. As the trial court ordered on April 5, 2012, the termination fee was \$636,381.19 given its previously found early termination date of August 24, 2010, and that CLMIA was responsible for paying that termination fee to Wells Fargo. This was consistent with the language in the swap agreement.

The trial court also ordered in the April 5, 2012, order that if CLMIA failed to pay the termination fee to Wells Fargo then Mercantile would be obligated to pay the fee pursuant to the swap agreement. The swap agreement provides at section 4.

Receipts by Swap Bank: Remittances. It shall be Swap Bank's responsibility to terminate all Counterparty Transactions under the terms of a Counterparty Swap Agreement upon an Event of Default or a Termination Event thereunder. *Upon payment by Participant of the Percentage Share of all Swap Liabilities under a Counterparty Swap Agreement to Swap Bank, Swap Bank shall be obligated to assign to Participant all of Swap Bank's rights and responsibilities under such Counterparty Swap Agreement.* After execution of the assignment documents between Participant and Swap Bank, Swap Bank shall have no further rights or responsibilities under the Counterparty Swap Agreement and it shall be solely the right of participant to enforce any and all assigned rights under the Counterparty Swap Agreement. (emphasis added)

The Participation Agreement defines “swap liabilities” as including “(a) all amounts payable by such Counterparty to Swap Bank under Section 6(e) of the Counterparty Swap Agreement with respect to such Counterparty Transaction” which is, in turn payments upon early termination of the swap agreement. Thus, the trial court's order is in conformance with the above contracts. The contracts clearly provide that CLMIA is liable for an early termination fee upon an event of default and an event of default was found to have occurred in August 2010. CLMIA does not dispute that it did not pay the early termination fee as ordered by the court. The Participation Agreement requires that Mercantile pay the

termination fee if CLMIA does not and that, upon such payment, Wells Fargo must assign all of its rights and interest in the swap agreement to Mercantile upon its payment of the termination fee. Wells Fargo had the right to collect the termination fee from CLMIA. It thus assigned that right to Mercantile upon Mercantile's payment of the fee to Wells Fargo.

***21** Contrary to CLMIA's assertion, Mercantile was not primarily liable for the termination fee. That is, Mercantile did not have an independent obligation to pay the termination fee. Its obligation only arose out of CLMIA's failure to pay the same. It is true that Mercantile's obligation to pay the fee arose out of its separate Participation Agreement with Wells Fargo. But, this Participation Agreement was referenced within the swap agreement on several occasions. Where one writing references another instrument for additional contract terms, the two writings should be read together. *Forge v. Smith*, 458 Mich. 198, 207; 580 NW2d 876 (1998).

For example, at section 3(a)(v) each party represents to the other party that “[i]ts obligations under this Agreement and any Credit Support Document to which it is a party constitute its legal, valid and binding obligations” A “Credit Support Document” is defined in the schedule to the Master Swap Agreement as “each document which by its terms secures, guarantees or otherwise supports [CLMIA's] obligations under this Agreement” Likewise, Mercantile's participation in the swap agreement is specifically referenced. Section 5(a)(iii)(1) of the Master Swap Agreement defines one event of default as “[f]ailure by the party or any Credit Support provider of such party to comply with or perform any agreement or obligation to be complied with” A credit support provider is defined in the schedule to the swap agreement as “each party to a Credit Support Document that provides or is obligated to provide security, a guaranty or other credit support for [CLMIA's] obligations under this Agreement, including, without limitation, Mercantile Bank of Michigan.” Moreover, from the above definitions, it is clear that Mercantile was acting as a surety or guarantor.

With respect to whether Longman's guaranty binds him to be liable for the judgment entered against CLMIA and in favor of Mercantile, Longman incorrectly focuses on the guaranty executed in conjunction with the swap agreement and whether this guaranty is assignable. However, on October 31, 2011, Longman executed a guaranty in favor of Mercantile. In the guaranty, Longman as guarantor “absolutely, unconditionally and irrevocably guarantees prompt payment when due ...

of (a) any and all existing future indebtedness, obligations and liabilities ... to [Mercantile] ... and (c) any “Judgment”, as that term is defined in Paragraph 4 below....” Judgment is thereafter defined as “any order or judgment, whether a final judgment or not, awarding the Bank, either directly or indirectly, as an assignee or otherwise, any award of money, damages, interests, costs or attorneys' fees against [CLIA, CLMIA] or [Longman] in the lawsuit filed in Kent County Circuit Court, Michigan, captioned *Mercantile Bank of Michigan v. CLMIA, LLC et al*, Case No. 09-01639-CZ (the “Lawsuit”), or in any other proceeding that may be brought regarding the subject matter of the Lawsuit.” Thus, Longman agreed to guarantee the prompt payment of any judgment rendered against CLMIA in the instant case.

Mercantile's Cross-Appeal

***22** On cross-appeal, Mercantile contends the trial court erroneously accepted the factual allegation of CLMIA that an event of default under the Master Swap Agreement had occurred in granting CLMIA's motion for summary disposition concerning Mercantile's claims against it for equitable relief. We find that the trial court's ultimate conclusion did not necessarily hinge upon its erroneous conclusion that an event of default had occurred.

This Court has the discretion to grant equitable relief where a legal remedy is not available. *Tkachik v. Mandeville*, 487 Mich. 38, 45; 790 NW2d 260 (2010). As explained in *Tkachik*:

A remedy at law, in order to preclude a suit in equity, must be complete and ample, and not doubtful and uncertain. Furthermore, to preclude a suit in equity, a remedy at law, both in respect to its final relief and its modes of obtaining the relief, must be as effectual as the remedy which equity would confer under the circumstances. Equity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life. While legislative action that provides an adequate remedy by statute precludes equitable relief, the *absence* of such action does not. This

is so because every equitable right or interest derives not from a declaration of substantive law, but from the broad and flexible jurisdiction of courts of equity to afford remedial relief, where justice and good conscience so dictate. Equity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case. *Id.* at 45–46 (internal citations and quotations omitted).

In its May 10, 2010, opinion and order, the trial court did act under the assumption (or accept CLMIA's assertion) that an event of default occurred in December 2008 when CLMIA discontinued its required payments to Wells Fargo. The trial court indicated that the Participation Agreement delineates Wells Fargo's responsibilities if an event of default occurs under the swap agreement and that Mercantile was aware of these responsibilities when presented with a “claimed event of default.” The trial court opined that “[Wells Fargo] and Mercantile ... at their peril, chose to ignore the alleged default event” and that “Mercantile is contractually bound to pay only the amount of Swap Liabilities outstanding at the time of the event of default” under the Participation Agreement and that it further “cannot unilaterally increase its obligations and invoke equitable rights in light of unambiguous terms of the Agreements.” The trial court did err in assuming or accepting that a default event did occur. Not only because this was a position advocated by the moving party, but also because as indicated previously, under the plain language of the Master Swap Agreement, the simple non-payment is not, by itself, a default event. Nevertheless, we will not reverse a lower court that reaches the right result for wrong reasons. *Taylor v. Laban*, 241 Mich.App 449, 458; 616 NW2d 229 (2000).

*23 The trial court correctly recognized that the Participation Agreement provided, at section 4:

Receipts by Swap Bank: Remittances. It shall be Swap Bank's responsibility to terminate all Counterparty Transactions under the terms of a Counterparty Swap Agreement upon an Event of Default or a Termination Event thereunder. *Upon payment by Participant of the Percentage Share of all Swap Liabilities under a Counterparty Swap Agreement to Swap Bank, Swap Bank shall be obligated to assign to Participant all of Swap Bank's rights and responsibilities under such Counterparty*

Swap Agreement. After execution of the assignment documents between Participant and Swap Bank, Swap Bank shall have no further rights or responsibilities under the Counterparty Swap Agreement and it shall be solely the right of participant to enforce any and all assigned rights under the Counterparty Swap Agreement. (emphasis added)

Because swap liabilities include any amounts owing by CLMIA to Wells Fargo, under the Swap Participation Agreement, Mercantile would be obligated to pay any monthly fee to Wells Fargo that CLMIA failed to pay. And, under the “Receipts by Swap Bank: Remittances” section of the Swap Participation Agreement upon payment of the very first monthly fee by Mercantile (i.e. swap liability), Wells Fargo was “obligated to assign to [Mercantile] all of [Wells Fargo's] rights and responsibilities under such Counterparty Swap Agreement.”

While the trial court focused on the payment of the termination fee as the swap liability, it correctly noted that the payment of a swap liability by Mercantile entitled it to an assignment of rights by Wells Fargo. Mercantile thus had an adequate legal remedy, regardless of what the swap liability may have been. As such it was not entitled to equitable remedies.

Mercantile next argues that the trial court erred in interpreting the contractual provisions at issue and concluding that Mercantile's exclusive remedy was to terminate the underlying transaction. As set forth in section 4. of the Swap Participation:

It shall be Swap Bank's responsibility to terminate all Counterparty Transactions under the terms of a Counterparty Swap Agreement upon an Event of Default or a Termination Event thereunder. *Upon payment by Participant of the Percentage Share of all Swap Liabilities under a Counterparty Swap Agreement to Swap Bank, Swap Bank shall be obligated to assign to Participant all of Swap Bank's rights and responsibilities under such Counterparty Swap Agreement.* After execution of the assignment

documents between Participant and Swap Bank, Swap Bank shall have no further rights or responsibilities under the Counterparty Swap Agreement and it shall be solely the right of participant to enforce any and all assigned rights under the Counterparty Swap Agreement. (emphasis added).

Mercantile is correct that it could not refuse to make a monthly payment on demand from Wells Fargo. It is incorrect that it could elect to make monthly payments until it unilaterally deemed it prudent to discontinue said payments. Under the terms of the Participation Agreement, upon payment of “all other amounts owing by such Counterparty to Swap Bank in respect of such Counterparty Transaction, in each case (i) to the extent certified by Swap Bank (whether in its demand for payment or otherwise) as not having been paid by such Counterparty when due” Wells Fargo was to assign Mercantile all of its rights and responsibilities under the swap agreement. Mercantile cannot have it both ways. If a monthly payment falls within the definition of a swap liability, as this Court agrees that it does, then the above applies. There is nothing in the Participation Agreement to indicate that Mercantile gets to stop making payments when it chooses and thus force Wells Fargo to declare a default event when Mercantile feels it is appropriate. This would leave enforcement of the terms of the swap agreement and the potential damages for which CLMIA could be liable in the hands of a party outside of the contract signed only by CLMIA and Wells Fargo.

*24 Finally, Mercantile contends that its equitable claims against CLMIA should not have been dismissed at the pleading stage, given that it has no remedy to recover the monthly payments it made to Wells Fargo in CLMIA's stead other than through its claims of equitable subrogation, unjust enrichment, and implied contract. We disagree.

Equitable subrogation “is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.” *Auto-Owners Ins. Co. v. Amoco Prod Co.*, 468 Mich. 53, 59; 658 NW2d 460 (2003). “In order to be entitled to subrogation, a subrogee cannot voluntarily have made payment, but rather must have done so in order to fulfill a legal or equitable duty owed to the subrogor.” *Ameriquest Mortgage Co. v. Alton*, 273 Mich.App 84, 95; 731 NW2d

99 (2006)(superseded by statute on other grounds as stated in *CitiMortgage, Inc. v. Mortgage Electronic Registration Systems, Inc.*, 295 Mich.App 72; 813 NW2d 332 (2011)).

Mercantile is not and would not be entitled to equitable subrogation from CLMIA because it did not make the monthly payments to Wells Fargo in order to fulfill a legal or equitable duty owed to CLMIA as the alleged subrogor. Once payment of a single swap liability was made by Mercantile under the Participation Agreement, then Wells Fargo had the obligation to assign all of its rights under the swap agreement to Mercantile. Mercantile did not ensure that it and Wells Fargo's Participation Agreement was adhered to immediately; that is a separate issue between those two parties, not raised on appeal.

Mercantile further argues that CLMIA was unjustly enriched by Mercantile's monthly payments to Wells Fargo or that it should be entitled to recover against CLMIA based on implied contract. To sustain an action for unjust enrichment, plaintiff must “establish (1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party.” *Karaus v. Bank of New York Mellon*, 300 Mich.App 9, 22–23; 831 NW2d 897 (2012).

Here, CLMIA did not receive a benefit from Mercantile.² First and foremost, CLMIA did not receive anything from Mercantile at all—Wells Fargo did. Second, Mercantile paid Wells Fargo a monthly fee that was purportedly due from CLMIA. However, Mercantile paid this fee for over a year. As indicated, had Mercantile paid the monthly fee one time, an event of default would have occurred and a termination fee would have been calculated. The hundreds of thousands of dollars in monthly fees that Mercantile ultimately paid and now seeks to collect from CLMIA would not have been owed to or paid to Wells Fargo by CLMIA—only a termination fee. Thus, the claim of unjust enrichment would fail in any event.

² Mercantile paid funds to Wells Fargo pursuant to its Participation Agreement with Wells Fargo. Wells Fargo thus received the benefit of those payments. Mercantile paid nothing to CLMIA and CLMIA neither asked Mercantile to pay anything on its behalf to Wells Fargo nor arguably would have owed the monthly payments to Wells Fargo. Wells Fargo would not have otherwise received the monthly payments because CLMIA made it patently clear in November 2008 that it would

201WL 8 9502V©

no longer be making the monthly payments to Wells Fargo. The Wells Fargo–CLMIA Swap Agreement contained a termination provision for such an event. Had Mercantile not made more than one such payment, as it could have done under the terms of Participation Agreement, what ultimately occurred in 2010 when Mercantile did stop making the monthly payments to Wells Fargo would have happened much earlier and the default would have occurred in December 2008. Further, CLMIA is still liable for the termination fee, as it would have been in December 2008. CLMIA thus did not receive the benefit of Mercantile's voluntary monthly payments to Wells Fargo, which Mercantile now seeks to recoup through its unjust enrichment claim.

A contract will be implied only if no express contract between the same parties exists that covers the same subject matter.

Morris Pumps v. Centerline Piping, Inc., 273 Mich.App 187, 194; 729 NW2d 898 (2006). Furthermore, an implied contract will be found only when there has been receipt of a benefit by one party from the other, and it would be inequitable for the party to retain such a benefit. *Id.* at 195. Again, Mercantile has not and cannot establish a benefit to CLMIA from Mercantile. Thus, no implied contract theory of recovery would succeed. In sum, Mercantile's equitable subrogation, unjust enrichment, and implied contract claims were properly dismissed.

***25** Affirmed.

All Citations

Not Reported in N.W.2d, 2015 WL 630259

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 33

2011 WL 7267851

2011 WL 7267851

Only the Westlaw citation is currently available.

United States District Court,
W.D. Oklahoma.

NAYLOR FARMS, INC., Plaintiff,

v.

ANADARKO OGC COMPANY, et al., Defendants.

No. CIV–08–668–R.

|

June 15, 2011.

Attorneys and Law Firms

Conner L. Helms, Darren R. Cook, Erin M. Moore, Gary R. Underwood, Helms Underwood & Cook, Oklahoma City, OK, for Plaintiff.

Dennis C. Cameron, M. Benjamin Singletary, Lisa T. Silvestri, Gable & Gotwals, James C.T. Hardwick, Mark Banner, Pamela S. Anderson, Hall Estill, Tulsa, OK, for Defendants.

ORDER

DAVID L. RUSSELL, District Judge.

*1 Before the Court is Defendant QEP Energy Company's motion for partial summary judgment on Plaintiff's claim for unjust enrichment. [Doc. No. 151]. In support of its motion, Defendant argues that it is entitled to summary judgment on Plaintiff's class claim because it was never certified as a class claim. Alternatively, Defendant argues that it is entitled to summary judgment on Plaintiff's and the class members' claim for unjust enrichment because the Plaintiffs have an adequate remedy at law, because QEP has not received any of the monies that Plaintiffs claim are owed, Plaintiffs are not entitled to disgorgement because the amounts Plaintiffs seek are not proceeds paid to or received by QEP, and that an award of purported earnings or profits of QEP on any proceeds QEP received that Plaintiffs claim should have been paid to royalty owners is not an appropriate unjust enrichment remedy.

Plaintiffs in response maintain that the Court did certify unjust enrichment as a class claim but point out that they have sought clarification of the Court's certification Order. The Court has now corrected its certification Order to include the unjust

enrichment claim as one of the claims it certified as a class claim.

Plaintiffs argue that Defendant's motion on Plaintiffs' class claim for unjust enrichment is premature because it has not been determined whether Plaintiffs are entitled to recover on the breach of contract claim. Plaintiffs assert that whether or not they have an adequate remedy at law can be determined only after it is determined whether Plaintiffs have obtained full recovery on their breach of contract claim. Plaintiffs also argue that they may pursue their unjust enrichment claim as an alternate theory of recovery under Oklahoma and Tenth Circuit law and that disgorgement, including profits on moneys that should have been paid to Plaintiffs, is an appropriate remedy. Plaintiffs further argue that QEP's argument that it did not receive the proceeds Plaintiffs claim are owed to them is disingenuous because QEP saved itself money and benefitted itself by structuring its transaction with DCP as a sale. Unjust enrichment, according to Plaintiffs, encompasses "negative unjust enrichment" which permits recovery of the money QEP saved.

Plaintiff is correct that a party may plead and may pursue alternative theories of recovery, and sometimes may even pursue both legal and equitable alternative claims, provided that double recovery is not allowed. See *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1029–30 (10th Cir.2007), citing *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 929 P.2d 288, 295 (Okla.Civ.App.1996); *F.R.Civ.P.* 8(d)(2). However, it is equally true that to invoke equity jurisdiction, it must be shown that no adequate statutory or legal remedy is available. *Billingsley v. North*, 298 P.2d 418, 422 (Okla.1956). Thus, "where the plaintiff has a plain, speedy and adequate remedy at law equity will not intervene in his behalf." *Robertson v. Maney*, 196 Okla. 500, 166 P.2d 106, 108 (Okla.1946). Unjust enrichment is a form of equitable relief that a court will not ordinarily exercise its equitable jurisdiction to grant where the plaintiff has an adequate remedy at law. *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035 (Okla.2006); *Robinson v. Southerland*, 123 P.3d 35, 45 (Okla.Civ.App.2005), cert. denied (Okla.2005); *Hydro Turf, Inc. v. International Fidelity Insurance Co.*, 91 P.3d 667, 673 (Okla.Civ.App.2004). Where an enforceable express contract governs the parties' relationship, quasi-contractual remedies such as unjust enrichment are not available. See *Member Services Life Insurance Co. v. American National Bank and Trust Co.*, 130 F.3d 950, 957–58 (10th Cir.1997); *Edwards v. Farmers Insurance Co.*, 2009 WL 4506218 at

*4 (N.D.Okla. Nov. 24, 2009) (No. 08–CV 730–TCK–PTC) (only if Defendants convince the Court or jury that no contract existed at the time of the Plaintiff's loss is there the possibility of a need for a quasi-contractual remedy); *AG Equipment Co. v. AIG Life Insurance Company, Inc.*, 2009 WL 223106 at *8 (N.D.Okla. Jan. 28, 2009)(No. 07–CV–0556–CVE–PJC)(party may allege equitable claim as alternative to a contract—based claim but where it is clear that the parties' relationship is governed by a contract, i.e., when one or the other party will recover on its breach of contract claim, there is an adequate remedy at law and the plaintiff was entitled to summary judgment on the counterclaim for equitable relief). See also *Harvell v. Goodyear Tire & Rubber Company*, 164 P.3d at 1035 n.38 (citing cases from other jurisdictions holding that unjust enrichment claim fails if an express contract governing the parties' relationship exists). Where a party has an adequate remedy at law for breach of contract or negligence, regardless of whether the party actually recovers thereon, the party may not pursue a claim for unjust enrichment. *Robinson v. Southerland*, 123 P.3d at 45 (breach of contract claim available against plaintiff's attorneys); *Hydro Turf, Inc. v. International Fidelity Insurance Co.*, 91 P.3d at 673 (because Hydro Turf had an adequate remedy available at law through its negligence claim, even though the summary judgment for it on that claim had to be reversed, it was unnecessary for trial court to invoke its equitable jurisdiction on the unjust enrichment claim and the trial court erred in awarding summary judgment to Hydro Turf on the unjust enrichment claim). The cases of *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, and *N.C. Corff Partnership, Ltd. v. Oxy USA, Inc.*, 929 P.2d 288, on which Plaintiffs rely are distinguishable because in those cases there was no negligence claim or contract governing the parties relationship such that it could be determined as a matter of law that the plaintiff had an adequate remedy at law by virtue of a negligence or breach of contract claim.

*2 In this case it is undisputed that the Plaintiffs are lessors/parties to oil and gas leases to some or all of which Defendant QEP is the lessee or successor lessee.¹ Such oil and gas leases are contracts and implied in each of them is the implied covenant to market, which includes the obligation of the lessee to put gas in marketable form. Plaintiffs' class claim

for unjust enrichment is based upon the same contentions that support their class claims for breach of contract and the claim included in the breach of contract claim for breach of the implied covenant to market. Thus, the claims of all class Plaintiffs having oil and gas leases to which Defendant QEP is a party either as lessee or successive lessee are governed by express contracts, they have an adequate remedy at law for breach of contract and their claims for unjust enrichment fail as a matter of law. Defendant QEP is entitled to summary judgment on such class Plaintiffs' claim for unjust enrichment. As to those class Plaintiffs having oil and gas leases to which Defendant QEP is not a party because it is not the lessee or successive lessee, the Court DENIES Defendant's motion as premature and declines to address the other issues raised by Defendant's motion for partial summary judgment.

¹ As Plaintiffs point out, in Defendant's Response to Plaintiff's Motion for Partial Summary Judgment Regarding Fiduciary Duty [Doc. No. 120], Defendant QEP did not dispute the statement in Plaintiff's Motion for Partial Summary Judgment Regarding Fiduciary Duty [Doc. No. 116] that QEP was the lessee or successor lessee on all of the class Plaintiffs' oil and gas leases. Compare Doc. No. 116, Statement of Undisputed Facts at ¶ 2 with Doc. No. 120, Response to Plaintiff's Statement of Facts at ¶ 2. But with the current motion, Defendant QEP has submitted the Declaration of Michael Butcher (Exhibit "1" to Doc No. 151) in which he attests that in most of the class wells, working interest owners, not QEP, are the lessees or successor lessees. *Id.* at ¶ 4.

In accordance with the foregoing, Defendant QEP Energy Company's motion for partial summary judgment on Plaintiff's claim for unjust enrichment [Doc. 151] is GRANTED in part and DENIED in part as set out herein.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 7267851

TAB 34

2019 WL 6529163

Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

Steven and Ellen PALMER, Individually and
on Behalf of All Others Similarly Situated

v.

CVS HEALTH and Nice-Pak Products, Inc.

Civil Action No. CCB 17-938

|
Signed 12/04/2019

Attorneys and Law Firms

Dana Whitehead McKee, Jessica Paulie Weber, Brown Goldstein and Levy LLP, Baltimore, MD, Mark S. Reich, Pro Hac Vice, Vincent M. Serra, Pro Hac Vice, Robbins Geller Rudman and Dowd LLP, Melville, NY, for Steven Palmer, Ellen Palmer.

Darryl Louis Tarver, DLA Piper LLP, Stephen Edward Marshall, Brian J. Healy, Venable LLP, Baltimore, MD, Dustin B. Rawlin, Pro Hac Vice, John Q. Lewis, Pro Hac Vice, William H. Berglund, Pro Hac Vice, Karl A. Bekeny, Pro Hac Vice, Tucker Ellis LLP, Cleveland, OH, for CVS Health, Nice-Pak Products, Inc.

CLASS ACTION

MEMORANDUM

Catherine C. Blake, United States District Judge

*1 Steven and Ellen Palmer (the “Palmers”) filed this putative class action against CVS Health and Nice-Pak Products, Inc. (the “defendants”) alleging that they misleadingly labeled their wipes as “flushable” when they were not. Now pending are the defendants’ motion for leave to file amended answers and the defendants’ motion for judgment on the pleadings as to the Palmers’ claims for injunctive relief, negligent misrepresentation (as to Nice-Pak), and breach of express warranty.¹ The motions have been fully briefed and no oral argument is necessary. For the reasons stated below, the court will grant the motion for leave to file amended answers, and will grant in part and deny without prejudice in part the motion for judgment on the pleadings.

1

The Palmers also brought claims for violations of the Maryland Consumer Protection Act § 13-301, for unjust enrichment, and for negligent misrepresentation as to CVS. The defendants do not seek to dismiss these claims.

FACTS

The Palmers began purchasing CVS Flushable Medicated Wipes in 2012. (Corrected Compl. ¶ 68, ECF 21). CVS Flushable Medicated Wipes, as well as CVS Flushable Cleansing Wipes and CVS Flushable Ultra Soft Cleansing Wipes, are manufactured by Nice-Pak. (*Id.* ¶¶ 2, 8). The wipes were advertised as safe to flush down toilets, but when the Palmers began flushing the wipes down their home toilets, they experienced plumbing issues. (*Id.* ¶¶ 69, 72). Around October 2014, their sewer system backed up, and they employed professional plumbers to snake their home plumbing. (*Id.* at 169). Upon snaking the plumbing, the plumbers found still-intact flushable wipes products and warned the Palmers that flushing these wipes “will destroy your system.” (*Id.*). After being advised to search online, the Palmers saw several articles detailing the damage the flushable wipes could cause. (*Id.*). A plumber had to return at least one more time to clear the Palmers’ pipes. (*Id.* ¶ 70). The Palmers allege that many others faced similar “horror stories” wherein the purportedly flushable wipes damaged their plumbing, (*id.* ¶¶ 21–27), and also allege that flushable wipes have caused problems in municipal sewer systems across the country, (*id.* ¶¶ 38–61).

The Federal Trade Commission (“FTC”) began investigating Nice-Pak’s flushable wipes, and entered into a consent agreement with Nice-Pak in 2015.² (*Id.* ¶ 62). Under that agreement, the FTC ordered Nice-Pak not to market its wipes as flushable “unless the representation is non-misleading, and, at the time the representation is made, Respondent possesses and relies upon competent and reliable evidence[.]” (FTC Decision and Order at 2, *In the Matter of Nice-Pak Products*, ECF 177–4). The order is in effect until October 30, 2035, or twenty years from the most recent date the United States or the FTC files a complaint alleging a violation of the order. (*Id.* at 5).

2

Although the agreement does not contain a date, it appears that the Agreement Containing Consent Order (ECF 177-3) was entered into on May 18,

2019 WL 6529163

2015. (See Corrected Compl. ¶ 62). It was then open for comments (see Letter from D. Clark to K. Schmid, ECF 177-2), and on October 30, 2015, the FTC issued the Final Decision and Order (ECF 177-4).

*2 The Palmers initially filed in the Eastern District of New York. On April 10, 2017, the case was transferred to this court. *Steven v. CVS Health & Nice-Pak Products, Inc.*, No. 15-CV-2928, 2017 WL 656767, at *2 (E.D.N.Y. Feb. 17, 2017); Order, ECF 121 (case to be transferred April 10, 2017). On May 9, 2018, the court granted the parties' motion to stay,³ pending decisions in the related cases *Kurtz v. Kimberly-Clark Corp. et al.*, No. 14-cv-1142, and *Belfiore v. Proctor & Gamble Co.*, No. 14-cv-4090 (on appeal in the Second Circuit),⁴ and *The Preserve at Connetquot Homeowners Assoc. Inc. v. Costco Wholesale Corp., et al.*, No. 17-cv-7050 (E.D.N.Y.). (ECF 164). On January 28, 2019, the court in *Preserve* dismissed the case without prejudice for lack of standing. (Status Report, ECF 165). *Preserve* is currently on appeal. (Status Report, ECF 170). On May 14, 2019, the Second Circuit issued a summary order in *Kurtz* and *Belfiore*, remanding the cases to the U.S. District Court for the Eastern District of New York for further proceedings on the Rule 23(b)(3) predominance requirement.⁵ (*Id.* at 2). The stay in this case was lifted on June 25, 2019. (ECF 173).

³ This case previously had been stayed on May 30, 2017, pending the *Kurtz* and *Belfiore* decisions. (ECF 145).

⁴ *Kurtz* and *Belfiore* were heard by the Second Circuit in tandem.

⁵ On remand, the district court again concluded that the predominance requirement was met. *Kurtz v. Kimberly-Clark Corp.*, — Supp. 3d —, 2019 WL 5483510, at *12 (E.D.N.Y. Oct. 25, 2019).

STANDARD OF REVIEW

Motion for leave to amend:

Leave to amend should be freely granted under Rule 15(a), and amendments are generally accepted absent futility, undue prejudice, or bad faith. See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 193 (4th Cir. 2009) (explaining that leave to amend “should be denied only when the amendment would be

prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile”).

Motion for judgment on the pleadings:

Motions for judgment on the pleadings under Fed. R. Civ. P. 12(c) are decided under the same standard as motions to dismiss under Rule 12(b)(6). *Independence News, Inc. v. City of Charlotte*, 568 F.3d 148, 154 (4th Cir. 2009). To survive a motion to dismiss, the factual allegations of a complaint “must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). “To satisfy this standard, a plaintiff need not ‘forecast’ evidence sufficient to prove the elements of the claim. However, the complaint must allege sufficient facts to establish those elements.” *Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted). “Thus, while a plaintiff does not need to demonstrate in a complaint that the right to relief is ‘probable,’ the complaint must advance the plaintiff’s claim ‘across the line from conceivable to plausible.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 570). Additionally, although courts “must view the facts alleged in the light most favorable to the plaintiff,” they “will not accept ‘legal conclusions couched as facts or unwarranted inferences, unreasonable conclusions, or arguments’ ” in deciding whether a case should survive a motion to dismiss. *U.S. ex rel. Nathan v. Takeda Pharm. North Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013) (quoting *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012)).

DISCUSSION

Leave to amend:

CVS and Nice-Pak seek to amend their answers to add the additional defenses of: lack of class action standing, primary jurisdiction, statute of limitations, speculative damages, failure to plead punitive damages, injunctive relief is moot, spoliation of evidence, compliance with federal and industry standards and, for Nice-Pak only, lack of privity.

*3 The court will grant the defendants’ motion to amend. Although this case was filed in 2015 and transferred to this court in 2017, there has been no formal discovery because of the requested stays and the motion for judgment on the pleadings.⁶ The Palmers have not shown that they relied on the affirmative defenses asserted in the answers in taking any action in this case, and have not shown that allowing

the amendments would prejudice them. Although the Palmers cite to *Rangarajan v. Johns Hopkins Health System Corp.*, in that case, the court denied the plaintiff's motion to amend her complaint because the amendment "would inescapably lead to a second motion to dismiss and round of briefing which would further delay the start of any discovery" and "[t]he proposed amendment would fundamentally change the nature of Plaintiff's claims." No. WMN-12-1953, 2015 WL 1712270, at *3 (D. Md. April 14, 2015). Here, there is no showing that allowing the defendants to amend their answers would result in any additional briefing, delay discovery, or fundamentally change the nature of the case.⁷

⁶ Although there has been no formal discovery, it appears the defendants produced approximately 19,000 documents and 77,000 pages to the Palmers in January 2018 upon agreement of the parties. (ECF 193; ECF 194). Additionally, the parties filed a proposed discovery plan pending resolution of defendants' motion for judgment on the pleadings, which the court approved on September 13, 2019 (ECF 194), and a stipulated protocol for collection and production of electronically stored information and hard copy documents, which the court approved on September 17, 2019 (ECF 197).

⁷ The Palmers further argue that the defenses of spoliation of evidence, speculative damages, the failure to plead punitive damages, and failure to plead class action standing are not proper affirmative defenses and do not need to be pled in the answer. The court will permit the defendants to amend their answers to include these defenses, without deciding whether they are properly labeled as affirmative defenses. If they are not required to be pled in the answer, as the Palmers argue, then the Palmers "can claim no prejudice by the court's permitting amendment. In fact [the Palmers] benefit[] from the defendants' advance notice of their intent" to raise these defenses. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155–56 (4th Cir. 1995).

Standing for injunctive relief:

Plaintiffs seeking injunctive relief must show they are "in danger of being injured by the opposing party's conduct and that the danger is both 'real' and 'imminent.'" ⁸ *Gardner v. Montgomery Cnty. Teachers Fed. Credit Union*, 864 F. Supp. 2d 410, 421 (D. Md. 2012) (quoting *City of Los Angeles v.*

Lyons, 461 U.S. 95, 102 (1983)). Therefore, "[a] plaintiff has standing to sue for injunctive relief when there is a 'real or immediate threat' that the party will suffer an injury in the future." *Griffin v. Dep't of Labor Fed. Credit Union*, 912 F.3d 649, 655 (4th Cir. 2019) (citation omitted). Relevant here, the Ninth Circuit has held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling" if she plausibly alleges "that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to" or that "she might purchase the product in the future, despite the fact that it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969–70 (9th Cir. 2018).

⁸ "That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (citations omitted).

*4 The Palmers do not plausibly allege a likelihood of future injury. They do not allege that they want to or plan on purchasing the flushable wipes in the future. Rather, they allege that "after being advised by their plumbers not to flush anything down the toilet other than human waste and toilet paper, [they] stopped purchasing the CVS Flushable Medicated Wipes altogether." (Corrected Compl. ¶ 71). The complaint also alleges that the Palmers purchased the wipes because they were labeled as "flushable" and "would not have purchased the wipes had they not been labeled as such." (*Id.* ¶ 72). Therefore, the complaint does not contain any allegations of future injury, but instead implies that the Palmers do not plan on purchasing these wipes in the future.

The Palmers urge this court to follow the lead of other courts that have relaxed the future injury requirement in consumer protection cases.⁹ See *Belfiore v. Procter & Gamble Co.*, 94 F. Supp. 3d 440, 445 (E.D.N.Y. 2015) ("To hold otherwise would denigrate the New York consumer protection statute[.]"); *Ackerman v. Coca-Cola Co.*, No. 09 CV 395(DLI)(RMI), 2013 WL 7044866, at *15 n.23 (E.D.N.Y. July 18, 2013) ("This is the harm New York's and California's consumer protection statutes are designed to redress.").¹⁰ These cases, however, are in contrast to

the opinions of several other courts, including the Second Circuit and a court in this circuit, that have held plaintiffs lack standing to seek injunctive relief when they do not sufficiently allege a likelihood of future harm. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (plaintiff did not have standing to seek an injunction relating to the sale of an appetite suppressant because he did not allege a likelihood of future harm); *Hassan v. Lenovo*, No. 5:18-CV-105-BO, 2019 WL 123002, at *6 (E.D.N.C. Jan. 7, 2019)¹¹ (plaintiff did not have standing to seek injunctive relief in a products liability action because “he does not allege that he intends to buy another Phab 2.”)¹²

⁹ The Palmers also cite to two Fourth Circuit cases, but both required the plaintiffs to show a likelihood of future injury to obtain injunctive relief. *PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 127 (4th Cir. 2011) (district court did not abuse its discretion by finding a likelihood of future injury when “PBM’s reputation was, and potentially continues to be, damaged” as a result of a competitor sending mailers with false claims); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 456 (4th Cir. 2017) (plaintiff sufficiently alleged a likelihood of future injury when he plausibly stated he would return to a location that was not compliant with the Americans with Disabilities Act).

¹⁰ *See also Koehler v. Litehouse, Inc.*, No. CV 12-04055 SI, 2012 WL 6217635, at *6 (N.D. Cal. Dec. 13, 2012). *Ries v. Az. Beverages USA LLC*, 287 F.R.D. 523, 533 (N.D. Cal. 2012), also cited by the Palmers, found a likelihood of future injury when “the record is devoid of any grounds to discount plaintiffs’ stated intent to purchase in the future.” But here, the Palmers have not alleged any intent to purchase flushable wipes from CVS or Nice-Pak in the future.

¹¹ Unreported decisions are cited for the soundness of their reasoning, not for any precedential value.

¹² *See also Marino v. Coach, Inc.*, 264 F. Supp. 3d 558, 566 (S.D.N.Y. 2017) (“Courts that have permitted plaintiffs to seek injunctive relief under similar circumstances have done so for public policy reasons” but “they appear to confuse whether a plaintiff has Article III standing to sue in federal court with whether the purposes of

the state law would be furthered by permitting plaintiffs to seek injunctive relief,” and noting that plaintiffs are still free to pursue their claims in state court); *see also Richardson v. L’Oreal USA, Inc.*, 991 F. Supp. 2d 181, 194 (D.D.C. 2013) (declining to conclude “that public policy requires plaintiffs to have standing here, notwithstanding the requirements of Article III” but instead finding the plaintiffs had sufficiently alleged a likelihood of future harm).

*5 Because the Palmers do not sufficiently allege a likelihood of future injury, the court will dismiss their request for injunctive relief. Accordingly, the court has no reason to consider the defendants’ primary jurisdiction argument.¹³

¹³ The defendants also argue in their motion that “[t]o the extent Plaintiffs seek to represent a class of consumers who purchased the Cleansing Wipes or Ultra Soft Cleansing Wipes” the Palmers cannot do so because they only purchased the “CVS Flushable Medicated Wipes.” (Defs.’ Mot. for Judgment on the Pleadings at 15, ECF 177). The court declines to consider this argument until the Palmers actually seek to certify the class.

Negligent misrepresentation claim against Nice-Pak:

To establish a claim for negligent misrepresentation under Maryland law, a plaintiff must prove:

- (1) the defendant, owing a duty of care to the plaintiff, negligently asserted a false statement; (2) the defendant intended that the statement will be acted upon by the plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement which, if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, took action in reliance on the statement, and (5) the plaintiff suffered damage proximately caused by the defendant’s negligence.

Swinson v. Lords Landing Village Condo., 360 Md. 462, 477 (2000).¹⁴ “Where the failure to exercise due care

creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent.” *Jacques v. First Nat’l Bank of Md.*, 307 Md. 527, 534–35 (1986). “[T]he rationale underlying the requirement of privity or its equivalent as a condition of liability for negligent conduct, including negligent misrepresentations, resulting in economic damages [is] to avoid liability in an indeterminate amount for an indeterminate time to an indeterminate class.” *Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645, 671 (2000) (internal quotation marks and citation omitted). To determine whether there is an intimate nexus, courts should focus on the defendant’s knowledge, that is, whether “the relationship of the litigants was close enough that the defendant knew that the plaintiff was likely to take some action based on what the defendant said or did.” *Select Exp., LLC v. Am. Trade Bindery, Inc.*, 178 Md. App. 607, 615 (2008) (citation omitted).

14 The parties do not dispute that Maryland law applies.

As an initial matter, it is not clear from the complaint whether Nice-Pak was responsible for the labeling of the CVS flushable wipes. Assuming they were, Nice-Pak had no interactions with the Palmers, making it difficult to find “contractual privity or its equivalent.” Further, finding an intimate nexus between Nice-Pak and consumers of its flushable wipes could subject Nice-Pak to damages “in an indeterminate amount for an indeterminate time to an indeterminate class,” which is what the intimate nexus requirement was meant to avoid. The court, however, declines to decide the issue now, without additional information about Nice-Pak’s role in labeling the wipes.¹⁵ Additionally, because a number of the Palmers’ claims against Nice-Pak will proceed, the parties would have to engage in discovery related to negligent misrepresentation even if that specific claim were not in the case. Therefore, the court will deny without prejudice the defendants’ motion for judgment on the pleadings as to the negligent misrepresentation claim against Nice-Pak.

15 Further, neither side proffered case law directly relevant to these specific factual circumstances.

Breach of express warranty claim against Nice-Pak:

*6 An express warranty is established by “[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the

bargain,” or “[a]ny description of the goods which is made part of the basis of the bargain.” Md. Code. Ann., Com. Law. § 2-313(1). To prevail on a claim for breach of express warranty under Maryland law, “a plaintiff is required to establish that 1) a warranty existed; 2) the product did not conform to the warranty, and 3) the breach proximately caused the injury or damage.” *SpinCycle, Inc. v. Kalender*, 186 F. Supp. 2d 585, 589 (D. Md. 2002) (citation omitted).

“Privity of contract remains an essential ingredient ... in a breach of express warranty action not involving personal injury, because privity between the plaintiff and defendant is requisite to maintain a contract action unless the plaintiff is either a donee beneficiary or a creditor beneficiary.” *Addressograph-Multigraph Corp. v. Link*, 273 Md. 277, 280 (1974); see also *Wood Prods., Inc. v. CMI Corp.*, 651 F. Supp. 641, 649 (D. Md. 1986) (“Privity is ... required in an action for breach of express warranty ... in which only economic loss is claimed.”); *H & M Co., Inc. v. Technical Heat Transfer Servs., Inc.*, No. TDC-14-1518, 2015 WL 1472000, at *4 (D. Md. March 30, 2015) (“H & M’s claim for breach of express warranty will be dismissed because privity is a required element for such a claim.”).

The Palmers do not allege they were in privity with Nice-Pak, as it appears they bought the wipes from CVS and not from Nice-Pak. Nor do they allege that they were a donee beneficiary or creditor beneficiary of any contract entered into by Nice-Pak. *Cf. Lawley v. Northam*, No. ELH-10-1074, 2011 WL 6013279, at *13 (D. Md. Dec. 1, 2011) (finding “a genuine dispute of material fact regarding the Lawleys’ argument that they are third-party beneficiaries to the contract” with respect to their breach of warranty claim). Therefore, they have failed to allege privity, which is necessary for their breach of express warranty claim.¹⁶ For these reasons, the court will dismiss the Palmers’ breach of express warranty claim against Nice-Pak.

16 The Palmers cite to *Ault v. J.M. Smucker Co.*, but that case is inapposite because it relies on New York law, which apparently does not require privity in a breach of express warranty claim. No. 13 Civ. 3409(PAC), 2014 WL 1998235, at *7 (S.D.N.Y. May 15, 2014) (“[P]rivacy between Plaintiff and Defendant is not required”). The Palmers also cite to *Hughes v. Ester C Co.*, 930 F. Supp. 2d 439, 475 (E.D.N.Y. 2013), which found a “special relationship between the parties” necessary for a negligent misrepresentation claim, but is not

relevant to whether the Palmers can show privity on their express warranty claim.

Breach of express warranty claim against CVS:

Under Md. Code, Com. Law, § 2-607(3)(a), a buyer “must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.” See *Frericks v. Gen. Motors Corp.*, 278 Md. 304, 310 (1976); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 542 (D. Md. 2011) (involving a claim for breach of implied warranty).¹⁷ Where such notice is not given, the buyer loses “the right of his remedy.” *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 17 (1974) (internal quotation marks omitted).

¹⁷ *Doll*, as well as *Lynx, Inc. v. Ordnance Products, Inc.* and *Lloyd v. General Motors Corp.*, *infra*, involve claims for breach of implied warranty, not for breach of express warranty. It does not appear, however, that § 2-607(3)(a)’s notice requirement applies differently to a claim for breach of implied warranty than it does to a claim for breach of express warranty. See § 2-607(3)(a) (referring to “any breach” without distinction between breaches of express or implied warranty); *Frericks*, 278 Md. at 306, 316 (1976) (analyzing claims for breach of express and implied warranty under the notice requirement); see also *Brown-High v. L’Oreal USA, Inc.*, No. GJH-17-276, 2017 WL 5952688, at *4 (D. Md. Nov. 29, 2017) (same).

*7 The Palmers appear to concede that they did not provide pre-suit notice to CVS; rather, they argue that the “pre-suit notice requirement is not served” here as the defendants had ample notice of the defect because of the “long history of consumer complaints and litigation on these issues.” (Pls.’ Opp’n to Defs.’ Mot. for Judgment on the Pleadings at 22–23, ECF 186). “This kind of ‘notice,’ however, is not what the law requires.” *Lloyd v. Gen. Motors Corp.*, 575 F. Supp. 2d 714, 723 (D. Md. 2008). The Palmers provide no Maryland case to support their argument that a court may disregard the pre-suit notice requirement when it is not served in a particular situation.¹⁸ Therefore, the court will also

dismiss the Palmers’ breach of express warranty claim against CVS.¹⁹

¹⁸ *Brown-High* looked to the intent of § 2-607 in finding it did not bar a remedy, but in different circumstances. 2017 WL 5952688, at *4. There, the buyer provided pre-suit notice to the manufacturer but not the seller. *Id.* The court looked to the rationale of § 2-607 to find that when “the manufacturer has been provided with sufficient pre-suit notice, the underlying policy of § 2-607 has been satisfied,” and suit was permitted against the manufacturer. *Id.* Here, though, the Palmers did not provide pre-suit notice to the seller, CVS, or the manufacturer, Nice-Pak.

¹⁹ Courts have held that if a buyer fails to provide pre-suit notice to the seller, the buyer is also barred from maintaining a breach of warranty action against the manufacturer. See *Doll*, 814 F. Supp. 2d at 542 (citing *Lloyd*, 575 F. Supp. 2d at 723 (“It is only logical ... that a consumer’s failure to observe [the pre-suit notice requirement] should provide the manufacturer with an affirmative defense.”)). Therefore, aside from the lack of privity with Nice-Pak, Palmers’ breach of express warranty claim against Nice-Pak also would fail for lack of pre-suit notice.

CONCLUSION

For the reasons stated above, the court will grant the defendants’ motion for judgment on the pleadings as to the Palmers’ request for injunctive relief and their claim for breach of express warranty against CVS and Nice-Pak. The court will deny the motion without prejudice as to the Palmers’ claim for negligent misrepresentation against Nice-Pak. The court also will grant the defendants’ motion for leave to file amended answers. A separate order follows.

All Citations

Slip Copy, 2019 WL 6529163

TAB 35

2009 WL 3923350

2009 WL 3923350

Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.

PEACE SOFTWARE, INC., a
Delaware Corporation, Plaintiff,

v.

HAWAIIAN ELECTRIC COMPANY,
INC., a Hawaii Corporation, Defendant.

Civ. No. 09-00408 SOM /LEK.

|
Nov. 17, 2009.

West KeySummary

1 Federal Civil Procedure 🗝️ **Fraud, mistake and condition of mind**

Software company sufficiently pled a fraudulent inducement claim based on its allegation that electric company made a false statement in its request for proposals (RFP). Software company alleged that electric company's RFP contained a fraudulent statement that electric company was seeking bids for only commercially available software. Software company alleged that the statement was fraudulent because electric company had no intention of installing a commercially available consumer information system (CIS), and actually planned to install a custom-made CIS. [Fed.Rules Civ.Proc.Rule 9\(b\)](#), 28 U.S.C.A.

13 Cases that cite this headnote

Attorneys and Law Firms

Jeannette H. Castagnetti, Margery S. Bronster, Bronster Hoshibata, Attorneys at Law, A Law Corporation, [Sunny S.J. Lee](#), Bronster Hoshibata, Honolulu, HI, [Neal J. Stephens](#), [Stephen C. Neal](#), Cooley Godward Kronish, Palo Alto, CA, for Plaintiff.

[Glenn T. Melchinger](#), Alston Hunt Floyd & Ing, Honolulu, HI, for Defendant.

ORDER GRANTING IN PART, DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND TO STRIKE PORTIONS OF THE COMPLAINT

[SUSAN OKI MOLLWAY](#), Chief District Judge.

I. INTRODUCTION.

*1 This case concerns the nature and scope of software and services that Plaintiff Peace Software, Inc., was required by contract to provide to Defendant Hawaiian Electric Company, Inc. Peace alleges that, among other things, HECO breached the contract. Before the court is HECO's motion to dismiss Peace's fraudulent inducement and negligent misrepresentation claims and to strike some of Peace's allegations. The court grants a portion of HECO's motion by limiting the fraudulent inducement claim to a single instance, but denies the remainder of the motion.

II. BACKGROUND.

In 2004, HECO decided to upgrade and replace its consumer information system ("CIS"). Compl. ¶¶ 2, 14 (Aug. 31, 2009). HECO thought that a new CIS would improve, among other things, its management of customer accounts, products, and services. *Id.* ¶ 15.

HECO allegedly could have upgraded its CIS in one of four ways. HECO could have outsourced the communications expense to a third party, internally developed a new system using custom-developed software, upgraded its current system, or bought a commercially available prepackaged system. *Id.* ¶ 16. Although HECO allegedly wanted to internally develop a custom-tailored system, HECO decided to buy a prepackaged system. *Id.* ¶ 17. Thus, in 2004 HECO sought approval from the Hawaii Public Utilities Commission ("PUC") of its decision to buy a prepackaged system from an outside vendor. *Id.* ¶¶ 2, 18-19. The PUC approved HECO's plan in May 2005. Pl.'s Mem. Opp. Mot. Dismiss 2 (Oct. 29, 2009).

HECO then issued a request for proposals ("RFP") inviting bids for the installation of a CIS for HECO. Compl. ¶ 2; Def.'s Mem. Supp. Mot. Dismiss 1 (Oct. 5, 2009). HECO's RFP allegedly described its requirements for the new CIS and allegedly asked for bids from only companies that sold prepackaged software. Compl. ¶ 23.

2009 WL 3923350

Peace says that it submitted a bid that, based on HECO's RFP, satisfied HECO's requirements. *Id.* ¶ 25. HECO accepted Peace's bid. *Id.* ¶ 29. On March 10, 2006, the parties entered into a contract, called an Implementation Services Agreement, in which Peace agreed to install a new CIS for HECO. *Id.* ¶ 31. They also entered into a software license agreement, and a "statement of work" that described the scope of the work to be performed by each party. *Id.* ¶¶ 32–33.

Peace began implementing the new CIS, but work on the CIS fell behind schedule and costs for the project exceeded what had been anticipated. Def.'s Mem. Supp. Mot. Dismiss 2. Peace alleges that the delays and increased costs resulted from HECO's desire for a custom-made CIS, something Peace could not implement for the agreed-upon price. Compl. ¶¶ 24–28. Peace alleges that HECO intentionally misled Peace into believing that Peace's prepackaged CIS would meet its needs. *Id.* ¶ 75. Peace says that it "became clear that HECO's demands far exceed [ed] the scope of work set forth in the Agreements." *Id.* ¶ 46.

*2 Peace filed suit after negotiations between the parties over payment and the scope of work stalled. Among Peace's claims are Count II, alleging that HECO made intentional misrepresentations in HECO's PUC application, RFP, and contract negotiations and fraudulently induced Peace to install a CIS, and Count III, alleging that HECO was at least negligent in that regard. *Id.* ¶¶ 79–84.

HECO moves to dismiss Count II and Count III on the ground that Peace has failed to plead these counts with the particularity required by [Rule 9\(b\) of the Federal Rules of Civil Procedure](#). HECO also argues that certain allegations regarding compromise negotiations should be stricken as impertinent and immaterial under [Rule 12\(f\) of the Federal Rules of Civil Procedure](#). For the reasons set forth below, the court grants HECO's motion in part and limits the scope of the fraudulent inducement claim, but the court denies the remainder of the motion.

III. STANDARD OF REVIEW.

A. [Rule 9\(b\)](#).

Usually, a party's pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." [Fed.R.Civ.P. 8\(a\)\(2\)](#). However, [Rule 9\(b\)](#) requires that, when fraud or mistake is alleged, "a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions

of a person's mind may be alleged generally." [Fed.R.Civ.P. 9\(b\)](#). [Rule 9\(b\)](#)'s purposes are to provide defendants with adequate notice to allow them to defend against a charge, to protect those whose reputation would be harmed as a result of being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties, and society social and economic costs without some factual basis. [Kearns v. Ford Motor Co.](#), 567 F.3d 1120, 1125 (9th Cir.2009).

An allegation of fraud is sufficient if it "identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." [Neubronner v. Milken](#), 6 F.3d 666, 672 (9th Cir.1993)(internal citations and quotations omitted). To sufficiently identify the circumstances that constitute fraud, a plaintiff must identify such facts as the times, dates, places, or other details of the alleged fraudulent activity. *Id.* A plaintiff must plead these evidentiary facts and must explain why the alleged conduct or statements are fraudulent. [In re GlenFed, Inc. Sec. Litig.](#), 42 F.3d 1541, 1548 n. 7 (9th Cir.1994). Allegations of fraud based on information and belief do not satisfy [Rule 9\(b\)](#); instead a plaintiff must state the factual basis for the belief. [Neubronner](#), 6 F.3d at 672.

Fraud is sometimes not an essential element of every claim asserted by a plaintiff; only those allegations of a complaint that aver fraud are subject to [Rule 9\(b\)](#)'s heightened pleading standard. [Kearns](#), 567 F.3d at 1124. The court should disregard averments of fraud that do not meet [Rule 9\(b\)](#)'s standard, and then determine whether the remaining allegations state a claim. *Id.*

*3 When fraud is not an essential element of a claim, but a plaintiff alleges that a defendant engaged in a "unified course of fraudulent conduct" and relies on that course of conduct for the basis of that claim, the claim is grounded in fraud and the pleading as a whole must satisfy the particularity requirement of [Rule 9\(b\)](#). [Kearns](#), 567 F.3d at 1125 (citing [Vess v. Ciba-Geigy Corp. USA](#), 317 F.3d 1097, 1102–1105 (9th Cir.2003)). Of course, allegations of nonfraudulent conduct need only satisfy the ordinary pleading standard of [Rule 8\(a\) of the Federal Rules of Civil Procedure](#). [Vess](#), 317 F.3d at 1103.

A court treats a motion to dismiss under [Rule 9\(b\)](#) like a motion to dismiss under [Rule 12\(b\)\(6\)](#):

A motion to dismiss a complaint or claim "grounded in fraud" under

Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim. If insufficiently pled averments of fraud are disregarded, as they must be, in a complaint or claim grounded in fraud, there is effectively nothing left of the complaint. In that event, a motion to dismiss under Rule 12(b)(6) would obviously be granted. Because a dismissal of a complaint or claim grounded in fraud for failure to comply with Rule 9(b) has the same consequence as a dismissal under Rule 12(b)(6), dismissals under the two rules are treated in the same manner.

Vess, 317 F.3d at 1107.

When a court exercises diversity jurisdiction, state substantive law determines the elements of the claims. “[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule.” *Kearns*, 567 F.3d at 1125 (internal citations and quotations omitted).

B. Rule 12(f).

Rule 12(f) of the Federal Rules of Civil Procedure provides that the “court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed.R.Civ.P. 12(f). The court may act on its own, or on motion made by a party before responding to the pleading or within 20 days after being served with the pleading. Fed.R.Civ.P. 12(f)(1) and (2).

The function of a 12(f) motion is to avoid spending time and money litigating spurious issues by dispensing with those issues before trial. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983). This court has stated that the “rationale behind granting motions to strike is to avoid prejudice to a party by preventing a jury from seeing the offensive matter or giving the allegation any unnecessary notoriety.” *Wailua Assocs. v. Aetna Cas. & Sur. Co.*, 183 F.R.D. 550, 553 (D.Haw.1998). Grounds for a motion to strike

must be readily apparent from the face of the pleadings or from materials that may be judicially noticed. *Id.* at 554. A matter will not be stricken from a pleading unless it is clear that it can have no possible bearing on the subject matter of the litigation. *Id.*

*4 Immaterial matter is that which has no essential or important relationship to the claims or defenses pled. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382 (3d ed.2004). Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question. *Aetna Cas. & Sur. Co.*, 183 F.R.D. at 553 (noting that an allegation is impertinent when it is irrelevant).

As a general rule, a motion to strike is disfavored because it is often used as a delaying tactic. *Hart v. Baca*, 204 F.R.D. 456, 457 (C.D.Cal.2001) (internal quotations omitted). A Rule 12(f) motion is primarily used to object to an insufficient defense. At least one court has noted that a Rule 12(f) motion is “neither an authorized nor proper way to obtain dismissal of a complaint or portions of a complaint.” *Clement v. Am. Greetings Corp.*, 636 F.Supp. 1326, 1332 (S.D.Cal.1986).

IV. ANALYSIS.

The court first addresses HECO's contention that Peace did not sufficiently plead its fraudulent inducement and negligent misrepresentation claims. The court then addresses HECO's motion to strike some of the allegations.

A. Peace Has Sufficiently Pled a Fraudulent Inducement Claim Based on its Allegation That HECO Made A False Statement in its RFP.

Peace claims that HECO fraudulently induced Peace to agree to install a CIS for HECO. Peace alleges that HECO made false statements on three occasions. HECO argues that Peace fails to plead three false statements with the particularity required by Rule 9(b). This court agrees and limits Peace's claim of fraudulent inducement to a single instance.

To state a claim for fraudulent inducement, a plaintiff must allege (1) a representation of a material fact, (2) made for the purpose of inducing the other party to act, (3) known to be false but reasonably believed true by the other party, and (4) upon which the other party relies and acts to his or her damage. *Hawaii Cmty. Fed. Credit Union v. Keka*, 94 Hawai'i 213, 230, 11 P.3d 1, 18 (2000).

Peace alleges that HECO's RFP contains a fraudulent statement that HECO was seeking bids for only "commercially available software." Compl. ¶ 23. This allegation is sufficient to put HECO on notice that Peace is contending that HECO made a false statement in its RFP. See *Neubronner*, 6 F.3d at 671–2 (noting that a pleading alleging fraud is sufficient if defendants can prepare an adequate answer from the allegations). This allegation also gives the time, place, and content, or the "who, what, when, where, and how," of the alleged misconduct. *Kearns*, 567 F.3d at 1124 (internal quotations omitted). This allegedly false statement was included in one specific RFP released after May 2005, after HECO's application for a new CIS had been approved by the PUC. Peace alleges that the statement was fraudulent because HECO had no intention of installing a commercially available CIS, knowingly made a false statement, and actually planned to install a custom-made CIS. Compl. ¶¶ 23, 73. The allegations describing this particular conduct are sufficient to satisfy the heightened pleading requirements of [Rule 9\(b\)](#).

*5 By contrast, Peace's allegations that HECO made fraudulent statements in its PUC application and during contract negotiations do not satisfy [Rule 9\(b\)](#). *Id.* ¶ 76. These allegations do not state the time, place, and content of the alleged fraudulent statements. The Complaint does not include or refer to the actual language of the statements in the PUC application or state how any statement in the application was fraudulent. Additionally, there is no allegation as to when the application was submitted. While one might infer statements that Peace might be alleging were included in the application, [Rule 9\(b\)](#) requires more than an inference.

With regard to contract negotiations, there is similarly no allegation of when fraudulent statements were made, who made the statements, and what exactly was said that was fraudulent. These allegations of fraudulent activity fail to satisfy the heightened pleading standard of [Rule 9\(b\)](#). The court disregards these allegations, and the fraudulent inducement claim may proceed based only on the alleged fraud in the RFP. See *Kearns*, 567 F.3d at 1124.

HECO seeks dismissal of Peace's entire fraudulent inducement claim on the additional ground that some of Peace's allegations are made on "information and belief." Allegations made on information and belief do not satisfy the heightened pleading standard of [Rule 9\(b\)](#). See *Neubronner*, 6 F.3d at 672 (noting that as a general rule allegations of fraud based on information and belief do not satisfy [Rule 9\(b\)](#)). The court is unpersuaded.

To the extent any allegation made on "information and belief" does not aver fraud, it need not be pled with specificity under [Rule 9\(b\)](#). *Kearns*, 567 F.3d at 1124 ("To the extent a party does not aver fraud, the party's allegations need only satisfy the requirements of [Rule 8\(a\)\(2\)](#)."); see also *Vess*, 317 F.3d at 1104 ("To require that non-fraud allegations be stated with particularity merely because they appear in a complaint alongside fraud averments, however, serves no similar reputation-preserving function, and would impose a burden on plaintiffs not contemplated by the notice pleading requirements of [Rule 8\(a\)](#)."). And allegations of intent or knowledge on behalf of a defendant need only be generally alleged. See *Fed.R.Civ.P. 9(b)*; see also *Neubronner*, 6 F.3d at 372 (noting that "allegations of fraud based on information and belief that do not satisfy [Rule 9\(b\)](#) may be relaxed with respect to matters within the opposing party's knowledge"). This court need not decide whether Peace's allegations "on information and belief" that HECO always intended to install a custom-made CIS, and that HECO's ultimate goal was to achieve the benefits of a custom-designed CIS, Compl. ¶¶ 2, 17, allege fraud. Even if the court reads these allegations as alleging fraud, Peace has other allegations that clearly aver fraud without stating that they are made on "information and belief." Compl. ¶¶ 72–78.

*6 The same could be said about the other "information and belief" allegations that HECO complains about. Peace alleges on "information and belief" that HECO made a misrepresentation to induce Peace into agreeing to produce a product for a fixed price. Comp. ¶ 24. Elsewhere, Peace alleges on "information and belief" that HECO materially and intentionally misled Peace into believing that HECO wanted a prepackaged CIS. Compl. ¶ 27. Even if the court disregards these allegations, Peace sufficiently pleads a fraudulent inducement claim with respect to the RFP, as Peace has equivalent allegations in the Complaint that do not state that they are made on "information and belief." Compl. ¶¶ 74–75.

This court limits Peace's fraudulent inducement claim to the assertion that HECO made fraudulent statements in the RFP. The claim may proceed on only that ground. See *Kearns*, 567 F.3d at 1124 ("Any averments which do not meet that standard should be disregarded, or stripped from the claim for failure to satisfy [Rule 9\(b\)](#).") (internal quotations omitted).

B. HECO Does Not Establish that Peace's Negligent Misrepresentation Claim Is Subject to The Heightened Pleading Requirements of Rule 9(b).

Peace alleges that the same conduct that forms the basis of Peace's fraudulent inducement claim supports a negligent misrepresentation claim. Peace asserts, "At the very least, HECO's misrepresentations and omissions of material fact were the result of HECO's failure to exercise reasonable care and competence." Compl. ¶ 80. In other words, Peace says that HECO performed negligently in submitting its application to the PUC, in drafting its RFP, and in negotiating the contract. HECO seeks dismissal of the negligent misrepresentation claim on the ground that it fails to meet the heightened pleading requirements of Rule 9(b). This court denies HECO's motion in this regard based on HECO's failure to establish that Rule 9(b) applies to this claim.

HECO cites *Neilson v. Union Bank of California*, 290 F.Supp.2d 1101, 1141 (C.D.Cal.2003), which states that it is "well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements." See also *Hutson v. American Home Mortgage Servicing, Inc.*, 2009 WL 3353312, at *14 (N.D.Cal. Oct.16, 2009) (quoting *Neilson*). But *Neilson* applied California's law of negligent misrepresentation and cited other decisions doing the same. It therefore appears to this court that the reference in *Neilson* is a reference to well-established federal pleading requirements for fraud and negligent misrepresentation claims brought under California law.

Under California law, to be a negligent misrepresentation, a statement must have been made "without reasonable grounds for believing it to be true" and "with intent to induce another's reliance." *Id.* at 1141. This means that, under California law, the elements of a claim for negligent misrepresentation are similar to the elements for fraud. *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1115, 1128 (N.D.Cal.2001). Indeed, in California, negligent misrepresentation is a "form of deceit." *Neilson*, 290 F.Supp.2d at 1141 (internal citations and quotations omitted).

*7 A court sitting in diversity must apply the substantive law of the state in which it sits. Thus, this court looks to Hawaii law to determine the elements of Peace's negligent misrepresentation claim before determining whether the procedural requirements of Rule 9(b) apply.

HECO argues that Hawaii law mirrors California law in requiring an intent to induce reliance. The elements of a negligent misrepresentation claim under Hawaii law have been stated in various ways. In *Kohala Agric. v. Deloitte & Touche*, 86 Hawai'i 301, 304, 949 P.2d 141, 144 (Haw.App.1997), the Hawaii Intermediate Court of Appeals applied the elements of negligent misrepresentation set forth in section 552 of the Restatement (Second) of Torts. The ICA noted that section 552 required, among other things, that a plaintiff have relied on an alleged misrepresentation in a transaction that the alleged tortfeasor intended the misrepresentation to influence. *Id.*, 949 P.2d at 144.

The Hawaii Supreme Court subsequently held that, to state a claim for negligent misrepresentation under Hawaii law, a party must allege that (1) false information was supplied as a result of the failure to exercise reasonable care or competence in communicating the information; (2) the person for whose benefit the information was supplied suffered a loss; and (3) the recipient relied on the misrepresentation. *Blair v. Ing*, 95 Hawai'i 247, 269, 21 P.3d 452, 474 (2001). In so stating, the Hawaii Supreme Court specifically referred to the ICA decision and to section 552, although it did not list an intent to influence as a numbered element.

HECO urges this court to rely not on *Blair* but on the more recent Hawaii Supreme Court decision in *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Limited Partnership*, 114 Hawai'i 201, 166 P.3d 961 (Haw.2007). *Laeroc* states that Hawaii "has adopted the Restatement (Second) of Torts § 552 addressing the tort of negligent misrepresentation," and then quotes section 552, including the "intent to influence" language that is not contained in the list of the elements of a negligent misrepresentation claim set forth in *Blair*. It is not at all clear that the Hawaii Supreme Court intended *Laeroc* to supersede *Blair* with respect to the elements of a negligent misrepresentation claim.

In a decision that is very nearly contemporaneous with *Laeroc*, the Hawaii Supreme Court quoted the three elements set forth in *Blair* as stating Hawaii's requirements for negligent misrepresentation. That nearly contemporaneous case, *Association of Apartment Owners of Newton Meadows v. Venture 15, Inc.*, 115 Hawai'i 232, 167 P.3d 225 (Haw.2007), was originally decided a month before *Laeroc* and corrected less than a month after *Laeroc* in connection with the denial of a reconsideration motion. The *Venture 15* decision thus issued in its final form after *Laeroc* did. *Venture 15* notes the similar reliance requirements under Hawaii

2009 WL 3923350

law for negligent misrepresentation and for intentional or fraudulent misrepresentation. But *Venture 15* strikingly includes for only intentional or fraudulent misrepresentation the requirement that false representations have been made “in contemplation of plaintiff’s reliance upon these false representations.” *Id.* at 263, 167 P.3d at 256. The absence of the “contemplation” or “intent” language from the description of the elements of a negligent misrepresentation claim gives this court pause in applying [Rule 9\(b\)](#).

*8 HECO does not explain why, given these Hawaii cases, this court should read a reference in *Laeroc* to [section 552](#) as negating *Blair* and *Venture 15*. This is a burden that HECO has as the movant here, and HECO does not satisfy that burden.

Nor does HECO explain how its reading of *Laeroc* can be reconciled with *Honda v. Board of Trustees of the Employees’ Retirement System*, 108 Hawai’i 212, 222, 118 P.3d 1155, 1165 (2005). *Honda* involved a claim by the wife of a deceased state civil service employee for retirement benefits. The Hawaii Supreme Court held that a retirement application form and pamphlet prepared by the defendant may have amounted to a negligent misrepresentation to the deceased employee that his wife would receive survivor benefits when he died, which was not in fact the case. *Id.* The employee appeared to have relied on this representation in selecting a retirement option that did not allow his spouse to receive retirement benefits. *Id.* In discussing the negligent misrepresentation claim, the court did not impose any requirement that the defendant have intended the employee to rely on a misrepresentation when choosing an option. Thus, the Hawaii Supreme Court does not appear to have been equating negligent misrepresentation with fraud.

Regardless of whether Hawaii does or does not require intent to induce reliance to establish negligent misrepresentation, HECO does not meet its burden of establishing that it does so require. This court accordingly does not apply [Rule 9\(b\)](#) to that claim.

Nor could Peace’s negligent misrepresentation claim be said to be subject to [Rule 9\(b\)](#) because it is “grounded in fraud.” While the Ninth Circuit has held that [Rule 9\(b\)](#) applies when a plaintiff alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis for a claim that does not have fraud as an essential element, *Kearns*, 567 F.3d at 1125, the present case involves no such allegation. This case involves related, but clearly separable, instances of alleged negligence. Therefore, the court again

rules that HECO does not meet its burden of establishing that the heightened pleading standard applies to Peace’s negligent misrepresentation claim.

B. The Court Declines To Strike Allegations In The Complaint That HECO Claims Contain Statements Made in Compromise Negotiations.

HECO argues that allegations in paragraphs 41 to 44 of the Complaint must be stricken under [Rule 12\(f\) of the Federal Rules of Civil Procedure](#). Those paragraphs allege that a third-party consultant, Accenture, was hired to review how implementation of the CIS was proceeding and to report on its status. Peace alleges that Accenture reported that HECO itself had caused many problems that led to delay in implementing the CIS. Compl. ¶¶ 41–45.

HECO argues that these allegations relate to compromise attempts and are therefore inadmissible under [Rule 408 of the Federal Rules of Evidence](#). According to HECO, allegations inadmissible under the Federal Rules of Evidence are necessarily immaterial and impertinent and must be stricken under [Rule 12\(f\) of the Federal Rules of Civil Procedure](#). HECO also says that these allegations should be stricken as violative of a nondisclosure agreement. On the present record, the court disagrees.

*9 [Rule 408](#) provides that evidence of conduct or statements made in negotiations to compromise a claim are “not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount.” [Fed.R.Evid. 408\(a\)\(2\)](#). However, as a general matter, allegations in a complaint are not evidence. Because the Federal Rules of Evidence deal with evidence offered at trial, not allegations in a complaint, HECO’s contention that allegations must be stricken because they violate the Rules of Evidence is unpersuasive. It is, moreover, unclear from the face of the Complaint that these allegations concern compromise negotiations regarding a claim that trigger [Rule 408](#). These discussions may have occurred before either party contemplated a claim against the other party. Finally, HECO does not establish that these allegations fall under [Rule 408](#) as matters offered to prove liability for, invalidity of, or amount of a claim. Peace could conceivably offer these allegations for some other purpose.

HECO also contends that these allegations violate a nondisclosure agreement protecting proposal negotiations. Def.’s Mem. Supp. Mot. Dismiss 13. First, it is unclear that the allegations in the Complaint concern proposal negotiations.

2009 WL 3923350

Second, on a motion to strike a pleading, the court typically considers only the face of the pleading or matters that the court takes judicial notice of. *See Aetna Cas. & Sur. Co.*, 183 F.R.D. at 554. The face of the Complaint does not show that Peace breached the nondisclosure agreement.

The court denies HECO's motion to strike allegations from the Complaint.

V. CONCLUSION.

The court denies HECO's motion to the extent it seeks to dismiss in its entirety Peace's fraudulent inducement claim,

but the court limits that claim to the issue of representations in the RFP. The court denies the motion to dismiss insofar as it seeks dismissal of the negligent misrepresentation claim. Finally, the court denies Heco's motion to strike certain allegations, as HECO does not prove that the allegations are immaterial or impertinent under [Rule 12\(f\) of the Federal Rules of Civil Procedure](#).

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3923350

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 36

201WL 8 9111995



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [Eason v. Roman Catholic Bishop of San Diego](#), S.D.Cal.,
October 7, 2019

2015 WL 4111448

Only the Westlaw citation is currently available.

United States District Court,
N.D. California,
San Jose Division.

William Philips et al., Plaintiffs,

v.

Ford Motor Company, Defendant.

Case No. 14-CV-02989-LHK

|

Signed 07/07/2015

Attorneys and Law Firms

[Adam J. Levitt](#), [John Ernst Tangren](#), Grant & Eisenhofer P.A.,
Chicago, IL, [Mary Sikra Thomas](#), [Justin S. Brooks](#), Grant &
Eisenhofer, P.A., Wilmington, DE, [Nathan Bowen Atkinson](#),
Spilman Thomas and Battle, PLLC, Winston-Salem, NC,
[Niall A. Paul](#), Spilman Thomas and Battle, PLLC, Charleston,
WV, [Mark Philip Pifko](#), [Roland K. Tellis](#), Baron & Budd, P.C.,
Encino, CA, for Plaintiffs.

[Amir M. Nassihi](#), [Andrew L. Chang](#), [Michael Kevin Underhill](#),
Shook, Hardy & Bacon L.L.P., San Francisco, CA,
[Dustin Alan Lane](#), Seipp Flick Hosley LLP, Coral Gables,
FL, [Todd Andrew Croftchik](#), Seipp, Flick, Hosley LLP, Lake
Mary, FL, for Defendant.

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO DISMISS**

LUCY H. KOH, District Judge

*1 Plaintiffs William Philips (“Philips”), Jaime Goodman (“Goodman”), Allison Colburn and her son Ian Colburn (collectively, “California Plaintiffs”) have brought a putative class action lawsuit against defendant Ford Motor Company (“Ford”), a Delaware corporation with its principal place of business in Dearborn, Michigan. ECF No. 55, Second Amended Complaint (“SAC”) ¶¶ 1, 32–56. Before the Court is Ford’s Motion to Dismiss the SAC’s California claims.¹ ECF No. 58 (“Mot.”). California Plaintiffs have opposed the

motion, ECF No. 63 (“Opp.”), and Ford has replied, ECF No. 67 (“Reply”).

1 In addition to California Plaintiffs, the SAC includes the same non-California Plaintiffs from the First Amended Complaint (“FAC”): Jason Wilkinson, Robert Morris, Victoria Jackson, Johnpaul Fournier, and Ryan and Rebecca Wolf (together, with California Plaintiffs, “Plaintiffs”). See SAC ¶¶ 189–219. In light of the fact that the 108–page FAC contained fifty-one causes of action, including nationwide class claims and class claims brought under the specific laws of six different states, the Court decided to proceed by addressing the California claims first. See ECF No. 46; ECF No. 54 at 6, 9, 11–12, 37. To that end, the parties stipulated that “[a]lthough the SAC may contain both California and non-California claims,” Ford’s second motion to dismiss “shall address only Plaintiffs’ California claims.” ECF No. 51. Accordingly, the Court’s order is limited to the four causes of action brought by California Plaintiffs in the SAC.

The Court finds this matter suitable for decision without oral argument under Civil Local Rule 7–1(b) and hereby VACATES the motion hearing set for July 9, 2015, at 1:30 p.m. The case management conference scheduled for that date and time remains as set. Having considered the submissions of the parties, the relevant law, and the record in this case, the Court hereby GRANTS IN PART and DENIES IN PART Ford’s Motion to Dismiss.

I. BACKGROUND**A. Factual Allegations**

California Plaintiffs are individuals seeking to represent a class of statewide consumers who purchased or leased Ford Fusion vehicles, model years 2010 through 2014, or Ford Focus vehicles, model years 2012 through 2014 (the “Vehicles”),² which California Plaintiffs allege are equipped with a defective Electronic Power Assisted Steering (“EPAS”) system. SAC ¶ 1. The following chart summarizes California Plaintiffs’ alleged purchasing information:

2 The SAC specifies further that the “Vehicles include the following models: 2010–2014 Ford Fusion; 2010–2014 Ford Fusion Hybrid; 2013–

201WL 8 9111995

2014 Ford Fusion Energi; 2012–2014 Ford Focus; and 2012–2014 Ford Focus Electric.” SAC ¶ 69.

Plaintiff	Vehicle	Site of Purchase	Date of Purchase
Philips	2011 Ford Fusion (used)	Salinas Valley Ford (California)	March 2012
Goodman	2011 Ford Fusion (new)	Future Ford of Clovis (California)	October 13, 2010
Allison Colburn ³	2010 Ford Fusion (new)	Galpin Ford (California)	January 12, 2010

[Editor's Note: The preceding image contains the reference for footnote³]

³ There is no allegation that Ian Colburn, Allison Colburn's son, purchased any of the Vehicles. See SAC ¶¶ 51–54. Rather, Ian Colburn was gifted the 2010 Ford Fusion by his mother. *Id.* ¶ 51.

Id. ¶¶ 32–54.

Power steering systems supplement the torque that the driver applies to the steering wheel, thus making it easier for the driver to turn the wheel. SAC ¶ 76. Ford's EPAS system replaces the traditional hydraulic-assist power steering pump and is comprised of a power steering control motor, electronic control unit, torque sensor, and steering wheel position sensor. *Id.* ¶ 2. California Plaintiffs allege, however, that Ford's EPAS system suffers from a “systemic defect” that “renders the system prone to sudden and premature failure during ordinary and foreseeable driving situations.” *Id.* This defect, California Plaintiffs claim, causes drivers of the Vehicles to “experience significantly increased steering effort and an increased risk of losing control of their vehicles when the EPAS system fails” and “defaults to manual steering.” *Id.* ¶¶ 3, 101.

*2 In support of this claim, California Plaintiffs rely on three categories of evidence: (1) their own alleged experiences with EPAS failure, SAC ¶¶ 36, 43, 53; (2) the National Highway Traffic Safety Administration's (“NHTSA”) investigation into the EPAS system of the Ford Explorer, a vehicle not at issue in this putative class action, *id.* ¶¶ 82–103; and (3) complaints to the NHTSA by Ford owners about power steering failures in the Vehicles, *id.* ¶¶ 104–32.

As to the first category, California Plaintiffs allege that the EPAS system in each of their Vehicles⁴ has failed. None of them, however, alleges that any accident has taken place or that they have suffered any physical injury or any property damage as a result of an EPAS failure. Specifically, Philips says he “reviewed Ford's promotional materials and other information,” and that he “would not have purchased his 2011 Ford Fusion, or would not have paid the purchase

price charged,” if he had known of “the EPAS system defects and failures.” SAC ¶ 34. Philips also says he experienced “intermittent problems with the steering system in his Fusion,” which caused “difficulty steering.” *Id.* ¶ 36. After lodging multiple complaints with Ford, Philips alleges he “was told that it would cost approximately \$2,000 to fix the problem.” *Id.* According to Philips, “Ford offered to pay 50%.” *Id.*

⁴ California Plaintiffs do not allege that any of them purchased a Ford Focus.

Goodman, on the other hand, claims that prior to “purchasing her 2011 Ford Fusion,” she “(a) viewed television advertisements concerning the vehicles; (b) viewed material concerning the Fusion on Ford's website; (c) reviewed the window sticker on the vehicle she would purchase; and (d) received and reviewed a brochure concerning the Fusion.” *Id.* ¶ 40. “The window sticker,” Goodman says, “indicated that the vehicle she would purchase was equipped with power steering.” *Id.* “Nowhere in these materials did Ford disclose the EPAS system defects and failures,” and had Ford done so, Goodman alleges she “would not have purchased her 2011 Ford Fusion, or would not have paid the purchase price charged.” *Id.* ¶¶ 40–41. In addition, Goodman claims that “in 2014” she “began having intermittent problems with the steering system in her 2011 Ford Fusion and experienced difficulty steering.” *Id.* ¶ 43. “The problems first occurred at low speeds,” Goodman says, “when the steering would lock up while she was attempting to park.” *Id.* After one attempt at repair, Goodman alleges that she experienced steering difficulties “while she was driving on the road, not just parking.” *Id.* Ultimately, Goodman “took the vehicle to a Ford dealership and was told that it would cost \$1,800 to fix the problem with the steering system.” *Id.*

Prior to “purchasing her 2010 Ford Fusion,” Allison Colburn claims that, just like Goodman, she “(a) viewed television advertisements concerning the vehicles; (b) viewed material concerning the Fusion on Ford's website; (c) reviewed the window sticker on the vehicle she would purchase; and (d) received and reviewed a brochure concerning the Fusion,” and that “[t]he window sticker indicated that the vehicle she would purchase was equipped with power steering.” SAC ¶ 47. Unlike Goodman, however, Allison Colburn alleges that the brochure she read “contained the same ‘Drive smart’ heading featured in the ‘Technology Fact Sheets’ available on Ford's website.” *Id.* “Nowhere in these materials did Ford disclose the EPAS system defects and failures,” and had Ford done so, Allison Colburn alleges she “would not have

201WL 8 9111995

purchased her 2010 Ford Fusion, or would not have paid the purchase price charged.” *Id.* ¶¶ 47–48. Notably, Allison Colburn does not allege she experienced any power steering failures. Instead, her son Ian Colburn alleges that “in October 2014,” after his mother had given him the car, “the power steering in the 2010 Ford Fusion failed.” *Id.* ¶¶ 51, 53. The Ford dealership in San Diego where Ian Colburn took the car for repairs “initially quoted the repair price as \$1,756.95, but reduced the price to \$990.19.” *Id.* ¶ 54. Allison Colburn says she paid the \$990.19 to fix the power steering. *Id.*

*3 As to the second category of evidence, California Plaintiffs emphasize documents produced in connection with the NHTSA’s Ford Explorer investigation, which began on June 19, 2012. SAC ¶ 83. In response to the NHTSA’s request for information, Ford “produced a database containing 1,173 complaints” regarding loss of power steering, nine of which allegedly described “incidents that resulted in a crash.” *Id.* ¶ 89. Ford also produced various internal e-mails which, California Plaintiffs allege, reveal that the Vehicles suffer from the same EPAS system defect as the Ford Explorer and that Ford knew about the defect yet never disclosed it to the public or otherwise took corrective action. *Id.* ¶¶ 90–98. According to California Plaintiffs, the NHTSA investigation found “fifteen accidents that were caused by a loss of power steering in the Explorer.” *Id.* ¶ 99. However, the NHTSA’s Office of Defects Investigation (“ODI”), which published a resume closing the Ford Explorer investigation, was more circumspect: “ODI identified 15 crashes with evidence indicating loss of power steering assist *may* have been a factor.” ECF No. 22–4 (“ODI Resume”) at 2 (emphasis added).⁵ “All 15 crashes,” the ODI Resume continued, “involved low-speed impacts ... resulting in minor vehicle damage or no damage,” with only one reported incident of “minor injuries to the driver that did not require medical treatment.” *Id.*

⁵ The Court GRANTS Ford’s Request for Judicial Notice of the ODI Resume closing the NHTSA’s investigation into the Ford Explorer’s EPAS system. ECF No. 22–3. Because the SAC “necessarily relies” on this document, and because California Plaintiffs do not contest the document’s authenticity or relevance, the Court considers it an appropriate subject for judicial notice under “the doctrine of incorporation by reference.” *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); see also *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices &*

Prods. Liab. Litig., 890 F.Supp.2d 1210, 1216 n.2 (C.D.Cal. 2011) (taking judicial notice of the “NHTSA’s ODI resume closing its investigation into Model Year 2010 Prius braking performance”).

As to the third category, California Plaintiffs provide a litany of testimonials by other Ford owners complaining to the NHTSA about alleged power steering failures in the Vehicles. SAC ¶¶ 104–32. The two dozen complaints California Plaintiffs detail in the SAC are, California Plaintiffs allege, a mere sampling of the hundreds of complaints the NHTSA has received concerning EPAS failures in the Vehicles. *See id.* ¶ 104. Only two of the examples cited by California Plaintiffs, however, involved accidents:

On December 11, 2012, a vehicle owner reported a crash in a 2010 Ford Fusion. The Defective Vehicle lost power steering, traction control, and the ability to brake upon entering a freeway on ramp. To stop the vehicle and avoid endangering other drivers, the driver was “forced to crash into the concrete wall barrier on the driver’s side of the ramp.” The driver and one other individual were injured.

....

On October 3, 2012, a vehicle owner reported a crash in a 2011 Ford Fusion. The steering wheel seized while the owner was driving at 35 MPH, causing her to crash into a curb. After the initial accident, the steering of the vehicle continued to fail. The vehicle was taken to a Ford dealer three times, and the dealer refused to help her because the failure could not be replicated. The vehicle owner notified Ford but Ford was unwilling to offer assistance.

Id. ¶¶ 110, 112. The most recent power steering failure cited by California Plaintiffs, mentioned for the first time in the SAC, took place on March 10, 2015, “very nearly” led to a collision, and left the driver “quite shaken.” *Id.* ¶ 132.

Based on this evidence, California Plaintiffs allege that Ford fraudulently concealed⁶ the claimed power steering defect: “Ford actively concealed, failed to disclose, and continues to fail to disclose to consumers of the Defective Vehicles that the uniformly designed EPAS system in the Defective Vehicles is prone to premature failure during ordinary and foreseeable driving situations.” SAC ¶ 4. Despite press releases and web-based “promotional materials” touting “EPAS as a reliable and beneficial product,” Ford, according to California Plaintiffs, knew “as early as 2010” that the EPAS system was “prone to sudden, premature failure,” and yet took no remedial action. *Id.* ¶ 11. “Ford’s omissions,”

201WL 8 9111995

California Plaintiffs say, “are material to consumers because of the significant safety concerns presented as a result of the system’s defects and premature failures.” *Id.* ¶ 5. According to California Plaintiffs, “Ford’s failure to disclose to consumers and the public at large the material fact that the EPAS system is prone to premature failure ... recklessly risked the safety of occupants of the Defective Vehicles and the public at large.” *Id.* ¶ 6.

⁶ California Plaintiffs no longer allege fraud based on a theory of misrepresentation. *See* ECF No. 15 (“FAC”) ¶¶ 7–8. California Plaintiffs instead rely solely on a theory of fraud by “omission[],” which they also call “fraudulent concealment.” SAC ¶¶ 5, 35.

*4 In May 2011, and again in December 2012, Ford allegedly issued technical service bulletins indicating Ford’s awareness of EPAS system failures in the Vehicles. SAC ¶¶ 13 (2012 Ford Focus), 19 (2013 Ford Fusion). California Plaintiffs claim that “Ford concealed the fact that the EPAS system is prone to sudden and premature failure from consumers so that the warranty period on the Defective Vehicles would expire before consumers become aware of the problem.” *Id.* ¶ 24.⁷ Had Ford disclosed the alleged defect, California Plaintiffs say they “would not have purchased ... those vehicles, or would have paid substantially less for the vehicles than they did.” *Id.* ¶ 25.

⁷ The Vehicles were all covered by an express New Vehicle Limited Warranty (“NVLW”), which Ford has filed with the Court. *See* ECF No. 22–2 (containing Ford’s NVLWs for 2010, 2011, 2012, and 2013). Because the SAC “necessarily relies” on these documents, and because California Plaintiffs do not contest the documents’ authenticity or relevance, the Court considers them an appropriate subject for judicial notice under “the doctrine of incorporation by reference.” *Coto Settlement*, 593 F.3d at 1038; *see Elias v. Hewlett–Packard Co.*, 903 F.Supp.2d 843, 850 n.1 (N.D.Cal. 2012). The NVLW covered the Vehicles for the first three years or 36,000 miles driven, whichever came first. *See, e.g.*, ECF No. 22–2 at 14.

B. Procedural History

On June 27, 2014, Plaintiffs filed their initial Complaint in federal court. ECF No. 1. The Class Action Fairness Act

(“CAFA”), 28 U.S.C. § 1332(d), is the asserted basis for this Court’s subject matter jurisdiction. SAC ¶ 28.

On September 8, 2014, Plaintiffs filed their FAC containing fifty-one causes of action, including forty-nine claims specific to the laws of six states (California, Ohio, Michigan, Georgia, Illinois, and Arizona) and two nationwide claims based on the laws of forty-four additional states. *See* FAC ¶¶ 145–645. On October 24, 2014, Ford moved to dismiss the FAC. ECF No. 22. Concurrently with that motion, Ford filed a Request for Judicial Notice, ECF No. 22–3, which the Court has granted, *see supra* note 5. Plaintiffs opposed the motion on December 16, 2014, ECF No. 35, and Ford replied on January 16, 2015, ECF No. 36. At a hearing held on February 12, 2015, the Court granted Ford’s Motion to Dismiss with leave to amend. ECF Nos. 46, 48.

In light of the unwieldy nature of the FAC, the parties stipulated at a February 18, 2015 case management conference to proceed with the California claims only for Ford’s second round Motion to Dismiss. ECF No. 51. If any of the California claims survived the second round Motion to Dismiss, the parties would continue to litigate those claims to resolution before this Court. ECF No. 54 at 9. If, however, none of the California claims survived, then the Court would confer with the parties regarding how to proceed with the non-California claims, including possibly transferring the case to a more appropriate jurisdiction. *Id.*

With that understanding, California Plaintiffs filed the SAC on March 27, 2015. The SAC asserts four causes of action under California law: (1) violation of the unlawful and unfair prongs of the Unfair Competition Law (“UCL”), *Cal. Bus. & Prof.Code* § 17200 *et seq.*, SAC ¶¶ 141–49; (2) violation of the fraudulent prong of the UCL, *id.* ¶¶ 150–59; (3) violation of the Consumer Legal Remedies Act (“CLRA”), *Cal. Civ.Code* § 1750 *et seq.*, *id.* ¶¶ 160–71; and (4) common law fraudulent concealment, *id.* ¶¶ 172–85. Notably, California Plaintiffs have abandoned their claims under the False Advertising Law (“FAL”), *Cal. Civil Code* § 17500, *et seq.*, and Song–Beverly Consumer Warranty Act, *Cal. Civ.Code* § 1790 *et seq.* *See* FAC ¶¶ 181–220.

*5 In the SAC, California Plaintiffs seek to represent the following statewide class of consumers:

All current and former owners and lessees of a Defective Vehicle (as defined herein) in California

SAC ¶ 133. Excluded from the class definitions are, inter alia, “any individuals who experienced physical injuries as a result of the defects at issue in this litigation.” *Id.* ¶ 134.

On April 30, 2015, Ford filed the instant Motion to Dismiss. Mot. at 26. Pursuant to a stipulation approved by the Court, see ECF No. 60, California Plaintiffs opposed the motion on May 28, 2015, Opp. at 26. Ford replied on June 15, 2015. Reply at 16.

II. LEGAL STANDARDS

A. Rule 12(b)(6) Motion to Dismiss

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). Rule 8(a) requires a plaintiff to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted). For purposes of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

The Court, however, need not accept as true allegations contradicted by judicially noticeable facts, see *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and it “may look beyond the plaintiff’s complaint to matters of public record” without converting the Rule 12(b)(6) motion into a motion for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995). Nor must the Court “assume the

truth of legal conclusions merely because they are cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal quotation marks omitted). Mere “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

B. Rule 9(b) Pleading Requirements

Claims sounding in fraud are subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which requires that a plaintiff alleging fraud “must state with particularity the circumstances constituting fraud.” Fed.R.Civ.P. 9(b); see *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). To satisfy the heightened standard under Rule 9(b), the allegations must be “specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims sounding in fraud must allege “an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per curiam) (internal quotation marks omitted); see also *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (“Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged.” (internal quotation marks omitted)). The plaintiff must also set forth “what is false or misleading about a statement, and why it is false.” *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks omitted).

III. DISCUSSION

*6 Ford offers several bases in support of its Motion to Dismiss. First, Ford argues that California Plaintiffs have waived or abandoned various claims. Mot. at 7–9. Second, Ford contends that California Plaintiffs’ claims are barred by the applicable statutes of limitations. *Id.* at 9–10. Third, Ford says that California Plaintiffs have failed to adequately plead their fraud-based claims. *Id.* at 11–21. Fourth, Ford argues that California Plaintiffs’ CLRA claims must fail because they have failed to allege a “transaction” under the meaning of the statute. *Id.* at 21–23. Fifth, Ford contends that California Plaintiffs’ equitable claims—i.e., UCL claims and

201WL 8 9111995

CLRA claims for injunctive relief—must be dismissed because California Plaintiffs have an adequate remedy at law. *Id.* at 23–24. Finally, Ford asks the Court to strike references to “nationwide” claims from the SAC. *Id.* at 25. For the reasons stated below, the Court GRANTS IN PART and DENIES IN PART Ford's Motion to Dismiss.

A. Waived or Abandoned Claims

Ford first argues that California Plaintiffs have waived their warranty and FAL claims by failing to replead these claims in the SAC. Mot. at 7. The Court agrees. The warranty and FAL claims were dismissed with leave to amend, and California Plaintiffs have waived the claims by failing to replead them. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (“For claims dismissed with prejudice and without leave to amend, we will not require that they be repleaded in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repleaded.”). Accordingly, California Plaintiffs are precluded from reasserting California warranty or FAL claims against Ford.

B. Standing to Assert Claims for Vehicles Not Purchased

Ford argues that California Plaintiffs lack standing to assert claims based on Vehicles that California Plaintiffs did not purchase—i.e., the 2012–2014 Ford Fusion; 2010–2014 Ford Fusion Hybrid; 2013–2014 Ford Fusion Energi; 2012–2014 Ford Focus; and 2012–2014 Ford Focus Electric. Specifically, Ford argues that California Plaintiffs fail to adequately allege facts showing substantial similarity between the EPAS systems in the 2010–11 Ford Fusions and those in the other Vehicles. Mot. at 7–8. For the reasons stated below, the Court finds that California Plaintiffs have adequately pleaded standing to assert claims against products they did not personally purchase.⁸

⁸ The Court's ruling is without prejudice to Ford later moving to dismiss for lack of standing should a sufficient factual record be developed showing that the products are not substantially similar.

Article III of the U.S. Constitution requires that a plaintiff plead and prove he or she has suffered sufficient injury to satisfy the “case and controversy” requirement. *See Clapper v. Amnesty Int'l*, 133 S.Ct. 1138, 1146 (2013) (“One element of the case-or-controversy requirement is that plaintiffs ‘must establish that they have standing to sue.’” (quoting *Raines v.*

Byrd, 521 U.S. 811, 818 (1997))). The U.S. Supreme Court has further clarified that standing means a plaintiff must plead and prove (1) injury-in-fact that is concrete and particularized, as well as actual or imminent; (2) that this injury is fairly traceable to the challenged action of the defendant; and (3) that this injury is redressable by a favorable ruling from the court. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2752 (2010).

In food misbranding cases, courts in this district have held that “a plaintiff may have standing to assert claims for unnamed class members based on products he or she did not purchase so long as the products and alleged misrepresentations are *substantially similar*.” *E.g.*, *Miller v. Ghirardelli Chocolate Co.*, 912 F.Supp.2d 861, 869 (N.D.Cal. 2012) (emphasis added). In this particular case, the Court finds that California Plaintiffs have adequately alleged that the supposedly defective EPAS system is substantially similar across the Vehicles. California Plaintiffs cite evidence in the form of internal communications between Ford employees where the power steering systems in different vehicles were commonly referred to as “the EPAS,” without any indication that the EPAS system varied across vehicles. SAC ¶¶ 14–15. Specifically, a Product Development Engineer wrote that she “[t]alked to the tech below and this loss of assist [in the Explorer] would always occur in low speed parking lot maneuvers similar to the Focus issue.” *Id.* ¶ 14. Later, an EPAS Steering Engineering employee wrote “Can you tell if the EPAS ribbon cable concern of the Fusion is linked to the Explorer[?] This concern I believe was resolved at the end of Nov. 2011 for the Fusion vehicle line.” *Id.* ¶ 15. Plaintiffs contend that these emails show that Ford equated the Focus's EPAS system to the Ford Explorer EPAS system, and the Fusion's EPAS system to the Explorer EPAS system. At the motion to dismiss stage, the Court must “construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek*, 519 F.3d at 1031.

*7 Moreover, California Plaintiffs allege repeatedly that the EPAS systems in all the vehicles are “uniform,” *id.* ¶¶ 1, 4, 21–22, 69, 186, and that the steering defect manifested in similar manners across different models of vehicles, *id.* ¶¶ 107–29. As the Court must “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party” when ruling on a motion to dismiss, the Court finds these allegations sufficient in this case. *Manzarek*, 519 F.3d at 1031. In addition, California Plaintiff have only limited technical information available in the pre-discovery stage. *See Armstrong v. Davis*, 275 F.3d

201WL 8 9111995

849, 867 (9th Cir. 2001) (holding that plaintiffs are not required to engage in hyper-technical inquiries during the pleading stage), *abrogated on other grounds as recognized by Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014). The Court therefore finds that these allegations sufficiently establish substantial similarity between the purchased and unpurchased products. Accordingly, the Court DENIES Ford's Motion to Dismiss California Plaintiffs' claims as to the following models: 2012-2014 Ford Fusion; 2010–2014 Ford Fusion Hybrid; 2013–2014 Ford Fusion Energi; 2012–2014 Ford Focus; and 2012–2014 Ford Focus Electric.

C. Statutes of Limitations

Ford next moves to dismiss California Plaintiffs' claims based on the applicable statutes of limitations. The UCL contains a statute of limitations that bars claims brought more than four years after the cause of action accrued. *See Cal. Bus. & Prof. Code* § 17208. The CLRA's limitations period is three years, *see Cal. Civ. Code* § 1783, as is common law fraud's, *see Cal. Civ. Code* § 338(d). Because this action was brought in June 2014, and the limitations periods began to run when the California Plaintiffs purchased their vehicles, all UCL, CLRA, and fraudulent concealment claims asserted by California Plaintiffs would be barred except for Philips's claims and Goodman's UCL claim. In the SAC, however, California Plaintiffs invoke the discovery rule, the doctrine of fraudulent concealment, and equitable estoppel in seeking to toll the limitations period for their claims. SAC ¶¶ 57–67. For the reasons stated below, the Court finds that California Plaintiffs' UCL, CLRA, and fraudulent concealment claims are not time-barred.

As an affirmative defense, the statute of limitations promotes diligent assertion of claims and ensures defendants “the opportunity to collect evidence while still fresh, and provide[s] repose and protection from dilatory suits once excess time has passed.” *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 875 (Cal. 2013). Ordinarily, the statute of limitations runs from the occurrence of the last element essential to a plaintiff's claim—i.e., the “last element” accrual rule. *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032 (9th Cir. 2003) (internal citation omitted). To align the policy goals of the limitations defense with its actual application, courts and legislatures have over time developed certain exceptions to the “last element” rule, including the discovery rule and the doctrine of fraudulent concealment. *Aryeh*, 292 P.3d at 875. The discovery rule “postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.” *Id.* Meanwhile, the doctrine of

fraudulent concealment “tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale.” *Id.* The California Supreme Court has held that claims under the UCL are “governed by common law accrual rules,” including the discovery rule. *Id.* at 878; *see Plumlee v. Pfizer, Inc.*, No. 13–CV–00414 LHK, 2014 WL 4275519, at *6 n.5 (N.D.Cal. Aug. 29, 2014). The discovery rule also applies to CLRA claims. *See Yumul v. Smart Balance, Inc.*, 733 F.Supp.2d 1117, 1131 (C.D.Cal. 2010). The doctrine of fraudulent concealment applies to claims under the UCL and the CLRA. *Id.*

Under the discovery rule, a claim accrues and the limitations period begins to run when a plaintiff has information of “circumstances to put [him] on inquiry or if [he] ha[s] the opportunity to obtain knowledge from sources open to [his] supervision.” *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 917 (Cal. 2005). At that point, a plaintiff must conduct a reasonable investigation about the cause of his injury and is subsequently charged with the presumptive knowledge of the information that would have been revealed by such an investigation. *Fox*, 110 P.3d at 920. In order to rebut this presumption and toll the statute of limitations through the discovery rule, a plaintiff must plead facts showing (1) the “time and manner of discovery” and (2) the “inability to have made earlier discovery despite reasonable diligence” in investigating. *Id.* at 921. The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand a motion to dismiss. *Plumlee*, 2014 WL 4275519, at *8. If the discovery rule is invoked, the statute of limitations will be tolled until a reasonable investigation would have revealed the factual basis for that cause of action. *Fox*, 110 P.3d at 917.

*8 Even though Ford is correct that UCL and CLRA claims in consumer cases generally accrue on the date of purchase, California Plaintiffs here were not charged with a duty to reasonably investigate until the alleged steering defect manifested in their vehicles. *See Plumlee*, 2014 WL 4275519, at *7; *Fox*, 110 P.3d at 920 (plaintiffs are not charged with knowledge under the discovery rule until “information of circumstances to put [them] on inquiry or if they have the opportunity to obtain knowledge from sources open to [their] investigation.” (citation omitted)). Prior to that point, California Plaintiffs had no reason to suspect wrongdoing, and there was no fact or circumstance to prompt an investigation. Only when the defect manifested in their vehicles in 2013 and 2014, *see* SAC ¶ 36 (defect in Philips' 2011 Ford Fusion manifested in “fall of 2013”); ¶ 43 (defect in Goodman's 2011 Ford Fusion manifested “in 2014”); ¶

201WL 8 9111995

53 (defect in Allison Colburn's 2010 Ford Fusion manifested "in October 2014"), were California Plaintiffs charged with a duty to investigate and presumptive knowledge of the defect. *Fox*, 110 P.3d at 920. The statute of limitations began to run at that point. *Id.* California Plaintiffs, thus, timely filed this action within the limitations periods.

Although Ford relies heavily on *Plumlee*, this reliance is misplaced because that case is distinguishable from the instant one. In *Plumlee*, the plaintiff bought a drug in 2005 and used it for three years. *Plumlee*, 2014 WL 4275519, at *7. She then stopped using the drug due to its failure to improve her condition. *Id.* at *7. At this point, the plaintiff was charged with a duty to investigate and the statute of limitations began to run, since the lack of improvement in her condition was the "circumstance[]" that should have caused a reasonable person to suspect wrongdoing. *Id.* at *6. The plaintiff, however, waited for more than four years—beyond the statute of limitations period under the UCL—before bringing her claim. *Id.* at *7. In attempting to invoke the discovery rule, the plaintiff in *Plumlee* failed to plead facts showing that she was unable to discover the cause of her injury despite her reasonable diligence within those four years. Therefore, the court held that Plumlee's UCL claim was time-barred. *Id.*

Here, in contrast to *Plumlee*, California Plaintiffs' vehicles performed as expected up until their cars' EPAS systems failed. "Plaintiffs are required to conduct a reasonable investigation *after* becoming aware of an injury," and not before. *Fox*, 110 P.3d at 920. Therefore, California Plaintiffs need not allege facts showing diligence prior to the manifestation of the defect, as there was no duty to investigate prior to that point. Because the statutes of limitation did not begin to run until 2013 and 2014, when the defect manifested, the action was timely filed within the statutory periods provided for the UCL, CLRA, and fraudulent concealment claims. The Court therefore DENIES Ford's Motion to Dismiss California Plaintiffs' claims on statute of limitations grounds.

D. Fraudulent Omission Claims

As California Plaintiffs have now abandoned their affirmative misrepresentation claims, the four claims in the SAC all concern fraudulent omissions regarding the EPAS system defect. See SAC ¶¶ 144–45 (UCL unfair or unlawful prong); ¶ 154 (UCL fraudulent prong); ¶¶ 162, 164 (CLRA); ¶ 174 (fraudulent concealment claim). Accordingly, the Court addresses the four claims together as the "fraudulent omission" claims.

To state a valid claim for a fraudulent omission, California Plaintiffs must allege the "omission of a fact the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co.*, 144 Cal.App. 4th 824, 835 (2006). "California federal courts have generally interpreted *Daugherty* as holding that '[a] manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue.' " *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) (quoting *Oestreicher v. Alienware Corp.*, 322 Fed.Appx. 489, 493 (9th Cir. 2009)). In addition, "Plaintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss." *Id.* at 1145.

*9 Ford makes three arguments in support of its Motion to Dismiss the fraudulent omission 16 claims: (1) California Plaintiffs fail to adequately allege Ford's knowledge of the EPAS system defect at the time of purchase; (2) Ford had no duty to disclose the EPAS system defect because it is not an unreasonable safety hazard; and (3) California Plaintiffs fail to adequately allege an omission. Ford also argues (4) that Philips's claims "necessarily fail" because his allegations in the SAC are materially indistinguishable from his allegations in the FAC; and (5) that Plaintiff Ian Colburn's claims fail for lack of reliance or injury. The Court addresses each argument in turn, and finds California Plaintiffs' (except for Ian Colburn's) allegations of fraudulent omission sufficient to survive a motion to dismiss for failure to state a claim.

1. Ford's Knowledge

Ford's first argument is that California Plaintiffs fail to allege that Ford knew of the EPAS system defect when California Plaintiffs purchased their vehicles. Mot. at 11; *Wilson*, 668 F.3d at 1145 ("[P]laintiffs must sufficiently allege that a defendant was aware of a defect at the time of sale to survive a motion to dismiss."). The first named plaintiff to purchase one of the Vehicles was Allison Colburn, who purchased her new 2010 Ford Fusion on January 12, 2010. SAC ¶ 46. Goodman purchased her 2011 Ford Fusion on October 13, 2010. *Id.* ¶ 38. Philips purchased his 2011 Ford Fusion in March 2012. *Id.* ¶ 33. Accordingly, California Plaintiffs must allege Ford's knowledge prior to January 12, 2010.

California Plaintiffs cite several sources of information supporting their allegation that "Ford has outwardly maintained its commitment to the flawed EPAS system even

201WL 8 9111995

though it has been aware that the EPAS system installed in the Defective Vehicles is prone to sudden, premature failure since *as early as 2010*.” *Id.* ¶¶ 11, 81 (emphasis added). Specifically, California Plaintiffs rely on a May 2011 technical service bulletin (“TSB”) stating that “[s]ome 2012 Focus vehicles equipped with electric power assisted steering (EPAS) ... may exhibit a lack of power steering assist on vehicle start up.” SAC ¶ 13. A second TSB was issued in December 2012, stating that “[s]ome 2013 Fusion vehicles built on or before 11/30/2012 may exhibit a loss of power steering assist.” *Id.* ¶ 19. California Plaintiffs also cite internal communications among Ford employees, from June 6, 2011 and March 23, 2012. *Id.* ¶¶ 14–16; 91–94. California Plaintiffs further cite the June 2012 NHTSA investigation into the Ford Explorer vehicles as evidence of Ford’s knowledge of EPAS system defects. *Id.* ¶ 83. Other internal Ford e-mails suggest Ford’s awareness of the Explorer issues in January 2011. *Id.* ¶ 97. Next, California Plaintiffs cite “hundreds of complaints from owners and lessees about steering problems with the Fusion line.” *Id.* ¶¶ 17, 104–32. Some of these complaints are dated from 2010, but most are dated from 2012–2014. *Id.*

Ford contends that these allegations are insufficient, especially to show Ford’s knowledge in January 2010, the time of Allison Colburn’s purchase. Mot. at 11–12. Although the Court agrees that California Plaintiffs have not proved Ford’s knowledge, they need not do so at the pleading stage. Rather, California Plaintiffs need only have plausibly alleged that Ford knew about the EPAS system defects “since as early as 2010.” SAC ¶ 11. The Court finds that California Plaintiffs have done so.

The May 2011 TSB, newly alleged in the SAC, is especially relevant. As other courts have recognized, it is reasonable to infer that “the TSBs ... were proceeded by an accretion of knowledge by Ford.” *In re MyFord Touch Consumer Litig.*, 46 F.Supp.3d 936, 958 (N.D.Cal. 2014); see *Falco v. Nissan N. Am., Inc.*, No. CV 13–00686 DDP (MANx), 2013 WL 5575065, at *6–7 (C.D.Cal. Oct. 10, 2013) (stating that, where defendant issued the first of several TSBs in July 2007 and further did a redesign in 2006 or 2007, that “permit[s] plausible inferences that [defendant] was aware of the defect at the time they sold the vehicles in 2005 and 2006”); see also *MacDonald v. Ford Motor Co.*, 37 F.Supp.3d 1087, 1093 (N.D.Cal. 2014) (identifying “a number of facts” that support plaintiffs’ knowledge allegations, including internal data, NHTSA complaints, and TSBs); *Decker v. Mazda Motor of Am., Inc.*, No. SACV 11–0873 AG MLGX, 2011 WL 5101705, at *5 (C.D.Cal. Oct. 24, 2011) (finding allegations

of internal data and TSBs issued within one of year of purchase sufficient to plead knowledge). Furthermore, “[o]ne could reasonably infer that the TSB was issued in response to consumer complaints that surfaced immediately after rollout. That there were such complaints is substantiated by the NHTSA complaints identified by Plaintiffs.” *MyFord Touch*, 46 F.Supp.3d at 958. As the Court must “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party,” the Court finds these allegations sufficient at the motion to dismiss stage. *Manzarek*, 519 F.3d at 1031.

*10 The cases cited by Ford are distinguishable. For example, in *Wilson* the Ninth Circuit rejected allegations of the defendant’s knowledge where the plaintiff relied solely on customer complaints, many of which were undated or post-dated the plaintiff’s purchase. See *Wilson*, 668 F.3d at 1148 (“Plaintiffs have submitted fourteen customer complaints, but the second amended complaint does not indicate where or how the complaints were made (*e.g.*, via HP’s website). Twelve of those complaints are undated. The two complaints that are dated were made over two years after Plaintiffs purchased the Laptops.”); see also *Williams v. Yamaha Motor Corp., U.S.A.*, No. CV 13–05066 BRO, 2015 WL 2375906, at *10 (C.D.Cal. Apr. 29, 2015) (rejecting knowledge allegations in part because plaintiffs “failed to allege even a single complaint that predates the sale of any first-generation motor.”); *Callaghan v. BMW of N. Am., LLC*, No. 13–CV–04794–JD, 2014 WL 6629254, at *4 (N.D.Cal. Nov. 21, 2014) (rejecting knowledge based on post-purchase customer complaints). Other cases cited by Ford rejected the plaintiffs’ allegations of knowledge where the plaintiff did not allege knowledge that the defect caused a safety hazard. See, *e.g.*, *Marchante v. Sony Corp. of Am.*, No. 10CV795 JLS RBB, 2011 WL 6027602, at *4 (S.D.Cal. Dec. 5, 2011) (“[A]ll of Plaintiffs allegations regarding Sony’s knowledge of the alleged defect pertain to Sony’s knowledge that the defect causes excess heat that results in the deterioration of the television display, not that the defect poses any safety hazard.”).

Here, California Plaintiffs’ allegations, which include internal testing, dated internal communications, dated customer complaints, and dated TSBs, are sufficient to plausibly allege that Ford had knowledge of the EPAS system defect at the time California Plaintiffs purchased their vehicles. Indeed, other courts have allowed plaintiffs to proceed past the motion to dismiss on much thinner allegations. See, *e.g.*, *Mui Ho v. Toyota Motor Corp.*, 931 F.Supp.2d 987, 998

201WL 8 9111995

(N.D.Cal. 2013) (“Plaintiffs claim that Defendants had non-public, internal data about the Class Vehicles’ headlamp problems, including ‘pre-release testing data, early consumer complaints about the defect to Defendants’ dealers who are their agents for vehicle repairs, dealership repair orders, testing conducted in response to those complaints, and other internal sources.’”). Accordingly, the Court will not dismiss the fraudulent omission claims for failure to adequately allege Ford’s knowledge.

2. Ford’s Duty to Disclose

Ford’s next argument is that Ford did not have a duty to disclose the EPAS system defect, and therefore California Plaintiffs cannot state a fraudulent omission claim under *Daugherty*. See 144 Cal.App. 4th at 835 (plaintiffs must allege the “omission of a fact the defendant was obliged to disclose.”). California Plaintiffs argue that Ford was required to disclose the EPAS system defect because the defect constituted a material safety hazard. *Wilson*, 668 F.3d at 1141; *Smith v. Ford Motor Co.*, 749 F.Supp.2d 980, 987–88 (N.D.Cal. 2010). Ford argues that California Plaintiffs’ allegations fail because the risk of EPAS system failure is at most a “safety hazard” and not an “unreasonable safety hazard.” Mot. at 19 (emphasis in original); Reply at 12. Ford’s argument is unconvincing. Whether the alleged defects are an unreasonable safety hazard is a question of fact, and based on the allegations in the SAC, the Court cannot say that California Plaintiffs’ allegations in that regard are deficient as a matter of law.

In the SAC, California Plaintiffs allege that the EPAS system failure causes “increased risk of losing control of their vehicles when the EPAS system fails.” SAC ¶ 3. California Plaintiffs also allege that “[w]hen the EPAS system fails while a Defective Vehicle is on the road and the driver’s ability to turn the vehicle is greatly reduced, occupants of the Defective Vehicles, occupants of surrounding vehicles, and pedestrians are exposed to the risk of collisions and grave bodily harm.” *Id.* ¶ 5. The SAC continues in this vein:

101. The marked increase in the difficulty of steering that arises when the EPAS system fails and the steering system in the Defective Vehicles defaults to manual steering creates an unreasonable safety risk (both in the Ford Explorer and in the Defective Vehicles).

*11 102. Although failure of the EPAS system always compromises safety, this is particularly true when a vehicle

is traveling at high speeds or on unlevel terrain. The sudden shock of needing to immediately exert great effort to control the vehicle makes the Defective Vehicles extremely susceptible to accidents when the EPAS system fails.

103. The danger created by sudden and unexpected failure of the EPAS system is clear from complaints reported to NHTSA about loss of control as a result of failure of the EPAS system. Moreover, certain complaints made to NHTSA suggest that failure of the EPAS system also may disable the braking system. One West Virginia owner reported that she rolled down a hill into a wooded area after the EPAS of her vehicle failed. In addition to losing the ability to steer the vehicle, the braking system failed to engage and the owner “lost complete control of the vehicle.”

SAC ¶¶ 101–03. As California Plaintiffs’ allegations explain, even if the EPAS only failed “in low speed parking lot maneuvers,” *id.* ¶ 14, such a failure could still amount to a material safety hazard.

California Plaintiffs also tie the steering incidents they experienced to the EPAS system’s alleged defects. See, e.g., SAC ¶ 80 (listing five alleged defects in the EPAS system and explaining how each could lead to failure). These allegations distinguish the instant case from *Wilson*, where the plaintiffs’ claim was dismissed for failure to link the defect to the safety risk, and not, as Ford argues, see Mot. at 21, because a burning laptop is not a safety hazard, see *Wilson* at 1144–45 (“As Plaintiffs do not plead any facts indicating how the alleged design defect, *i.e.*, the loss of the connection between the power jack and the motherboard, causes the Laptops to burst into flames, the District Court did not err in finding that Plaintiffs failed to plausibly allege the existence of an unreasonable safety defect.”).

Ford’s attempt to further parse this argument in its Reply is just as unconvincing. Ford argues:

the risk of injury posed by any vehicle defect would (all else being equal) be greatest when driving at high speed. But at high speed, a driver rarely if ever *needs* power-assisted steering; in fact, dramatic steering motions at high speed would likely pose a risk of injury themselves. Power-assisted steering is very helpful at low speeds, by contrast,

such as when trying to park, but the risk of injury is correspondingly low.

Reply at 12–13 (emphasis in original). Ford's argument is not persuasive at the motion to dismiss stage, as the materiality of Ford's alleged nondisclosure is a factual question for the jury to decide. *See, e.g., MyFord Touch*, 46 F.Supp.3d at 957 (materiality is generally a question of fact); *Blaue v. Kissinger*, 2006 WL 2092380, *9 n.6 (N.D.Ill. July 24, 2006) (“[T]he question of whether a defendant's product is unreasonably dangerous for failure to incorporate certain safety devices is a question to be decided by a jury.”). At the very least, it is plausible that a total failure in a vehicle's power steering—at high or low speeds—constitutes an unreasonable safety hazard. *See* SAC ¶¶ 101–03. Accordingly, the Court finds that, for purposes of a motion to dismiss, California Plaintiffs have alleged a material safety defect that Ford had a duty to disclose.

3. Ford's Alleged Omissions

*12 Ford argues that California Plaintiffs' fraudulent omissions claims do not meet Rule 9(b)'s pleading standard. In *Kearns*, the Ninth Circuit explained that “nondisclosure is a claim for misrepresentation in a cause of action for fraud, [which] (as any other fraud claim) must be pleaded with particularity under Rule 9(b).” 567 F.3d at 1127. In *Kearns*, the nondisclosure claims failed because they “were couched in general pleadings alleging Ford's intent to conceal from customers that [certified pre-owned] vehicles were essentially the same as ordinary used vehicles. Such general pleadings do not satisfy the heightened pleading requirements of Rule 9(b).” *Id.* Ford argues here that California Plaintiffs' claims fail for similar reasons. Mot. at 1213.

Ford relies in part on *Marolda v. Symantec Corp.*, 672 F.Supp.2d 992, 1002 (N.D.Cal. 2009), which required the plaintiff to identify “where the omitted information should or could have been revealed, as well as provide representative samples of advertisements, offers, or other representations that plaintiff relied on to make her purchase and that failed to include the allegedly omitted information.” *Marolda* involved an alleged fraudulent omission within a particular advertisement produced by the defendant. The plaintiff there claimed to know about the advertisement but failed to produce or describe it to the court. *See id.* at 1001. As other courts have recognized, however, “the *Marolda* requirements are

not necessarily appropriate for all cases alleging a fraudulent omission.” *Velasco v. Chrysler Grp. LLC*, No. CV 13–08080 DDP VBKX, 2014 WL 4187796, at *4 (C.D.Cal. Aug. 22, 2014) (quoting *Overton v. Bird Brain, Inc.*, 2012 WL 909295 (C.D.Cal. Mar. 15, 2012). In *MacDonald*, moreover, the court found that the plaintiffs satisfied Rule 9(b):

Plaintiffs adequately allege the “who what when and how,” given the inherent limitations of an omission claim. In short, the “who” is Ford, the “what” is its knowledge of a defect, the “when” is prior to the sale of Class Vehicles, and the “where” is the various channels of information through which Ford sold Class Vehicles.

MacDonald, 37 F.Supp.3d at 1096.

This Court finds *MacDonald* more on point than *Marolda*. California Plaintiffs allege that Ford's “television advertisements concerning the vehicles,” “material concerning the Fusion on Ford's website,” “window sticker [s],” and “brochure concerning the Fusion” did not include relevant information about the EPAS system and its possible failures. SAC ¶ 40. Ford, not surprisingly, does not argue that it disclosed the EPAS system's alleged failures.

As Judge Pregerson recently explained, in applying the reasoning from *MacDonald* :

Plaintiff has identified the “who” (Chrysler); the “what” (knowing about yet failing to disclose to customers, at the point of sale or otherwise, that the TIPM 7 installed in Plaintiffs' vehicles was defective and posed a safety hazard); the “when” (from the time of the sale of the first Class Vehicle until the present day); and the “where” (the various channels through which Chrysler sold the vehicles, including the authorized dealers where Plaintiffs' [sic] purchased

their vehicles). The court therefore concludes that Plaintiffs' factual averments are sufficient to allow Chrysler to prepare an adequate answer from the allegations.

Velasco, 2014 WL 4187796, at *5 (citations omitted). The same analysis applies here: California Plaintiffs have identified the “who” (Ford); the “what” (knowing about yet failing to disclose to customers, at the point of sale or otherwise, that the EPAS system installed in California Plaintiffs vehicles was defective and posed a material safety hazard); the “when” (from the time of the sale of the first vehicle until the present day); and the “where” (the various channels through which Ford sold the vehicles, including the authorized dealers where California Plaintiffs' purchased their vehicles). Accordingly, the Court finds that California Plaintiffs have sufficiently alleged that Ford fraudulently omitted information about the EPAS system in the Vehicles.⁹

⁹ The Court's analysis applies to Allison Colburn, Goodman, and Philips. As explained in Part III.D.5 *infra*, Ian Colburn's claims fail for lack of reliance and lack of injury. Those omissions apply to all the named plaintiffs except, as explained below, Ian Colburn.

*13 For all these reasons, the Court finds that California Plaintiffs have alleged a fraudulent omission and will not dismiss the SAC on that basis.

4. Plaintiff Philips's Allegations

Ford also argues that Philips's claims “necessarily fail” because his allegations in the SAC are materially indistinguishable from his allegations in the FAC. Mot. at 8–9. The Court does not find this argument persuasive. The Court's prior ruling focused on the inadequacy of Plaintiffs' affirmative misrepresentation allegations, which California Plaintiffs do not replead. ECF No. 48 at 9:1–23 (explaining that Plaintiffs' affirmative misrepresentation allegations were vague and conclusory). Considering that the only theory put forth in the SAC is a fraudulent omission theory, the Court finds the allegations relating to Philips sufficient to survive a motion to dismiss. The SAC adds specificity with regard to Ford's allegedly misleading marketing tactics and presents new allegations related to Ford's alleged knowledge of the

EPAS system defect. *See* SAC ¶¶ 9–10 (allegations relating to marketing materials); ¶¶ 81–132 (allegations relating to knowledge). Accordingly, the Court finds the allegations relating to Philips sufficient at this stage of the litigation.

5. Plaintiff Ian Colburn Fails to Allege Reliance or Injury

Ford moves to dismiss the fraudulent omission claims brought by Ian Colburn due to his failure to allege reliance and injury, which are required elements of his claims. For the reasons stated below, the Court finds that Ian Colburn fails to allege actual reliance or injury for all four of his claims and thus dismissed his claims with prejudice.

This Court held in *Bruton* that claims brought under the unlawful or unfair prong of the UCL, like claims brought under the UCL's fraud prong, must allege actual reliance and injury, especially if they are based on a defendant's misrepresentations. *See Bruton v. Berber Products Co.*, No. 12–CV–02412–LHK, 2014 WL 172111, at *6 (N.D.Cal. Jan. 15, 2014) (citing *in re Tobacco II Cases*, 46 Cal.4th 298, 326 (2009) (holding that Proposition 64 imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong)); *see also In re Actimmune Mktg. Litig.*, No. 08–CV–2376, 2010 WL 3463491, at *8 (N.D.Cal. Sept. 1, 2010) (holding “that a plaintiff must plead ‘actual reliance,’ even if their [sic] claim arises under the unlawful or unfair prongs, so long as the pleadings assert a cause of action grounded in misrepresentation or deception”), *aff'd*, 464 Fed.Appx. 651 (9th Cir. 2011). Similarly, the CLRA also requires that a plaintiff plead reliance and injury. *See Durell v. Sharp Healthcare*, 193 Cal.App. 4th 1350, 1367 (2010); *Aron v. UHaul Co.*, 143 Cal.App. 4th 796, 802 (2006). Finally, a claim for fraudulent concealment under California law requires allegations of (1) knowing concealment or nondisclosure by the defendant (2) with the intent to defraud, which induces (3) actual reliance and (4) causes injury to the plaintiff. 625 3rd St. Assocs., L.P. v. Alliant Credit Union, 623 F.Supp.2d 1040, 1050 (N.D.Cal. 2009) (citing *Hoey v. Sony Elecs., Inc.*, 515 F.Supp.2d 1099, 1104 (N.D.Cal. 2007)). It is clear from these cases that all four of Ian Colburn's claims require allegations of actual reliance and injury.

*14 In the SAC, Ian Colburn alleges that he was given a 2010 Ford Fusion by his mother, Allison Colburn. The steering wheel in his vehicle allegedly failed, causing him

201WL 8 9111995

to take it to a Ford dealership for repairs. SAC ¶¶ 51–54. Nowhere in the SAC does Ian Colburn allege that he viewed any promotional material or received any representation from Ford with regards to his vehicle. As in *Bruton*, a plaintiff has no standing to assert claims based on statements he did not view. *Bruton*, 2014 WL 172111, at *9 (citing *Kwikset v. Super. Ct.*, 51 Cal.4th 310, 326 (2011)). Because Ian Colburn does not allege that he viewed any statement from Ford before he came into possession of the vehicle, any fraudulent concealment that may have occurred could not have led to justifiable reliance on his part. What's more, Ian Colburn does not allege in the SAC that he suffered any injury. Because he fails to adequately plead actual reliance or injury with respect to each of his four claims, the Court GRANTS Ford's Motion to Dismiss all of Ian Colburn's claims.

The Court does so without leave to amend because the Court, in granting Ford's prior Motion to Dismiss, told Plaintiffs that they must identify “specific materials, like car window stickers and websites, that were reviewed by plaintiffs and contained material omissions” in order to survive a motion to dismiss. ECF No. 48 at 9:7–10:17. As Plaintiff Ian Colburn has made no such allegation despite being on notice, the Court finds that allowing further amendment would be futile. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir. 2000) (“A district court acts within its discretion to deny leave to amend when amendment would be futile”); *see also Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (“[W]hen a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad.” (internal quotation marks omitted)).

E. CLRA Claim: Whether California Plaintiffs Allege a “Transaction”

The CLRA provides that a consumer who suffers damage “as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person.” Cal. Civ.Code § 1780(a). Section 1770, in turn, lists certain methods, acts, or practices and declares that they are “unlawful” if “undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.” *Id.* § 1770(a) (emphasis added). The statute defines “transaction” as “an agreement between a consumer and another person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.” *Id.* § 1761(e). Ford argues that although California Plaintiffs allege they purchased their

vehicles, “they do not allege this occurred in any ‘transaction’ with Ford or one of its agents.” Mot. at 22.

The Court is not convinced. California Plaintiffs all allege that they purchased their vehicles directly from Ford dealerships. *See* SAC ¶ 33 (Philips purchased 2011 Ford Fusion from Salinas Valley Ford); ¶ 38 (Goodman purchased 2011 Ford Fusion from Future Ford of Clovis); ¶ 45 (Allison Colburn purchased 2010 Ford Fusion from Galpin Ford in Granada Hills). Allegations that vehicles were purchased from an authorized dealership are typically sufficient to state a claim against the vehicle manufacturer under the CLRA. *See, e.g., Chamberlan v. Ford Motor Co.*, No. C 03–2628 CW, 2003 WL 25751413, at *8 (N.D.Cal. Aug. 6, 2003) (finding allegations that vehicles were purchased from “authorized dealerships acting as [Ford's] agents” sufficient to state a claim against Ford under the CLRA). Indeed, a plain reading of the CLRA does not require a direct transaction between a consumer and a manufacturer. Rather, the statute broadly defines transaction as “an agreement between a consumer and another person.” Cal. Civ.Code § 1761(e) (emphasis added). This broad definition is in keeping with the CLRA's command that the statute be “liberally construed and applied to promote its underlying purposes.” *Id.* § 1760.

*15 It comes as no surprise, then, that the vast majority of courts to address the issue have rejected Ford's argument, holding instead that a plaintiff need not allege a direct transaction with the manufacturer. *See, e.g., Falco*, 2015 WL 1534800, at *6 (finding that plaintiffs need not allege a “direct” transaction between a consumer and the manufacturer in order to properly plead a CLRA claim); *Rossi v. Whirlpool Corp.*, No. 2:12–cv–00125, 2013 WL 5781673, at *10 (E.D.Cal. Oct. 25, 2013) (holding that plaintiffs adequately pled their CLRA claim because “where a manufacturer had exclusive knowledge of a defect and the consumer relied upon that defect, the CLRA's protection extends to the manufacturer as well, regardless of whether the consumer dealt directly with the manufacturer”); *Tietzworth v. Sears*, 720 F.Supp.2d 1123, 1140 (N.D.Cal. 2010) (rejecting defendants' argument that plaintiffs were required to allege a direct transaction to state a claim under the CLRA because “when a plaintiff can demonstrate that the manufacturer had exclusive knowledge of a defect and the consumer relied upon that defect, the CLRA's protection extends to the manufacturer as well, regardless of whether the consumer dealt directly with the manufacturer”); *Keilholtz v. Superior Fireplace Co.*, 2009 WL 839076, at *3–4 (rejecting defendants' argument that a direct transaction must be alleged

201WL 8 9111995

to state a claim under the CLRA because defendants “fail to cite any authority to support the proposition that a CLRA claim can be asserted only against defendants who sell goods or services directly to consumers”).

Ford's citations to the contrary are unpersuasive. In *Green v. Canidae Corp.*, No. CV 09–0486 GAF PLAX, 2009 WL 9421226, at *4 (C.D. Cal. June 9, 2009), the district court dismissed the plaintiffs' CLRA claim against a pet food manufacturer because “the legislation clearly contemplates consumer transactions between a consumer and a retail seller, and does not apply to commercial transactions between a retailer and its vendors to acquire a supply of goods for resale.” Not only does the weight of the persuasive authority fall against *Green*, but *Green*'s analysis is itself cursory. *Green* concludes summarily that permitting consumers to directly sue the manufacturers would contradict the dual CLRA purposes of consumer protection and efficiency. But *Green* offers no reason for so concluding. On the contrary, it seems that preventing consumers from suing manufacturers under the CLRA would require them to resort to less consumer-friendly causes of action for breach of warranty or common law fraud. See *Gray v. BMW of N. Am., LLC*, No. 13–CV–3417–WJM–MF, 2014 WL 4723161, at *6 (D.N.J. Sept. 23, 2014) (rejecting *Green* for the same reasons). In addition, *Green* distinguished *Chamberlan* on grounds that, in *Chamberlan*, “the used car dealers were authorized dealerships acting as agents of Ford.” 2009 WL 9421226, at *4. Here, as in *Chamberlan*, California Plaintiffs all allege that they purchased their vehicles from authorized Ford dealerships. See SAC ¶¶ 33, 38, 45

Ford's citations to *Cirulli v. Hyundai Motor Co.*, No. SACV 08–0854 AG, 2009 WL 4288367, at *4 (C.D. Cal. Nov. 9, 2009), and *Fulford v. Logitech, Inc.*, No. C–08–2041 MMC, 2008 WL 4914416, at *1 (N.D. Cal. Nov. 14, 2008), are even less persuasive. In *Cirulli*, the district court sustained the plaintiffs' CLRA claims against Hyundai Motor America (“HMA”), with whom plaintiffs had a warranty agreement, but dismissed their CLRA claims against Hyundai Motor Company (“HMC”), HMA's parent company, because there was “no comparable transaction” with HMC. 2009 WL 4288367, at *4. Here, by contrast, there is no dispute that California Plaintiffs all had a warranty agreement with Ford. See ECF No. 22 at 7 (Ford's first round Motion to Dismiss acknowledging that “[e]ach of the plaintiffs' cars was covered by an express ‘bumper-to-bumper’ warranty for the first three years or 36,000 miles driven”). Finally, in *Fulford*, the district court held, without analysis, that the plaintiff had

“failed to allege that Logitech engaged in such acts in the course of a transaction with him.” 2008 WL 4914416, at *1. In *Fulford*, unlike here and in *Chamberlan*, the products purchased in *Fulford* were not from “authorized dealerships acting as agents” of the manufacturer defendants. *Id.* at *1 n.2 (ellipsis and internal quotation marks omitted). Because California Plaintiffs purchased their vehicles from authorized Ford dealers, the instant case is therefore far more like *Chamberlan* than it is like *Green* or *Fulford*.

*16 Accordingly, the Court DENIES Ford's Motion to Dismiss California Plaintiffs' CLRA claims for failure to allege a “transaction.”

F. Equitable Relief Claims: UCL Claims and CLRA Injunctive Relief

Ford next argues that the Court should dismiss California Plaintiffs' equitable claims—to wit, their UCL claims and CLRA claims for injunctive relief. Mot. at 23–24. The Court should do so, Ford says, because California Plaintiffs have an adequate remedy at law. *Id.* For the second time, the Court agrees. See ECF No. 48 at 10:22–11:17 (granting Ford's first round Motion to Dismiss Plaintiffs' equitable claims due to “an adequate remedy at law”).

Apart from civil penalties, which are not at issue in this case, the UCL provides only the equitable remedies of restitution and injunctive relief. See *Kor. Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003); *Madrid v. Perot Sys. Corp.*, 130 Cal.App. 4th 440, 452 (2005). A plaintiff seeking equitable relief in California must establish that there is no adequate remedy at law available. See *Knox v. Phoenix Leasing, Inc.*, 29 Cal.App. 4th 1357, 1368 (1994). Statutory relief under the UCL “is subject to fundamental equitable principles, including inadequacy of the legal remedy.” *Prudential Home Mortg. Co. v. Super. Ct.*, 66 Cal.App. 4th 1236, 1249 (1998).

As the UCL provides only equitable remedies, see SAC ¶¶ 149, 159 (seeking restitution), and California Plaintiffs have an adequate remedy at law in the form of their claim for fraudulent concealment, the Court dismisses California Plaintiffs' UCL claims. See, e.g., *Durkee v. Ford Motor Co.*, No. C 14–0617 PJH, 2014 WL 4352184, at *3 (N.D. Cal. Sept. 2, 2014) (“Because the UCL provides for only equitable remedies, and plaintiffs have an adequate remedy at law for the alleged Song–Beverly Act violation, plaintiff's UCL claim must be dismissed.”); *Gardner v. Safeco Ins. Co. of Am.*, No. 14–CV–02024–JCS, 2014 WL 2568895, at *7

(N.D. Cal. June 6, 2014) (dismissing UCL claim where plaintiffs' "claims for breach of contract and breach of the implied covenant of good faith and fair dealing may provide an adequate remedy [at law]"); *Rhynes v. Stryker Corp.*, No. 10-5619 SC, 2011 WL 2149095, at *3-4 (N.D.Cal. May 31, 2011) (dismissing plaintiffs' UCL claims because their "products liability claims" afforded them "an adequate remedy at law to redress their alleged injuries"). California Plaintiffs do not attempt to distinguish any of these cases, nor do they argue that their claims for fraudulent concealment are an inadequate remedy at law. *See* Opp. at 21-22. Moreover, the cases cited by California Plaintiffs do not even address the issue. *See, e.g., MyFord Touch*, 46 F.Supp.3d at 952 (not addressing equitable relief). Although California Plaintiffs "must establish that there is no adequate remedy at law available," *Durkee*, 2014 WL 4352184, at *2, the SAC contains no allegation of inadequacy.

To the extent California Plaintiffs assert a claim for injunctive relief in addition to damages under the CLRA, *see* SAC ¶¶ 169-70 (discussing damages only), that too is dismissed for the same reasons, *see Durkee*, 2014 WL 4352184, at *3 (dismissing entire CLRA claim due to an adequate remedy at law where plaintiffs sought "only injunctive relief" under the CLRA). Again, California Plaintiffs provide no answer.

*17 As a result, the Court GRANTS Ford's Motion to Dismiss California Plaintiffs' UCL claims and CLRA claims for injunctive relief. The Court does so without leave to amend because the Court has previously dismissed Plaintiffs' equitable claims due to an adequate remedy at law. *See* ECF No. 48 at 10:22-11:17. The Court therefore finds that allowing further amendment would be futile. *See Chappel*, 232 F.3d at 725-26 ("A district court acts within its discretion to deny leave to amend when amendment would be futile"); *see also Chodos*, 292 F.3d at 1003 ("[W]hen a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad." (internal quotation marks omitted)). However, as stated *supra* at Part III.D., California Plaintiffs may continue to assert their CLRA claims for damages.

G. Request to Strike Nationwide Claims

Lastly, Ford argues that the Court should strike the "nationwide" class claims that are repled in the SAC. Mot. at 25 (citing SAC at 39 n.7). Although the Court explained that Plaintiffs would need to add individuals with standing under the laws of each state in order to reassert Plaintiffs' nationwide claims, *see* ECF No. 48 at 12:3-13:7, the Court accepts Plaintiffs' representation that they have repled these claims in order to preserve tolling and to avoid a possible finding of waiver by an appellate court down the road, *see* SAC at 39 n.7. In light of Plaintiffs' representation, the Court finds it unnecessary to strike the requested matter from the SAC at the pleading stage. *See Fed.R.Civ.P. 12(f)*. Accordingly, the Court hereby DENIES Ford's request to strike the nationwide claims from the SAC.

IV. CONCLUSION

For the foregoing reasons, the Court rules as follows:

- The Court GRANTS with prejudice Ford's Motion to Dismiss as to Plaintiff Ian Colburn;
- The Court DENIES Ford's Motion to Dismiss as to California Plaintiffs' claims for fraudulent concealment and CLRA claims for damages;
- The Court GRANTS with prejudice Ford's Motion to Dismiss as to California Plaintiffs' UCL claims and CLRA claims for injunctive relief; and
- The Court DENIES Ford's request to strike the nationwide claims from the SAC.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 4111448

TAB 37

2011 WL 5597327

Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
Louisville Division.

Roxann PIXLER, Plaintiff

v.

Anthony HUFF, et. al., Defendants.

Civil Action No. 3:11-CV-00207-JHM.

|

Nov. 17, 2011.

Attorneys and Law Firms

Gregory D. Simms, Gruner & Simms, PLLC, Steven R. Romines, Romines Weis & Young, PSC, Louisville, KY, for Plaintiff.

Judson B. Wagenseller, Louisville, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

JOSEPH H. MCKINLEY, JR., Chief Judge.

*1 This matter is before the Court on Defendant Brian N. Sly's Motion to Dismiss [DN 10]; Defendants A. Huff, S. Huff, Michele Brown, Anthony Russo, River Falls Investments, LLC, Oxygen Unlimited, LLC, River Falls Equities, LLC, SDH Realty, Inc., W.A. Huff, LLC, and The Huff Grandchildren Trust's Motion for More Definite Statement [DN 12]; Defendant Thomas Bean's Motion to Dismiss [DN 30]; Defendant Huff Farm (Horsebranch) Inc.'s Motion to Dismiss [DN 34]; and Plaintiff Roxann Pixler's Motion to Strike [DN 33] and Motion for Extension of Time [DN 36]. Fully briefed, these matters are ripe for decision.

I. BACKGROUND

This case centers around the creation and operation of Midwest Merger Management, LLC ("MMM"). In 2001, Plaintiff Roxann Pixler's husband, Danny Pixler, and Anthony Huff ("A. Huff") formed MMM. (Amend. Compl. at ¶ 18.) For reasons that are not entirely clear to the Court, Pixler and A. Huff placed their shares in the company in their respective wives' names. (*Id.*) On July 20, 2001, MMM filed its Articles of Organization, which listed two members, Plaintiff and

Sheri Huff ("S. Huff"). (*Id.* at ¶ 19.) It appears that MMM was run entirely by Pixler and A. Huff, and that Plaintiff had no involvement with the operations of the company. At some point, Michele Brown became the secretary and personal assistant to A. Huff and became involved with MMM. (*Id.* at ¶ 21.) In MMM's 2002 Annual Report, Brown was listed as a member or manager of MMM, along with Plaintiff and S. Huff. (*Id.* at ¶ 20.) When MMM was initially created, Brian N. Sly, a California business man, loaned the business approximately \$3.9 million dollars. (*Id.* at ¶ 43.)

MMM was established as a "risk manager." (*Id.* at ¶ 23.) In this line of work, MMM would collect premiums and fees from clients and would in turn pay premiums to insurance carriers that provided workers' compensation insurance coverage. (*Id.* at ¶ 24.) MMM also provided consulting services to various entities. (*Id.* at ¶ 25.)

In 2004, MMM acquired Certified Services, Inc., which itself owned several subsidiaries. (*Id.* at ¶ 27.) Beginning in 2005, A. Huff established several companies including, Oxygen Unlimited, LLC; Oxygen II, LLC (later renamed River Falls Investments, LLC); O2 HR, LLC; O2 HR Safety & Claims, LLC (later renamed W. Anthony Huff, LLC and renamed again River Falls Equities, LLC); W.A. Huff, LLC; and SDH Realty, Inc. (*Id.* at ¶¶ 29–32, 41, 42.) Thomas Bean, helped A. Huff establish and manage River Falls Investments, LLC and River Falls Equities, LLC. (*Id.* at ¶ 44.) In her Amended Complaint, Plaintiff alleges that A. Huff used at least two of these entities, SDH Realty, Inc. and W.A. Huff, LLC, to funnel money from MMM for illegal purposes. (*Id.* at ¶¶ 41–42.)

In 2006, Plaintiff was told that her share in MMM was virtually worthless. (*Id.* at ¶ 35.) However, A. Huff expressed interest in purchasing her share and paid Plaintiff \$170,000 as a partial buy-out. (*Id.*) Plaintiff eventually became suspicious of A. Huff and began to investigate the business dealings of MMM. She was able to obtain a copy of the MMM books in 2008 and discovered what she believed to be "accounting discrepancies that could not be reconciled." (*Id.* at ¶ 39.) Plaintiff filed suit against A. Huff and many other parties in April 2011.

II. DISCUSSION**A. Brian Sly**

*2 Defendant Sly has challenged Plaintiff's Complaint on a number of grounds. Defendant Sly has moved for dismissal

under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction, under Fed.R.Civ.P. 9(b) for failure to plead fraud with particularity, and under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

i. Lack of Personal Jurisdiction

The Supreme Court has held that personal jurisdiction “is an essential element of the jurisdiction of a district ... court,’ without which the court is ‘powerless to proceed to an adjudication.’” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Emp’rs Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998) (“The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception.”) (internal quotation marks omitted). Furthermore, if a court “can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground.” *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 436 (2007). Accordingly, the Court will address its jurisdiction over the defendant before addressing the merits of Plaintiff’s individual claims.

When addressing a motion to dismiss for lack of personal jurisdiction, “there is no statutory direction ..., [therefore,] the mode of its determination is left to the trial court.” *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939). However,

case law establishes a settled procedural scheme to guide trial courts in the exercise of this discretion. If it decides that the motion can be ruled on before trial, the court “may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.” *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir.1981). However the court handles the motion, the plaintiff always bears the burden of establishing that jurisdiction exists.

Serras v. First Tennessee Bank Nat’l Ass’n, 875 F.2d 1212, 1214 (6th Cir.1989). If the court determines the jurisdictional issue on written submissions only, the plaintiff “need only make a prima facie showing of jurisdiction.” *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir.1996). When making such a determination without an evidentiary hearing, “the court must consider the pleadings and affidavits in a light most favorable to the plaintiff.” *Id.* Furthermore, the

court must “not consider facts proffered by the defendant that conflict with those offered by the plaintiff.” *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir.2002).

In a diversity case, a federal court determines whether personal jurisdiction exists over a nonresident defendant by applying the law of the state in which it sits. *Third Nat’l Bank v. WEDGE Group Inc.*, 882 F.2d 1087, 1089 (6th Cir.1989). The Court applies a two-step inquiry to determine whether it may exercise personal jurisdiction over a non-resident defendant: “(1) whether the law of the state in which the district court sits authorizes jurisdiction, and (2) whether the exercise of jurisdiction comports with the Due Process Clause.” *Brunner v. Hampson*, 441 F.3d 457, 463 (6th Cir.2006). The district court’s exercise of jurisdiction over an out-of-state defendant must be consistent with both the forum state’s long-arm statute and the constitutional requirements of due process. *Id.*; *Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir.2007); *Appriss Inc. v. Information Strategies, Inc.*, 2011 WL 3585890, at *2 (W.D.Ky. Aug. 16, 2011). Furthermore, “[p]ersonal jurisdiction must be established with respect to each cause of action.” *Morris Aviation, LLC v. Diamond Aircraft Indus., Inc.*, 730 F.Supp.2d 683, 694 (W.D.Ky.2010).

*3 Until recently, the Kentucky long-arm statute, K.R.S. § 454.210, had been interpreted “to reach to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants.” *Wilson v. Case*, 85 S.W.3d 589, 592 (Ky.2002). In *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51 (Ky.2011), the Kentucky Supreme Court expressly overruled *Wilson* and held that the Kentucky long-arm statute does not extend to the full limit of due process and requires its own separate analysis. *Caesars*, 336 S.W.3d at 57.

Kentucky’s long-arm statute requires a two-prong showing before a court can exercise personal jurisdiction over a non-resident. First, the court must find that a non-resident’s conduct or activities fall within one of nine enumerated provisions in K.R.S. § 454.210. Only three of those provisions are applicable to the facts underlying the present motion against Defendant Sly; K.R.S. § 454.210(2)(a)(1), (3), and (4).¹ If this first prong is satisfied then the second prong requires the Court to determine if the plaintiff’s claim arises from the defendant’s actions. See K.R.S. § 454.210(2)(b) (“When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him.”) Accordingly,

“even when the defendant's conduct and activities fall within one of the enumerated categories, the plaintiff's claim still must ‘arise’ from that conduct or activity before long-arm jurisdiction exists.” *Caesars*, 336 S.W.3d at 56. The court in *Caesars* conceded that “[t]he phrase ‘arising from’ may reasonably be subject to various interpretations.” *Id.* at 58. In evaluating the meaning of that phrase, the Kentucky Supreme Court found that “[i]f there is a reasonable and direct nexus between the wrongful acts alleged in the complaint and the statutory predicate for long-arm jurisdiction, then jurisdiction is properly exercised.” *Id.* at 59. The court went on to say that “the analysis must necessarily be undertaken on a case by case basis” and that “[t]rial courts will ultimately have to depend upon a common sense analysis, giving the benefit of the doubt in favor of jurisdiction.” *Id.*

- 1 The long-arm statute states in pertinent part that
 - (2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
 1. Transacting any business in this Commonwealth;
 - ...
 3. Causing tortious injury by an act or omission in this Commonwealth;
 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth[.]

K.R.S. § 454.210(2)(a).

In the instant case, Plaintiff has alleged two claims against Defendant Sly, breach of fiduciary duty and unjust enrichment. The following factual allegations related to Defendant Sly are contained within the Amended Complaint: (1) Defendant Brian Sly is a citizen of the State of California, (Amend.Compl.¶ 11); (2) Defendant Sly loaned approximately \$3.9 million dollars to A. Huff, however, he was re-paid \$5.3 million with funds from MMM, (*Id.* at ¶ 43); and (3) Plaintiff relied on representations of Sly that the company was being operated lawfully (*Id.* at ¶ 46). In support of Count III, Breach of Fiduciary Duty, Plaintiff alleges that

she reposed trust and confidence in Sly who therefore had a duty of utmost good faith, trust, confidence and candor to the Plaintiff, and that Sly breached that duty and caused damage to the Plaintiff. (*Id.* at ¶¶ 62–62.) In support of Count VI, Unjust Enrichment, Plaintiff alleges that Sly received benefits from the Plaintiff's participation in MMM for which the Plaintiff has not been adequately compensated, which benefits were to the detriment of Plaintiff. (*Id.* at ¶¶ 75–76.)

*4 Both Plaintiff and Defendant Sly have submitted two declarations, sworn to under penalty of perjury, in an attempt to demonstrate or dispel the notion that the Court has personal jurisdiction over Defendant Sly. While the Federal Rules of Civil Procedure specifically address the use of affidavits and declarations to support or oppose a motion for summary judgment, the Rules are silent regarding their use to support or oppose a motion to dismiss under Rule 12(b). Compare Fed.R.Civ.P. 56(c), with Fed.R.Civ.P. 12(b). “Because there are no specific procedures or rules governing evidentiary rulings in connection with a motion to dismiss, courts consistently look to Rule 56 for guidance.” *Foshee v. Forethought Fed. Sav. Bank*, 2010 WL 2158454, at *3 (W.D.Tenn. May 7, 2010); see also *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 327 (6th Cir.1990) (finding that “[a]lthough the district court has considerable discretion in devising procedures for resolving questions going to subject matter jurisdiction, courts frequently look to Rule 56 for guidance in ruling upon evidentiary matters under 12(b)(1).”).

Under Rule 56(c), “[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed.R.Civ.P. 56(c). The Court sees no reason why an affidavit or declaration submitted in connection with a motion to dismiss under Rule 12(b)(2) should be treated any differently. Therefore, to the extent any affidavit or declaration submitted by the parties is not based upon personal knowledge or contains inadmissible evidence, the Court will not consider such portions in determining the issue of personal jurisdiction. See *United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1277 (11th Cir.2009) (finding that when a court is determining a Rule (12)(b)(2) motion to dismiss that it should “consider[] ‘only those portions of the [affidavit] that set forth specific factual declarations within the affiant's personal knowledge.’ ”); *Cooper v. McDermott Int'l, Inc.*, 62 F.3d 395, at *5 (5th Cir.1995) (unpublished) (holding that “[h]earsay is not properly included in an affidavit” submitted with a Rule 12(b)(2) motion.).

In support of his motion to dismiss, Defendant Sly has submitted two sworn declarations wherein he states that he is a resident of California who has never lived, owned real property, owned any other assets or personal property, maintained any bank or other accounts, maintained any regular business activities, paid taxes, or maintained any employees, contractors or agents in the Commonwealth of Kentucky. (Sly's Decl. in Support of Mot. to Dismiss ¶¶ 2–3 [DN 10].) Defendant Sly further maintains that he never spoke to Plaintiff regarding business while either of them were in Kentucky, rather, all of his contacts with Plaintiff in Kentucky were of a social nature. (*Id.* at ¶¶ 4–7.)

*5 Sly does admit that he was in Kentucky to attend a regular business meeting involving Oxygen Unlimited II, LLC in May 2006, but that Plaintiff was not at that business meeting. (*Id.* at ¶ 5.) Sly further declares that he did, in fact, loan MMM approximately \$3,924,808.00 in 2001, an action that he considered and executed from his California home. (Sly's Supp. Decl. ¶ 2 [DN 39].) Sly states that he has only received \$2,708,029.03 as a return on his loan, and that he has lost approximately \$1,216,779, which he does not expect to recover. (*Id.* at ¶¶ 4–5.) The payments that he did receive from MMM were all received by Sly at his home in California and deposited in his California bank accounts by him. (*Id.* at ¶ 4.) The last of these repayments was received in 2005. (*Id.*) Defendant Sly further states that he does not recall ever speaking with Plaintiff regarding MMM, until approximately 2009 when Plaintiff threatened to sue him. (*Id.* at ¶ 3.)

Plaintiff also filed two declarations opposing Defendant Sly's motion to dismiss. Plaintiff's declarations are prefaced with the statement that “[t]he following facts are within my own personal knowledge, and if called upon I could and would testify competently to these facts, except as to those matters stated herein upon information and belief, and as to those matter [sic] I have a good faith and reasonable basis to believe that they are true.” (Pl.'s Decl. in Supp. Pl.'s Resp. to Def. Brian Sly's Mot. to Dismiss ¶ 2 [DN 23].) Plaintiff states that she was a partial owner of MMM beginning from its inception in 2001, and that she owned a significant portion of the company during the time relevant to her Complaint. (*Id.* at ¶ 5.) The remaining statements contained in her declaration are not made from personal knowledge but are made based on Plaintiff's “knowledge and belief.” (*Id.* at ¶¶ 6–13.) Plaintiff states that it is her “knowledge and belief” that Defendant Sly has had “systematic and continuous” contacts with the state of Kentucky since 1990, (*Id.* at ¶ 6), including being a business

affiliate of A. Huff since the early 1990's, (*Id.* at ¶ 8). Plaintiff also states that is her “knowledge and belief” that Defendant Sly invested at least \$4,000,000 in MMM between 2001 and the present. (*Id.* at ¶ 10.)

In her Supplemental Declaration filed approximately six weeks after her initial declaration, Plaintiff again makes a number of statements based upon her “knowledge and belief.” (*See* Pl.'s Decl. in Supp. Pl.'s Supp. Resp. to Def. Brian Sly's Mot. to Dismiss [DN 37].) In this second declaration, Plaintiff states that it is her “knowledge and belief” that Defendant Sly held and sold an “equity position” in MMM, back to MMM for over \$15 million dollars in 2002. (*Id.* at ¶ 13.) Using the same “knowledge and belief” preface, Plaintiff further states that Defendant Sly was part of a large fraudulent scheme that included soliciting investments for MMM and Oxygen Unlimited, LLC, and agreeing to make large transfers of funds for “investment” purposes in these entities, which never resulted in business uses. (*See id.* at ¶¶ 9–15.) Plaintiff claims that Defendant A. Huff purposely acted to perpetrate fraud against MMM by engaging in circular accounting practices, that benefitted Defendant Sly, and that Defendant Sly was aware of such fraudulent practices. (*Id.* at ¶¶ 16–17, 22.)

*6 These “factual allegations” made by Plaintiff do not appear to be based upon personal knowledge, rather, they appear to be based upon conjecture, speculation, and belief. Although Plaintiff intentionally prefaced the majority of her statements with the phrase “knowledge and belief” instead of “information and belief,” the use of such wording is insufficient to satisfy the requirement of personal knowledge. These statements made upon “knowledge and belief” stand in stark contrast to the other statements made by Plaintiff based upon personal knowledge, which do not contain such a preface. (*See e.g. id.* at 6.) Statements not made upon personal knowledge are not to be considered by courts in determining a motion for summary judgement under Rule 56 and such statements should not be considered in a motion to dismiss under Rule 12(b)(2). *See Totman v. Louisville Jefferson Cnty. Metro Gov't*, 391 F. App'x 454, 464 (6th Cir.2010) (finding that statements made to the best of a party's knowledge and belief go beyond personal knowledge and do not meet the evidentiary standard set forth in Rule 56); *Plaskolite, Inc. v. Zhejiang Taizhou Eagle Mach. Co., Ltd.*, 2008 WL 5190049, at *5 (S.D.Ohio Dec. 9, 2008) (addressing a Rule 12(b)(2) motion to dismiss and refusing to consider portions of an affidavit based upon the belief of the affiant); *Doe I v. Al Maktoum*, 2008 WL 4965169, at *5 (E.D.Ky. Nov.

18, 2008) (finding an affidavit based upon news stories and websites was not based upon personal knowledge and was insufficient to defeat a motion to dismiss under Rule 12(b)(2); *Neewra, Inc. v. Manakh Al Khaleeg Gen. Trading and Contracting Co.*, 2004 WL 1620874, at *2 n.3 (S.D.N.Y. July 20, 2004) (finding an affidavit based upon information and belief was not based upon personal knowledge and was not to be considered in the determination of the Rule 12(b)(2) motion to dismiss).

Disregarding those “factual assertions” made upon Plaintiff’s knowledge and belief, the Court finds that there are few facts connecting Defendant Sly to the Commonwealth of Kentucky for purposes of Plaintiff’s claims of breach of fiduciary duty and unjust enrichment. While the Court must draw all reasonable inferences in favor of Plaintiff, it need not disregard statements and facts made by the Defendant that are not contradicted. Plaintiff’s claim for breach of fiduciary duty is premised upon Defendant Sly allegedly misrepresenting to her the legality of MMM’s operation. Plaintiff has produced no evidence demonstrating when, where or how this misrepresentation was made. She has failed to produce evidence that it was made while either she or Defendant Sly was in the Commonwealth of Kentucky. Defendant Sly has submitted a declaration stating that he has never spoken to Plaintiff over the phone when either he or she was in the Commonwealth of Kentucky. (Def. Sly’s Decl. ¶ 7.) He further states that the one time that he interacted with Plaintiff in Kentucky was in May 2006 when he saw her at a social function following a business meeting involving Oxygen Unlimited II, LLC. (*Id.* at ¶ 5.) Defendant Sly states that this contact with Plaintiff was purely a social one.²

² Noticeably, Defendant Sly does not go so far in his declaration as to state that he has never discussed MMM with Plaintiff, only that such communication never took place while either of them was in the Commonwealth of Kentucky.

*7 Looking first to Plaintiff’s breach of fiduciary duty claim, the Court can quickly eliminate K.R.S. § 454.210(2)(a)(3) and (4) as creating jurisdiction. Plaintiff has failed to demonstrate that the misrepresentation occurred in the Commonwealth, therefore jurisdiction cannot be found under subsection (2)(a)(3). As for subsection 2(a)(4), assuming that the misrepresentation in some way affected Plaintiff in Kentucky, the Court finds that Plaintiff has failed to demonstrate that Defendant Sly “regularly does or solicits business, or engages in any other persistent course of conduct,

or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth[.]” K.R.S. § 454.210(2)(a)(4). Furthermore, Plaintiff has not demonstrated that Defendant Sly’s alleged misrepresentation arose “out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth.” *Id.* Therefore, jurisdiction cannot be found under subsection (2)(a)(4).

Nor does K.R.S. § 454.210(2)(a)(1), transacting any business in the Commonwealth, provide the Court with the necessary jurisdiction. As the Kentucky Supreme Court only recently stated that Kentucky’s long-arm statute must be analyzed separately from due process, there is little precedent by Kentucky courts analyzing the phrase “transacting any business” in K.R.S. § 454.210(2)(a)(1). Under Kentucky law, statutes are to be “liberally construed with a view to promote their objects and carry out the intent of the legislature....” K.R.S. § 446.080(1). Furthermore, “words and phrases are to ‘be construed according to the common and approved usage of language’ unless a word has a certain technical meaning.” *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 792 (Ky.2008) (quoting K.R.S. § 446.080(4)).

The term “transact” is defined as “to carry on or conduct (business, negotiations, activities, etc.) to a conclusion or settlement.” Random House Unabridged Dictionary 2008 (2d ed.1993). In the instant case, the Amended Complaint alleges that Defendant Sly made a loan to A. Huff. (Amend.Compl.¶ 43.) Defendant Sly’s Supplemental Declaration states that the loan was actually issued to MMM, a Kentucky corporate entity. (Def. Sly’s Supp. Discl. ¶ 2.) Regardless of who initially received the funds, A. Huff or MMM, it is clear from the declarations that the money was intended to be a loan to MMM. Defendant Sly’s declaration states that this decision and the actual transfer of funds took place from his home in California. Regardless of where the loan was considered or executed, Defendant Sly placed \$3.9 million dollars into Kentucky corporation. The Court is satisfied that the loan at issue constitutes transacting business in the Commonwealth.

However, it is not enough that a defendant transact business in the Commonwealth, a plaintiff must also demonstrate that her claim arises from such a transaction. *See* K.R.S. § 454.210(2)(b); *Caesars*, 336 S.W.3d at 56. Plaintiff has not done so in the instant case. There are no factual allegations that support an inference that Defendant Sly’s alleged breach of a fiduciary duty is connected to his transacting business by issuing MMM a loan. The Court is unable to find a reasonable nexus between

Defendant Sly's loan and the Plaintiff's claim. A fiduciary duty is not imposed upon a lender by the simple act of making a loan. Furthermore, there are no facts alleged that suggest that the misrepresentation that MMM was being operated lawfully is connected whatsoever to Defendant Sly's loan. Without facts demonstrating how her claim for breach of a fiduciary duty arises from Defendant Sly's making of a loan, the Court finds that personal jurisdiction over this claim cannot be exercised under K.R.S. § 454.210(2)(a)(1). Accordingly, the Court finds that Plaintiff has failed to demonstrate a prima facie case of personal jurisdiction over Defendant Sly for the breach of fiduciary duty claim.

*8 Defendant Sly also challenges the Court's personal jurisdiction regarding Plaintiff's unjust enrichment claim. The Amended Complaint states that Defendant Sly made a loan of approximately \$3.9 million dollars to Defendant A. Huff, but was repaid \$5.3 million dollars from MMM. (Amend.Compl.¶ 43.) Thirty-two paragraphs later, the Complaint states in conclusory terms that the "Defendants [including Sly] received benefits from the Plaintiff's participation in 'MMM' for which the Plaintiff has not been adequately compensated." (*Id.* at ¶ 75.)

Plaintiff contends that the Court has jurisdiction over Defendant Sly for purposes of the unjust enrichment claim under the transacting business provision in K.R.S. § 454.210(2)(a)(1). As discussed above, Defendant Sly's loan to a Kentucky company through A. Huff, is sufficient at this prima facie stage to constitute transacting business in the Commonwealth. However, there still must be a reasonable and direct nexus between the claim that Defendant Sly was unjustly enriched and his loan to MMM. The Kentucky Supreme Court has found that the determination of this prong "will ultimately depend upon a common sense analysis, giving the benefit of the doubt in favor of jurisdiction." *Caesars*, 336 S.W.3d at 59. With these instructions in mind, the Court finds that there is a sufficient nexus for the Court to exercise personal jurisdiction under the Kentucky long-arm statute. While the Amended Complaint is rather bare, it appears that the unjust enrichment claim is directly related to the business Sly transacted in Kentucky. The Court finds that this demonstrates enough of a nexus between Plaintiff's claim of unjust enrichment and Defendant Sly's loan to exercise personal jurisdiction.

Having found that the Kentucky long-arm statute applies, the Court must also find that the exercise of personal jurisdiction conforms with due process. "The relevant inquiry is whether

the facts of the case demonstrate that the nonresident defendant possesses such minimum contacts with the forum state that the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.' " *Theunissen*, 935 F.2d 1454, 1459 (6th Cir.1991) (quoting *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945)). The Sixth Circuit has identified three criteria for determining whether specific in personam jurisdiction may be exercised.

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir.1968). See also *Theunissen*, 930 F.2d at 1460; *Franklin Roofing, Inc. v. Eagle Roofing and Sheet Metal, Inc.*, 61 S.W.3d 239, 240 (Ky.Ct.App.2001).

*9 In order to determine whether personal jurisdiction over Defendant Sly would be appropriate in this forum, the Court must examine his contacts in terms of the three criteria outlined in *Mohasco*. "The three prong test is intended to be a framework for analysis and is not susceptible to mechanical application." *Info-Med, Inc. v. Nat'l Healthcare, Inc.*, 669 F.Supp. 793, 796 (citing *Welsh v. Gibbs*, 631 F.2d 436, 440 (6th Cir.1980)). "Furthermore, the first and second prongs may be considered as one due to their inter-relatedness." *Id.* These prongs may be satisfied if a substantial business contract is present. *Id.*

Jurisdiction is proper under the purposeful availment requirement where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Moreover, the defendant's conduct and connection with the forum must be of a character that he or she should reasonably anticipate being haled into court there. *Id.* at 474. This purposeful availment

requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated” contacts. *Id.* at 475.

“A defendant may be said to have purposefully availed himself of the benefits of the forum state if he has either ‘deliberately’ engaged in significant activities within a state or created ‘continuing obligations’ between himself and the citizens of a forum.” *Info-Med*, 669 F.Supp. at 796 (quoting *Burger King*, 471 U.S. at 475–76). “[P]arties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state’ are subject to regulation and sanctions in the other State for the consequences of their activities.” *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir.1989) (quoting *Burger King*, 471 U.S. at 473). “[J]urisdiction may not be avoided merely because the defendant did not physically enter the forum state, so long as a commercial actor’s efforts are purposefully directed toward residents of another state.” *Info-Med*, 669 F.Supp. at 796.

The first prong of the *Mohasco* test requires the Court to determine if Defendant Sly purposely availed himself of the privilege of acting within Kentucky. Taking all reasonable inferences in favor of Plaintiff, the Court finds that Defendant Sly reached out beyond the state of California and loaned \$3.9 million dollars to a Kentucky company. This action created continuing obligations between himself and a Kentucky citizen. This was not a “random,” “fortuitous,” or “attenuated” contact, but was instead a purposefully direct and deliberate action on Defendant Sly’s part. As such, Sly should have reasonably anticipated being haled into a Kentucky court in a matter related to that loan. *See McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (finding the issuance of a single life insurance policy to by a non-resident was sufficient purposeful availment). As discussed above, the Court has already found that Plaintiff’s claim for unjust enrichment arises from this contact, thus satisfying the second prong of the *Mohasco* test. As for the final prong, the Court finds that infusing nearly \$4 million dollars into the state of Kentucky demonstrates sufficient effects within Kentucky to make the exercise of personal jurisdiction over Defendant Sly reasonable.

*10 The Court notes that its finding of personal jurisdiction is based only on Plaintiff’s ability to demonstrate a prima facie case. The finding of personal jurisdiction at this stage of the litigation does not preclude Defendant Sly from raising the defense again at trial. *See Serras v. First Tenn. Bank*

Nat’l Assoc., 875 F.2d 1212, 1214–15 (6th Cir.1989) (“A threshold determination that personal jurisdiction exists ‘does not relieve [the plaintiff] ... at the trial of the case-in-chief from proving the facts upon which jurisdiction is based by a preponderance of the evidence.’ ”)

ii. Failure to State a Claim

Having found that it has personal jurisdiction over Defendant Sly for purposes of the unjust enrichment claim, the Court will now address the merits of Plaintiff’s claim. Defendant Sly contends that Plaintiff has failed to state a claim upon which relief can be granted, and has moved to dismiss this claim under Fed.R.Civ.P. 12(b)(6).

Upon a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), a court “must construe the complaint in the light most favorable to plaintiff,” *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir.2007) (citation omitted), “accept all well-pled factual allegations as true[.]” *id.*, and determine whether the “complaint states a plausible claim for relief[.]” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). Under this standard, the plaintiff must provide the grounds for its entitlement to relief, which “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff satisfies this standard only when it “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949. A complaint falls short if it pleads facts “merely consistent with a defendant’s liability” or if the alleged facts do not “permit the court to infer more than the mere possibility of misconduct.” *Id.* at 1949, 1950. Instead, the allegations must “‘show [] that the pleader is entitled to relief.’ ” *Id.* at 1950 (quoting Fed.R.Civ.P. 8(a)(2)).

While the Court considered evidence outside of the pleadings, in the form of declarations, for purposes of Defendant Sly’s Fed.R.Civ.P. 12(b)(2) challenge, such consideration was limited to that analysis, and does not convert this motion to dismiss into one for summary judgment. *See Wilson-Cook Med., Inc. v. Wilson*, 942 F.2d 247, 251–52 (4th Cir.1991) (finding that trial court’s consideration of affidavits for purposes of 12(b)(2) motion did not convert a 12(b)(6) motion into one for summary judgment); *Kerns v. Caterpillar, Inc.*, 583 F.Supp.2d 885, 891 n.1 (M.D.Tenn.2008) (finding the consideration of external evidence in support of a 12(b)(2) motion does not require conversion to summary judgment). The Court will not consider such evidence for purposes of

this analysis, but will instead look solely to the pleadings. *See Kerns*, 583 F.Supp.2d at 891, 895 (considering pleadings and affidavits for purposes of 12(b)(2) motion, but only considering pleadings for purposes of 12(b)(6) motion).

*11 Defendant Sly contends that Plaintiff has failed to allege sufficient facts to establish a claim for unjust enrichment under Kentucky law. For a plaintiff to succeed on her unjust enrichment claim she must prove three elements: “(1) benefit conferred upon defendant at plaintiff’s expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value.” *Guerin v. Fulkerson*, —S.W.3d —, 2011 WL 4633090, at *3 (Ky.Ct.App. Oct. 7, 2011).

In application, Kentucky courts have consistently found that the first element not only requires a benefit be conferred upon the defendant, but also that the plaintiff be the party conferring that benefit. *See Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky.Ct.App.2009) (affirming trial court’s dismissal of unjust enrichment claim because the court found that plaintiff did not confer a benefit upon the defendant or his property); *JP White, LLC v. Poe Co., LLC*, 2011 WL 1706751, at *5 (Ky.Ct.App. May 6, 2011) (affirming directed verdict because plaintiff failed to demonstrate that it conferred a benefit on defendant); *Mattingly v. Primerica Life Ins. Co.*, 2007 WL 2792197, at *7 (W.D.Ky. Sept. 21, 2007) (stating that the first element of an unjust enrichment claim requires “a benefit conferred on the defendant *by the plaintiff*.” (emphasis added)); *see also* 66 Am.Jur.2d Restitution and Implied Contracts § 12 (2011) (Under the section titled “requirement of benefit at the expense of another,” stating that “[a]n essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant *from the plaintiff* that would be inequitable to retain without paying for its value.” (emphasis added)).

In *Dixie Fuel Company v. Straight Creek, LLC*, 2011 WL 845828 (E.D.Ky. Mar. 8, 2011), the court conducted a detailed analysis of the first element in an unjust enrichment claim under Kentucky law. The court found that “[a]lthough not always expressly stated by courts, the requirement that the benefit be conferred on the defendant *by the claimant* seems to always be a requirement in practice.” *Id.* at *4. The court cited *Jones v. Sparks* and several other state and federal cases that analyzed the first prong as requiring that the plaintiff be the party who conferred the benefit. *See id.* (collecting cases). The *Dixie Fuel* court found that the term “confer” means “to bestow from or as if from a position of superiority or

to give[.]” and that the plaintiff had not bestowed or given anything to the defendant. *Id.* at *5 (internal quotation marks omitted). Therefore, the court in *Dixie Fuel* dismissed the plaintiff’s claim. Having reviewed those cases and sources, the Court agrees with the analysis in *Dixie Fuel* and finds that under Kentucky law, a claim for unjust enrichment requires that a plaintiff prove that she conferred a benefit upon the defendant.

*12 In the instant case, the Court finds that Plaintiff has failed to allege sufficient facts to demonstrate that she is entitled to relief for a claim of unjust enrichment against Defendant Sly. The factual allegations established in the Amended Complaint are as follows: (1) Plaintiff held at least a 49% interest in MMM from its formation in July 2001 to 2006, when she was partially bought out, (Amend.Compl.¶¶ 22, 35); and (2) that Defendant Sly loaned \$3.9 million dollars to A. Huff and was repaid \$5.3 million dollars from MMM funds, (*Id.* at ¶ 43). Plaintiff then groups nine defendants together under Count VI, Unjust Enrichment, and states the following “the Defendants received benefits from the Plaintiff’s participation in ‘MMM’ for which the Plaintiff has not been adequately compensated” and “the Defendants benefitted from Plaintiff’s involvement in ‘MMM’, to the detriment of the Plaintiff.” (*Id.* at ¶¶ 75–76.)

These factual allegations taken together fall far short of demonstrating that Plaintiff is entitled to relief for unjust enrichment from Defendant Sly. Formulaic recitation of the elements is not sufficient to state a claim, however, Plaintiff’s pleadings fail to even properly state the necessary elements. Furthermore, there are insufficient facts demonstrating that Defendant Sly was conferred a benefit at the expense of Plaintiff, let alone that Plaintiff was the party who conferred that benefit. Plaintiff claims that Defendant Sly was repaid \$5.3 million dollars in exchange for a loan made in the amount of \$3.9 million dollars. There are no facts indicating when the loan was made, when it was repaid, or what the terms of the loan were that made repayment of \$5.3 million dollars unjust. Nor has Plaintiff pled facts indicating whether or how she was entitled to any of the funds that were repaid. These pleadings fail to demonstrate, in any meaningful way, that Defendant Sly was unjustly enriched by a benefit conferred by the Plaintiff. Accordingly, the Court finds that Plaintiff’s claim for unjust enrichment fails to state a claim upon which relief can be granted. Therefore, the Court **GRANTS** Defendant Sly’s Motion to Dismiss.

B. Thomas Bean

Plaintiff has alleged one claim of unjust enrichment against Defendant Bean. Defendant Bean has moved for dismissal of that claim under Fed.R.Civ.P. 12(b)(2) for lack of personal jurisdiction, under Fed.R.Civ.P. 9(b) for failure to plead fraud with particularity, and under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

i. Personal Jurisdiction

Because the Court is making the determination of personal jurisdiction on written submissions alone, Plaintiff's burden for demonstrating personal jurisdiction is only a prima facie showing. *Compuserve*, 89 F.3d at 1262. Plaintiff contends that Defendant Bean's actions in creating and managing two corporate entities in Kentucky sufficiently demonstrate that Defendant Bean transacted business in Kentucky, as required by K.R. S. § 454.210(2)(a)(1). In support of her argument, Plaintiff has submitted a declaration. However, much like the declaration submitted against Defendant Sly, Plaintiff's declaration against Defendant Bean consists mostly of statements made upon "knowledge and belief." As the Court has ruled above, such statements do not meet the threshold requirements of personal knowledge to be considered by the Court. See *supra* Part III.A.i; *Totman v. Louisville Jefferson Cnty. Metro Gov't*, 391 F. App'x 454, 464 (6th Cir.2010). Defendant Bean, in his Reply, discusses and references his own sworn declaration. However, the Court is unable to find any such declaration attached to the filing or in the Record.

*13 Therefore, the only information that the Court can use to analyze this issue are the pleadings within the Amended Complaint and the few statements contained in Plaintiff's sworn declaration that are made with sufficient personal knowledge. Considering that evidence and taking all inferences in favor of Plaintiff the Court finds that it does not have personal jurisdiction over Defendant Bean for purposes of Plaintiff's unjust enrichment claim. Plaintiff has alleged that Defendant Bean helped establish and manage two Kentucky corporate entities that operated in Kentucky. Assuming without deciding that this limited allegation is sufficient to demonstrate transacting business, the Court finds that Plaintiff has failed to demonstrate that there is a reasonable and direct nexus between this activity and her unjust enrichment claim.

The allegations found in the Amended Complaint against Defendant Bean are (1) that he acted with Defendant A. Huff to establish and manage River Falls Investment, LLC and River Falls Equities, LLC, (Amend.Compl.¶ 44); (2) that Defendant Bean received benefits from the Plaintiff's

participation in MMM for which the Plaintiff has not been adequately compensated (*Id.* at ¶ 75); and (3) that Defendant Bean benefitted from Plaintiff's involvement in MMM, to the detriment of Plaintiff, (*Id.* at ¶ 76). As for Plaintiff's declaration, the Court finds that the only allegation of any importance that is based upon sufficient personal knowledge is that Plaintiff owned a 50% interest in MMM during the times relevant to the Complaint. (See Plaintiff's Decl. Against Def. Bean ¶ 5 [DN 38].)

Those factual allegations are insufficient to demonstrate a reasonable nexus between a claim for unjust enrichment and Defendant Bean's status as a manager of two Kentucky corporate entities. Plaintiff argues that these companies were used to funnel money from MMM to Defendant Bean's personal use, however, such allegations are nowhere within the Amended Complaint. The Amended Complaint states that SDH Realty, Inc., and W.A. Huff, LLC were used to funnel money from MMM. (See Amend. Compl. ¶¶ 41–42.) Neither of those entities are or were ever named River Falls Investments, LLC or River Falls Equities, LLC.³ Nor is Defendant Bean alleged to have been involved with those two entities. Quite simply, there are no allegations based upon personal knowledge contained either within the Amended Complaint or Plaintiff's sworn declaration that link Defendant Bean's management of River Falls Investments, LLC or River Falls Equities, LLC to Plaintiff's claim for unjust enrichment. The bare assertions that Plaintiff attempts to link together are insufficient to demonstrate that the Court has personal jurisdiction over Defendant Bean.

³ Plaintiff's Amended Complaint states that River Falls Equities, LLC was at one time titled W. Anthony Huff, LLC. (Amend.Compl.¶ 32.) However, Plaintiff alleges that money was funneled through W.A. Huff, LLC, not through W. Anthony Huff, LLC. (See Amend. Compl. ¶ 42.) These are two separate entities.

ii. Failure to State a Claim

Notwithstanding the Court's lack of personal jurisdiction, the Court finds that the bare assertions contained within the Amended Complaint fail to state a claim upon which relief may be granted. As discussed above, a claim for unjust enrichment requires a plaintiff to demonstrate a "(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Guerin*

v. Fulkerson, — S.W.3d —, 2011 WL 4633090, at *3 (Ky.Ct.App. Oct. 7, 2011).

*14 The factual allegations alleged against Defendant Bean are that he acted with Defendant A. Huff to establish and manage River Falls Investment, LLC and River Falls Equities, LLC and that he received benefits from Plaintiff's participation in MMM. These allegations do not demonstrate sufficient facts upon which the Court could find that Plaintiff is entitled to relief for unjust enrichment. Plaintiff's memorandum opposing Defendant Bean's motion attempts to lump Defendant Bean's actions together with allegations against Defendant A. Huff, and to then cite the portions of the Amended Complaint that speak of "Defendants" actions in a general manner. However, the Court is not persuaded by Plaintiff's attempt to piggy-back claims using Defendant A. Huff, or to use generalities to imply that every Defendant engaged in a specific action. Therefore, the Court finds that the Amended Complaint fails to state a claim upon which relief can be granted. Accordingly, the Court **GRANTS** Defendant Bean's Motion to Dismiss.

C. Huff Farm (Horsebranch) Inc.

Defendant Huff Farm has moved to dismiss Plaintiff's claims of fraud and unjust enrichment. Defendant Huff Farm contends that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted. Plaintiff's Amended Complaint contains the following allegations against Defendant Huff Farm: (1) Defendant Huff Farm made representations of material fact to Plaintiff with the knowledge that they were false and the intent that Plaintiff would rely upon them, which the Plaintiff reasonably did, (Amend.Compl.¶ 65); and (2) Defendant Huff Farm received benefits from the Plaintiff's participation in MMM for which the Plaintiff was not adequately compensated, which was to Plaintiff's detriment, (*Id.* at ¶¶ 75–76).

There are no factual allegations that describe Defendant Huff Farm's involvement in either of these claims. Rather Defendant Huff Farm is included in general recitations of claims against multiple defendants. As discussed above, the plaintiff must provide the grounds for its entitlement to relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff satisfies this standard only when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. Plaintiff's Amended Complaint is

woefully inadequate regarding allegations against Defendant Huff Farm and her claims cannot survive a motion to dismiss.

In her Response to Defendant Huff Farm's motion, as well as the other Defendants' motions, Plaintiff argues that the lack of factual content supporting her claims should not be fatal to her Amended Complaint because her claims fall within the exclusive control doctrine. In support of her argument, Plaintiff cites this Court's opinion in *Union Underwear Company, Inc v. Wilson*, 2005 WL 3307098 (W.D.Ky. Dec. 1, 2005). In *Union Underwear*, the Court found that

*15 [A]n exception to the particularity requirement of Fed.R.Civ.P. 9(b) exists when the relevant facts "lie exclusively within the knowledge and control of the opposing party." *United States ex rel. Wilkins v. State of Ohio*, 885 F.Supp. 1055, 1061 (S.D. Ohio 1995). In such a case, pleading upon information and belief is permissible, although the plaintiff must still plead a statement of facts upon which the belief is based. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 489 (6th Cir.1990). A court should hesitate to dismiss an action when the facts underlying the claim are within the defendant's control, especially when no discovery has been conducted. *Michaels Bldg. Co.*, 848 F.2d at 680.

Id. at *4 (quoting *Beard v. Worldwide Mortg. Corp.*, 354 F.Supp.2d 789, 799 (W.D.Tenn.2005)).⁴ In discussing the exclusive control exception to Fed.R.Civ.P. 9(b), the Sixth Circuit stated that it is "reluctant to amputate [a] plaintiff[s] claim as long as there is a reasonable basis upon which to make out a cause of action from the events narrated in the complaint." *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir.1988).

4 It should be noted that this Court in *Union Underwear* found the exclusive control exception did not apply.

In the instant case, the Court finds that the exclusive control exception does not apply. This exception is intended to save a claim from dismissal under the heightened pleading standard of Rule 9(b). However, as discussed above, Plaintiff's fraud claim against Defendant Huff Farm does not even meet the initial pleading threshold of Rule 8(a). Plaintiff's claim of fraud against Defendant Huff Farm does not make out a cause of action, it simply uses generalities and a formulaic recitation of elements. There is no reasonable basis upon which to make out a cause of action from anything articulated in the Amended Complaint. There are no events narrated

in the Amended Complaint that indicate that there is a reasonable claim against Defendant Huff Farm. Furthermore, the Court finds that Plaintiff has failed to demonstrate that the information necessary to cure her claims is in the exclusive control of the Defendants.

The exclusive control exception was intended to save those claims that appear to have a reasonable basis, but lack the necessary factual support required by [Rule 9\(b\)](#). Plaintiff's fraud claim against Defendant Huff Farm is not such a claim. Therefore, the Court finds that the exclusive control exception does not apply in this case.

Considering the total lack of factual allegations against Defendant Huff Farm contained within the Amended Complaint and the bare formulaic assertion of the elements constituting her causes of action, the Court finds that Plaintiff's claims for fraud and unjust enrichment against Defendant Huff Farms fail to state claims upon which relief can be granted. Therefore, the Court **GRANTS** Defendant Huff Farm's Motion to Dismiss.

D. Leave to Amend

In each of her responsive motions, Plaintiff requests that in lieu of the dismissal of her claims against Defendants Sly, Bean, and Huff Farm, that she be granted leave to amend her complaint. Under [Fed.R.Civ.P. 15\(a\)\(1\)\(B\)](#), a plaintiff may amend her pleading once as a matter of course within 21 days after service of a motion under [Rule 12\(b\)](#). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." [Fed.R.Civ.P. 15\(a\)\(2\)](#). However, a district court may deny a motion to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." [Foman v. Davis](#), 371 U.S. 178, 182 (1962).

*16 In the instant case, the Court notes that Defendant Sly's Motion to Dismiss, based upon [Rule 12\(b\)](#) was filed on June 7, 2011. On June 24, 2011, Plaintiff Amended her Complaint as a matter of course, as permitted under [Rule 15\(a\)](#). However, rather than address the severe deficiencies in her Complaint, which were identified in Defendant Sly's motion to dismiss, Plaintiff made only minor changes in correctly identifying Defendant Huff Farm, LLC's principal place of business. Notwithstanding, the Court finds that

justice requires that Plaintiff be granted leave to amend her Amended Complaint one more time. As Plaintiff failed to tender a Second Amended Complaint to the Court in conjunction with her request, the Court orders her to submit a Second Amended Complaint **NO LATER THAN 20 DAYS** from the entry of this order.

E. Motion for More Definite Statement

Defendants A. Huff, S. Huff, Michele Brown, Anthony Russo, River Falls Investments, LLC, Oxygen Unlimited, LLC, River Falls Equities, LLC, SDH Realty, Inc., W.A. Huff, LLC, and The Huff Grandchildren Trust have moved under [Fed.R.Civ.P. 12\(e\)](#) for a more definite statement. These Defendants contend that the Amended Complaint fails to comply with the pleading standards of [Fed.R.Civ.P. 8\(a\)](#), and that clarification is required so that they may assert good faith responses and mandatory affirmative defenses.

[Rule 12\(e\)](#) states that a motion for more definite statement is proper only if "a pleading to which a responsive pleading is allowed [] is so vague or ambiguous that the party cannot reasonably prepare a response." [F.R.C.P. 12\(e\)](#). A motion for a more definite statement must state the defects in the pleading and the details desired. *Id.* A party, however, may not use a [Rule 12\(e\)](#) motion as a substitute for discovery. [Mitchell v. E-Z Way Towers, Inc.](#), 269 F.2d 126, 132 (5th Cir.1959). Given the liberal pleading standard set forth in [Rule 8](#), [Rule 12\(e\)](#) motions are disfavored. *See id.* At the same time, the Supreme Court has noted that "if a pleading fails to specify the allegations in a manner that provides sufficient notice," then a [Rule 12\(e\)](#) motion may be appropriate. [Swierkiewicz v. Sorema, N.A.](#), 534 U.S. 506, 514 (2002).

The Court finds that the Amended Complaint is too vague on all counts for the Defendants to properly form a responsive pleading. The Defendants have identified the many defects contained within the Amended Complaint and the details desired so that they may formulate a worthwhile response. Therefore, the Court grants the Defendants' motion and orders Plaintiff to address the issues identified by these Defendants in her Second Amended Complaint, which is to be filed no later than 20 days from entry of this order.

F. Motion to Strike

Plaintiff has moved to strike the Defendants Reply to Plaintiff's Response to Defendants' Motion for More Definite Statement. [Fed.R.Civ.P. 12\(f\)](#) provides that upon a motion made by a party, "[t]he court may strike from a pleading

any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” “Because striking a portion of a pleading is a drastic remedy, such motions are generally viewed with disfavor and are rarely granted.” *Watkins & Son Pet Supplies v. Iams Co.*, 107 F.Supp.2d 883, 887 (S.D. Ohio 1999). “The application of this rule, which is in the discretion of the trial judge, should be resorted to only where the pleading contains such allegations that are obviously false and clearly injurious to a party to the action because of the kind of language used or that the allegations are unmistakably unrelated to the subject matter.” *Pessin v. Keeneland Ass'n*, 45 F.R.D. 10, 13 (E.D. Ky. 1968).

*17 Plaintiff contends that substantial portions of the Reply contain improper introduction of new arguments, evidence and issues by the Defendants and that the information is irrelevant and prejudicial. Defendants contend that the portions of the Reply identified by Plaintiff are relevant to rebut Plaintiff's argument that the exclusive control doctrine applies to this case and that Plaintiff has failed to demonstrate any prejudice. The Court agrees with Defendants that the information is relevant and that there is an insufficient showing of prejudice to strike the Reply. Therefore, Plaintiff's Motion to Strike is **DENIED**.

III. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that Defendant Brian N. Sly's Motion to Dismiss [DN 10] is **GRANTED**, without prejudice.

IT IS FURTHER ORDERED that Defendants A. Huff, S. Huff, Michele Brown, Anthony Russo, River Falls Investments, LLC, Oxygen Unlimited, LLC, River Falls Equities, LLC, SDH Realty, Inc., W.A. Huff, LLC, and The Huff Grandchildren Trust's Motion for More Definite Statement [DN 12] is **GRANTED**.

FURTHER that Defendant Thomas Bean's Motion to Dismiss [DN 30] is **GRANTED**, without prejudice.

FURTHER that Defendant Huff Farm (Horsebranch) Inc.'s Motion to Dismiss [DN 34] is **GRANTED**, without prejudice.

FURTHER that Plaintiff Roxann Pixler's Motion to Strike [DN 33] is **DENIED**.

FURTHER that Plaintiff Roxann Pixler's Motion for Extension of Time [DN 36] is **GRANTED**.

FURTHER that Plaintiff file her Second Amended Complaint **NO LATER THAN 20 DAYS** from the entry of this Order.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5597327

TAB 38

75 Va. Cir. 404
Circuit Court of Virginia,
City of Hopewell.

R.M. HARRISON MECHANICAL CORP.

v.

DECKER INDUSTRIES, INC.,
and James River Cogeneration Co.

No. CL08–193.

|

Aug. 28, 2008.

Opinion

W. ALLAN SHARRETT, Judge.

*1 This memorandum opinion is in response to the complaint filed by R.M. Harrison Mechanical Corporation (“R.M.Harrison”) and the subsequent demurrer filed by James River Cogeneration Company (“JRCC”).

For the reasons that follow, the Court sustains the demurrer, with leave to amend.

I. Summary of the Facts

This is a dispute arising out of the construction of a coal-burning cogeneration facility in Hopewell, Virginia. JRCC, lessee of the premises, hired Decker Industries, Inc. (“Decker”) to serve as the general contractor on the project. Decker, in turn, subcontracted with R.M. Harrison to perform millwright and steel fabrication services required on the project. On June 12, 2007, Decker and R.M. Harrison entered into a contract to complete work on a timely and material basis. R.M. Harrison subsequently began work on the project sometime in June 2007 and performed all work required of it under the contract. R.M. Harrison sent several invoices to Decker and made repeated demands for payment, totaling \$24,850.96. Decker failed to pay. As a result, R.M. Harrison filed a complaint against (1) Decker for breach of contract, and (2) JRCC for quantum meruit/unjust enrichment. The relief requested is the same in both claims: judgment for \$24,850.96. R.M. Harrison has obtained a default judgment against Decker, and JRCC filed the demurrer considered here.

II. Questions Presented

(1) Based on the facts pleaded, is there a valid claim for unjust enrichment/quantum meruit relief by plaintiff R.M. Harrison against JRCC, irrespective of any other issues such as adequate remedy at law and preexisting default judgment?

(2) Is the lack of contractual privity between R.M. Harrison and JRCC outcome determinative? In addition, does the express contract between R.M. Harrison and Decker have any bearing on the relationship between R.M. Harrison and JRCC?

(3) Does R.M. Harrison's failure to perfect a mechanic's lien preclude it from pursuing an unjust enrichment claim against JRCC? Is R.M. Harrison's equitable claim barred due to some other adequate legal remedy?

(4) Does R.M. Harrison's default judgment against Decker have any impact on R.M. Harrison's availability of recovery from JRCC?

III. Short Answers

(1) There is not a valid claim for unjust enrichment/quantum meruit relief based on the facts pleaded because the circumstances do not give rise to a reasonable belief by R.M. Harrison that JRCC would ensure R.M. Harrison's compensation.

(2) Lack of contractual privity is not outcome determinative. Privity of contract is not necessary among a subcontractor-plaintiff and owner-defendant, provided that all elements of an unjust enrichment claim are met. Further, an express contract between R.M. Harrison and Decker has no bearing on the relationship between R.M. Harrison and JRCC.

(3) R. M. Harrison's failure to perfect a mechanic's lien does not preclude it from pursuing an unjust enrichment claim against JRCC. The demurrer stage is too early to address such factual considerations as whether an adequate remedy at law existed between the parties.

*2 (4) R. M. Harrison's default judgment against Decker does not have any impact on R.M. Harrison's ability to recover from JRCC, due to the provision for joint liability under the Code of Virginia.

IV. Discussion

“[T]he function of a demurrer is to test only whether the challenged pleading states a cause of action upon which relief can be granted if all the allegations are admitted as true.” *Faulknier v. Shafer*, 264 Va. 210, 214, 563 S.E.2d 755, 758 (2002).

A demurrer tests only the legal sufficiency of the claims stated in the pleading challenged. While a demurrer does not admit the correctness of the pleading's conclusions of law, it “admits the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred.” Thus, the sole question to be decided by the trial court is whether the facts thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant.

Thompson v. Skate America, 261 Va. 121, 128, 540 S.E.2d 123, 126–27 (2001).

(1) *Validity of the Unjust Enrichment Claim Based on the Facts Pleaded, Irrespective of Other Issues*

Ordinarily, when one person renders services for another which are requested and accepted by him, the law creates an obligation, called an implied-in-law contract, on his part to pay a reasonable compensation, unless something in the relationship of the parties indicates otherwise. *Burke v. Gale*, 193 Va. 130, 67 S.E.2d 917, 919 (1951). The crux of a quantum meruit cause of action lies in the unjust enrichment of one party. *Kern v. Freed Co.*, 224 Va. 678, 299 S.E.2d 363, 363–64 (1983). Merely rendering services alone does not create a contract implied-in-law, nor is such a contract implied when one officiously confers benefits upon another. *Weitzel v. Brown–Neil Corp.*, 152 F.Supp. 540, 549 (N.D.W.Va.1957); *United States v. Lias*, 154 F.Supp. 955, 958 (N.D.W.Va.1957). Further, even though the defendant may have benefitted from the plaintiff's services, the latter cannot recover unless he can show sufficient additional facts that imply a promise to pay. *Mullins v. Mingo Lime Co.*, 176 Va. 44, 10 S.E.2d 492, 494–95 (1940).

Unidyne Corp. v. Aerolineas Argentinas, 590 F.Supp. 391, 397 (E.D.Va.1984), *quoted in Shen Valley Masonry, Inc. v.*

S.P. Cahill & Associates, Inc., 52 Va. Cir. 484, 485 (City of Charlottesville, 2000).

“The law will imply a promise to pay for goods received. However, this implied or quasi-contract is based on equitable principles. It rests ‘upon the doctrine that a. man shall not be allowed to enrich himself unjustly at the expense of another’.” *Kern v. Freed Co.*, 224 Va. 680, 299 S.E.2d 363, 364–65 (1983) (citations omitted). “The quasi-contract is a plaintiff's remedy at law when the facts establish that a defendant has been unjustly enriched at the expense of the plaintiff, but where the facts fail to establish that the parties established any form of agreement.” *Nossen v. Hoy*, 750 F.Supp. 740, 744 (E.D.Va.1990); *see also Hitachi Sys. Corp. v. webMethods, Inc.*, 60 Va. Cir. 79, 86 (Fairfax County, 2002).

*3 To establish a claim of unjust enrichment or quantum meruit, a claimant must satisfy three elements: “(1) a benefit conferred on the defendant by the plaintiff; (2) knowledge on the part of the defendant of the conferring of the benefit; and (3) acceptance or retention of the benefit by the defendant *in circumstances that render it inequitable for the defendant to retain the benefit without paying for its value.*” *Centex Constr. v. Acstar Ins. Co.*, 448 F.Supp.2d 697, 707 (E.D.Va.2006) (emphasis added).

The first two elements do not appear to be in dispute here. It seems clear that JRCC received the benefit of R.M. Harrison's work and that JRCC knew the benefit would be conferred upon it.

The third element has given rise to the most litigation. The following has become the test for satisfaction of the third element: “The primary inquiry is ‘whether or not any circumstances had been shown which would reasonably have led the subcontractor to believe that anyone other than the general contractor ... and in particular, that the landowner would pay him for his labor and materials’.” *Sherwin Williams Co. v. Buckingham Associates*, 20 Va. Cir. 83, 84 (Chesterfield County, 1990) (citing Annotation, Building and Construction Contracts: Right of Subcontractor Who Has Dealt Only with Primary Contractor to Recover against Property Owner in Quasi-Contract, 62 A.L.R.3d 288, 294 (1975) (also cited in *Shen Valley Masonry, Inc. v. S.P. Cahill & Associates, Inc.*, 52 Va. Cir. 484, 486 (City of Charlottesville, 2000))).

There is support for this A.L.R. concept from the Supreme Court of Virginia. A plaintiff who brings suit because of some benefit bestowed on defendant, without adducing other facts to raise the implication of a promise to pay for such a benefit,

has no basis for recovery based on quantum meruit. *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 51, 10 S.E.2d 492, 495 (1940). The circumstances of the acceptance or retention of the benefit must render it inequitable for the defendant not to compensate the plaintiff. “The liability to pay for the services is based on an implication of law that arises from the facts and circumstances presented, independent of agreement or presumed intention.” *Po River Water & Sewer Co. v. Indian Acres Club of Thornburg, Inc.*, 255 Va. 108, 114–15, 495 S.E.2d 478, 482 (1998) (citations omitted).

Three cases are most applicable with regard to sustaining or overruling a demurrer based on satisfactory pleading of the third element. In *E.E. Lyons Constr. Co. v. TRM Dev. Corp. and Sizzler Restaurants Int’l, Inc.*, 25 Va. Cir. 352 (Fairfax County, 1991), SRI, the owner, contracted with TRM, the general contractor, to build a Sizzler restaurant. TRM then entered into a subcontract with E.E. Lyons. E.E. Lyons claimed it was never paid and brought suit against SRI under quantum meruit. To the *E.E. Lyons* court, the determinative factor in deciding whether to sustain SRI’s demurrer was whether SRI as the owner had paid the general contractor for the services and materials provided, as the general contractor was the one in contractual privity with E.E. Lyons. *Id.* at 354.

*4 If the owner has paid the general contractor, it is generally concluded that it would not be inequitable for the owner to retain the benefit of the services and materials for which he has paid. If the owner has not paid the general contractor, the Court’s primary inquiry is whether any circumstances have been shown which would reasonably lead the subcontractor to believe that the landowner would pay him for his labor and materials. If such circumstances are shown, a promise on behalf of the owner to pay for the labor and materials provided by the subcontractor is generally implied.

Id. at 354–55.

E.E. Lyons alleged in its complaint that SRI, the owner, remained indebted to the general contractor and that SRI agreed to issue joint checks to the plaintiff-subcontractor and

the general contractor. Thus, the court held that the facts alleged in the complaint “set forth circumstances from which the subcontractor could reasonably have believed that the owner would pay him for his labor and materials.” *Id.* at 355. Thus, the third element was met and the demurrer was overruled.

In *Sherwin Williams Co. v. Buckingham Associates*, 20 Va. Cir. 83 (Chesterfield County, 1990), the court was rather lenient in deciding that the facts and circumstances pleaded by the plaintiff-subcontractor were sufficient to meet the third element. Only a tenuous relationship between the parties was pleaded in the complaint:

Buckingham Associates, through its contract with George W. Kane, Inc., and George W. Kane, Inc., through its subcontract with M.S. SABRA, and M.S. SABRA, through its purchase orders with Sherwin Williams, requested that Sherwin Williams furnish certain paint and associated products for incorporation into the Property, with the understanding that Sherwin Williams expected payment for this material. The paint and associated products supplied by Sherwin Williams to the Property enhanced its value, thereby resulting in substantial benefit to each of the defendants for which they have not paid Sherwin Williams.

Id. at 83–84.

Based on these facts as pleaded, the court overruled the demurrer, holding that “[t]he complaint sufficiently alleges a claim for quantum meruit. Inferences drawn from the alleged relationship among defendants adequately support an ‘implied promise to pay’.” *Id.* at 85.

Lastly, in *Shen Valley Masonry, Inc. v. S.P. Cahill & Associates, Inc.*, 52 Va. Cir. 484, 486 (City of Charlottesville, 2000), Shen Valley, as the subcontractor, sued the University of Virginia (UVA) as the owner on a claim of unjust enrichment arising out of masonry services for a student residence construction project. Cahill was the general

contractor. UVA was not a party to the subcontract between Cahill and Shen Valley, and the contract between UVA and Shen Valley made it clear that UVA only contracted with Cahill. The contract between the owner and the general contractor (*i.e.* UVA and Cahill) contained express language stating that nothing in the contract documents shall create any contractual ownership between UVA and any subcontractor, nor shall it create any obligation on UVA's part to pay for or to see to the payment of any money due to any subcontractor. *Id.* at 485–86. Shen Valley admitted that the contract between Cahill and UVA was incorporated by reference into the subcontract between Shen Valley and Cahill. *Id.* at 486. As a result, the court, in sustaining UVA's demurrer, concluded that “in no way could the terms of Cahill's contract with UVA nor the terms of Cahill's contract with Shen Valley reasonably have led Shen Valley to believe that anyone other than Cahill, and in particular that UVA, would pay them for labor or materials.” *Id.*

*5 In the instant case, the third element has not been satisfied. Even if all facts pleaded in R.M. Harrison's complaint are assumed to be true, the facts are insufficient to support a claim of unjust enrichment. The circumstances as pleaded do not show that R.M. Harrison could reasonably have been led to believe that anyone other than Decker as the general contractor, and in particular that JRCC, would pay it for its labor and materials. *Shen Valley* is inapplicable, as no mention was made in the complaint of the terms of any contract between R.M. Harrison and Decker or Decker and JRCC regarding JRCC's responsibility for ensuring that R.M. Harrison was paid for its services. Unlike in *E.E. Lyons*, R.M. Harrison has pleaded no facts regarding whether JRCC has paid Decker. The *Sherwin Williams* court set a relatively low hurdle for R.M. Harrison to clear to be able to withstand a demurrer: however, the facts as pleaded by R.M. Harrison in its complaint are even less sufficient than those in the *Sherwin Williams* complaint.

R.M. Harrison's complaint states the following facts applicable to the circumstances of the work done and the relationship between R.M. Harrison, Decker, and JRCC:

5. JRCC hired Decker to serve as the general contractor on the Project.
6. Decker, in turn, hired R.M. Harrison to perform millwright and steel fabrication services required on the Portsmouth [sic] Project.

7. Decker and R.M. Harrison entered into a Contract dated June 12, 2007, through one Purchase Order ... to complete work on a time and material basis (“R. M. Harrison/Decker Contract”).

8. R. M. Harrison began work under the R.M. Harrison/Decker Contract on the Hopewell Project in or around June, 2007.

9. R. M. Harrison performed all work as required by contract with Decker and requested payment for its work from Decker....

16. R. M. Harrison furnished Decker labor and materials pursuant to its specific instance and request, said labor and materials have been accepted by Decker, and R.M. Harrison has invoiced Decker in the total amount [of] \$24,850.96....

20. Additionally and alternatively, JRCC has received a benefit for which it has paid no consideration. Upon information and belief, JRCC had knowledge of and/or appreciated the benefits conferred upon it and its property by R.M. Harrison and other services provided by R.M. Harrison *at defendants' request* [emphasis added], which was incorporated into, the Hopewell Property. JRCC has been unjustly enriched, and R.M. Harrison is entitled to be paid by JRCC for the value of its labor, materials, and other services.

The facts pleaded in the complaint, when assumed to be true, show that an express subcontract existed between R.M. Harrison and Decker; however, no contract existed between R.M. Harrison and JRCC. R.M. Harrison performed work as required in its contract with Decker. Decker accepted the labor and materials. The only fact alleged in the complaint which may give rise to a reasonable belief by R.M. Harrison that JRCC would be responsible for payment is in ¶ 20: JRCC had knowledge of and/or appreciated the benefits conferred upon the property by R.M. Harrison and other services provided by R.M. Harrison *at defendants' request*. The possessive plural of defendant is the only aspect that might show that JRCC specifically requested some work and/or materials of R.M. Harrison. Because insufficient circumstances have been shown which reasonably would have led R.M. Harrison to believe that anyone other than Decker, and in particular JRCC, would pay it for its labor and materials, the claim for unjust enrichment fails. Therefore, the demurrer is sustained with leave to amend.

*6 Because R.M. Harrison may indeed amend its complaint, the court

addresses below the other questions presented in the parties' pleadings.

(2) *Lack of Contractual Privity; Existence of an Express Contract*

Privity of contract is not a requirement in a claim for unjust enrichment by a subcontractor against the owner; thus, R.M. Harrison's claim against JRCC cannot be barred for that reason alone. "Virginia law appears to follow the majority approach and will allow recovery on a quantum meruit claim by a subcontractor against an owner with whom he lacks contractual privity provided the essential elements of quasi-contract are established." *E.E. Lyons Constr. Co. v. TRM Dev. Corp.*, 25 Va. Cir. 352, 354 (Fairfax County, 1991) (citations omitted). "The lack of privity of contract between the provider of services and materials to real property and the owner of the real property is not a defense if the essential elements of an unjust enrichment claim are proven." *Sargis & Jones, Ltd. v. Moran Associates, Limited Partnership*, 27 Va. Cir. 57, 61 (Loudoun County, 1992); see also *Sherwin Williams Co. v. Buckingham Associates*, 20 Va. Cir. 83, 84 (Chesterfield County, 1990).

In fact, if an express contract did exist between the subcontractor and the owner, unjust enrichment would not be a valid cause of action, because the existing contract would control the parties' relations. "An express contract defining the rights of the parties necessarily precludes the existence of an implied contract of a different nature containing the same subject matter." *Southern Biscuit v. Lloyd*, 174 Va. 299, 311, 6 S.E.2d 601, 606 (1940), cited in *Hitachi Sys. Corp. v. webMethods, Inc.*, 60 Va. Cir. 79, 86 (Fairfax County, 2002). *Southern Biscuit* dealt with express contracts between the plaintiff and defendant in the case and did not address whether an implied contract can be imposed on one who was not a party to the express contract. *Elegant Homes of Va., Inc. v. Boberski*, 70 Va. Cir. 377, 378 (City of Charlottesville, 2006). Later in 2006, the Eastern District of Virginia also shed light on the issue of express contracts: "Virginia law provides no relief under a quantum meruit theory where a valid, express contract exists between the parties." *Centex Constr. v. Acstar Ins. Co.*, 448 F.Supp.2d 697, 707 (E.D.Va.2006) (emphasis added); see also *United Leasing Corp. v. Resource Bank*, 58 Va. Cir. 96, 103 (City of Richmond, 2002). Thus, it appears that an express contract between other parties involved in the

project has no bearing on the instant parties to a case who did not have an express contract.

The converse must also be true; that is, where there is no express contract between the parties to a quantum meruit claim, Virginia law does provide relief under a quantum meruit theory, provided the elements of such a claim are otherwise satisfied. "It is only in the absence of an express or of an enforceable contract between parties, that the law (whether at law or in equity) will, from circumstances, imply a contract between them." *Ellis & Meyers Lumber Co. v. Hubbard*, 123 Va. 481, 502, 96 S.E. 754, 760 (1918). Therefore, if R.M. Harrison meets the test for an unjust enrichment claim, its lack of contractual privity with JRCC has no bearing and may give rise to such equitable relief.

(3) *Failure to Perfect a Mechanic's Lien; Existence of Other Adequate Remedies at Law*

*7 For a claim of unjust enrichment to stand, the plaintiff must have no adequate remedy at law against the demurring defendant. "The 'unjust' in 'unjust enrichment' refers to the lack of the plaintiff having an adequate remedy at law for any wrong perpetrated on him by the defendant." *Elegant Homes*, 70 Va. Cir. at 378 (quoting *Wright v. Cangiano*, 20 Cir. C15084 (Loudoun County, 1993)) (emphasis in original). If Decker was the party responsible for paying R.M. Harrison, then JRCC did not perpetrate any wrong on R.M. Harrison. The facts as pleaded are unclear and inadequate.

"At the demurrer stage, it is too early to determine whether there is an adequate remedy at law.... Factual matters that may bear on whether there is an adequate remedy at law are to be determined after the demurrer stage." *Id.* (citing *Faulknier v. Shafer*, 264 Va. 210, 216–17, 563 S.E.2d 755, 759 (2002)).

In *Connemara Corp. v. St. Andrews. L.L.C.*, 72 Va. Cir. 289 (Lancaster County, 2006), the court sustained a demurrer to a claim of unjust enrichment because Connemara had slept on its rights by failing to perfect a mechanic's lien. St. Andrews, as owner, contracted with Connemara, as general contractor, to do certain construction work on land purchased by St. Andrews on a secured line of credit from the Bank of Northumberland. Connemara filed a mechanic's lien against the property for its work but failed to perfect it. Subsequently, Connemara sued the Bank on a theory of unjust enrichment for the work it had done on the property on which the Bank had since foreclosed, and the Bank demurred. Without a perfected mechanic's lien against St. Andrews, the owner, Connemara had no security interest in the property. The Bank,

however, had a valid security interest. The court stated that if it were to permit the case to go forward, *i.e.* overrule the Bank's demurrer, it effectively would be allowing a party "who has slept on his rights at law to proceed in equity against another party who has been diligent." *Id.* at 290. Thus, the demurrer was sustained. *Connemara* is distinguishable from the instant case in that *Connemara* was about security interests and priority of lienholders and the Bank did not appreciate any actual benefit from the construction work done by *Connemara*. Thus, while *Connemara* may appear to have been decided based on the plaintiff's adequate remedy at law which it let slip by, it is actually a different situation altogether.

(4) Effect of Plaintiff's Default Judgment Against Decker

R.M. Harrison's default judgment against Decker does not have any impact on R.M. Harrison's ability to recover from JRCC, due to the provision for joint liability under the Code of Virginia:

A judgment against one of several joint wrongdoers shall not bar the prosecution of an action against any or all the others, but the injured party may bring separate actions against the wrongdoers and proceed to judgment in each.... [N]o bar shall arise as to any of them by reason of a judgment against another, or others, until the judgment has been satisfied.

*8 Va.Code Ann. § 8.01-443 (1950).

An injured party may bring separate suits against wrongdoers and proceed to judgment in each, and no bar arises as to any of them *until satisfaction is received*. *Fitzgerald v. Campbell*, 131 Va. 486, 490, 109 S.E. 308, 309 (1921). However, the plaintiff can only enforce one satisfaction for the same injury, and therefore must elect against which of the several wrongdoers he will proceed to execution of the judgment for satisfaction of his damages. *Id.* In applying the Code section above, the Circuit Court of Albemarle County stated that "in actions against joint contractual obligors as well as in actions against joint tortfeasors, judgments against different defendants may be entered at different times." *Hodges v. Perry*, 43 Va. Cir. 340, 344 (Albemarle County, 1997).

In the instant case, R.M. Harrison has suffered only one injury: it has not been paid for the labor and materials it provided. It is alleged that Decker and JRCC both may be to blame. As such, they should be treated as joint wrongdoers. Thus, under the Code and case law, R.M. Harrison as the injured party may bring separate suits against Decker and JRCC and proceed to judgment in each. Until R.M. Harrison seeks to enforce its judgment against Decker, it is free to pursue a judgment against JRCC.

V. Conclusion

Based on the facts pleaded in the complaint, R.M. Harrison does not have a valid claim for unjust enrichment/quantum meruit relief. The circumstances alleged do not give rise to a reasonable belief by R.M. Harrison that JRCC would see to its compensation. Thus, the demurrer is sustained, with leave to amend. The other questions presented through the pleadings were addressed in anticipation of R.M. Harrison taking advantage of the leave to amend granted herein.

The fact that JRCC and R.M. Harrison are not in privity of contract has no bearing; likewise, neither does the fact that an express contract existed between Decker and JRCC or Decker and R.M. Harrison.

In addition, R.M. Harrison's failure to perfect a mechanic's lien does not preclude it from pursuing an unjust enrichment claim against JRCC. The demurrer stage is too early to address such factual considerations as whether an adequate remedy at law existed between the parties.

Lastly, R.M. Harrison's default judgment against Decker does not have any impact on R.M. Harrison's ability to recover from JRCC, due to the provision for joint liability under the Virginia Code. JRCC and Decker are allegedly joint wrongdoers, both contributing to the single injury to R.M. Harrison, that is, that it has not been paid for labor and materials provided.

The demurrer is sustained with leave to amend. It is so ordered. Endorsement of the order by counsel is waived pursuant to Rule 1:13.

All Citations

Not Reported in S.E.2d, 75 Va. Cir. 404, 2008 WL 10669311

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 39

2018 WL 2431690

419 P.3d 702 (Table)

Unpublished Disposition

This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing. Supreme Court of Nevada.

The REGENT AT TOWN CENTRE
HOMEOWNERS' ASSOCIATION, a
Nevada non-profit corporation, Appellant,
v.

OXBOW CONSTRUCTION, LLC, a Nevada
limited liability company, Respondent.

The Regent at Town Centre
Homeowners' Association, a Nevada
non-profit corporation, Appellant,
v.

Oxbow Construction, LLC, a Nevada
limited liability company, Respondent.

No. 69777, No. 70296

FILED MAY 24, 2018

Attorneys and Law Firms

Fenton Grant Mayfield Kaneda & Litt, LLP

Koeller Nebeker Carlson & Haluck, LLP/Las Vegas

*ORDER AFFIRMING IN PART,
REVERSING IN PART AND REMANDING*

*1 These are consolidated appeals from a district court grant of summary judgment and post-judgment award of costs in a construction defect action between a homeowners' association and the general contractor of the property. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Appellant, The Regent at Town Centre Homeowners' Association (Association), brought claims against respondent Oxbow Construction LLC for breach of express warranty, breach of implied warranty, and negligence relating to the construction of The Regent at Town Centre (Town Centre). Oxbow argued, and the district court agreed, that no warranties existed between Oxbow and the Association and that various agreements waived the Association's claims. As such, the district court granted summary judgment in favor of

Oxbow, and awarded Oxbow costs and expert witness fees. We reverse the district court's grant of summary judgment on the Association's negligence claim and the award of costs and expert fees, affirm summary judgment on the Association's breach of express warranty and breach of implied warranty claims, and remand for further proceedings consistent with this order.

We review a grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute and that the moving party is entitled to judgment as a matter of law. *Id.* Further, we review "questions of statutory interpretation, such as interpretation of NRS Chapter 40, de novo." *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426–27 (2007).

Negligence

The Association brought a negligence claim under NRS Chapter 40, which recognizes liability for general contractors who are responsible for construction defects in a new residence. See NRS 40.640. In *Oxbow Construction, LLC v. Eighth Judicial District Court*, 130 Nev., Adv. Op. 86, 335 P.3d 1234, 1242 (2014) (*Oxbow I*), this court recognized that the Association can pursue a construction defect claim for negligence on behalf of itself and individual unit owners for "construction defects in limited common elements assigned to multiple units in a common building, [as long as] the building in question contains at least one unit that is a 'new residence.'"

However, under NRS 40.640(5), a construction defect claim is waived if the defect was disclosed prior to the owner's purchase of the property and "the disclosure was provided in language that is understandable and was written in underlined and boldfaced type with capital letters." A disclaimer that uses vague language or merely states "that certain defects 'may' exist and list[s] a number of potential defects" is not a valid disclosure. *Westpark Owners' Association*, 123 Nev. at 361 n.37, 167 P.3d at 429 n.37.

Here, there are three agreements that purport to disclaim Oxbow's liability and/or waive the Association's claim: (1) the purchase and sale agreement between El Capitan and Regent II; (2) the individual purchase and sale agreements between Regent II and individual unit owners; and (3)

2018 WL 2431690

the Declaration of Covenants, Conditions, and Restrictions (CC&Rs) for Town Centre. The individual purchase agreements and the CC&Rs reference and incorporate the Swainston Report and its list of defects.

*2 We need not address whether the purchase and sale agreement between El Capitan and Regent II is binding on the Association, as it does not meet the requirements for waiver under [NRS 40.640\(5\)](#). The purchase and sale agreement between El Capitan and Regent II is in regular typeface, and uses general language rather than specifically disclosing any defects at Town Centre. Similarly, the individual purchase agreements between Regent II and the individual unit owners do not meet the content requirement of [NRS 40.640\(5\)](#). Although the individual purchase agreements purport to disclose the “Current Conditions of Property” that “may include, but are not limited to such conditions as” and then lists a variety of defects, this language is nearly identical to a disclaimer previously held insufficient under NRS Chapter 40, *See Westpark*, 123 Nev. at 361 n.37, 167 P.3d at 429 n.37 (“Here, the waivers did not disclose any constructional defects; they stated only that certain defects ‘may’ exist and listed a number of potential defects. This vague language was not sufficient to waive any claims pursuant to NRS Chapter 40.”). Therefore, the purchase and sale agreement for Town Centre, as well as the individual unit owner’s purchase agreements,¹ do not meet [NRS 40.640\(5\)](#)’s requirements and cannot waive the Association’s negligence claim under NRS Chapter 40.

¹ The disclaimer in the main text of the individual purchase agreements is invalid under [NRS 40.640\(5\)](#). However, the individual purchase agreements incorporate the Swainston Report through an addendum, which does adequately disclaim various defects at Town Centre. But, because the Association has represented that it is not bringing claims on behalf of individual unit owners for defects in individual units, the CC&Rs’ incorporation of the Swainston Report is more applicable to the Association’s claims in this case.

Conversely, the limitations in the CC&Rs for Town Centre do bind the Association. *See Pinnacle Museum Tower Ass’n v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1221 (Cal. 2012) (holding that an arbitration clause in CC&Rs was binding on the homeowners’ association, even though the association did not exist as an independent entity when the CC&Rs were drafted and recorded); *see*

also NRS 116.2105(2) (“The declaration may contain any other matters the declarant considers appropriate.”). Oxbow, as a third-party beneficiary of the CC&Rs, has standing to enforce any waivers included in the CC&Rs. *See 20 Am. Jur. 2d Covenants, Conditions & Restrictions § 46 (2015)* (“[N]onparties to a transaction may nevertheless be the intended beneficiary of a covenant and thereby gain standing to enforce it.”) (footnote omitted). And although the CC&Rs do not include a disclosure of specific defects, they do incorporate the Swainston Report by reference. *See PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1201 (2nd Cir. 1996) (“[A] paper referred to in a written instrument and sufficiently described may be made a part of the instrument as if incorporated into the body of it.”) (quoting *Jones v. Cunard S.S. Co.*, 263 N.Y.S. 769, 771 (App. Div. 1933)).

El Capitan and Regent II enlisted the Swainston Consulting Group to do an analysis of Town Centre for construction defects, and Swainston issued a report concluding that there were various defects and violations at the property. The Swainston Report was issued prior to Regent II’s purchase of Town Centre, and before the creation of the Association through the CC&Rs. The Swainston Report affirmatively concludes that there are various defects at Town Centre:

The Regent at Town Cent[re] project was designed and constructed as an apartment project in general conformance with the standard of the industry that was in place at the time of original construction. Many technical deviations exist between the as-built condition and the requirements of the building codes and other applicable standards. While these deviations typically represent technical defects some of them are relatively minor in nature. Other deviations will require remedial measures and, as maintenance continues to be deferred, the impact of these deviations will increase accordingly.

(original in underlined typeface).

This conclusion, in conjunction with 21 pages detailing the defects at Town Centre in bold, all capital, underlined

2018 WL 2431690

typeface, distinguishes the Swainston Report from the conditional language that is inadequate under *Westpark*, and notified the Association that specific construction defects existed at Town Centre. Further, the Association's claims are for defects in the limited common areas of Town Centre, as opposed to claims regarding individual units on behalf of individual unit owners. Therefore, the general language in the Swainston Report—that the list includes defects common to the project as a whole—does not necessarily prevent disclosure of defects in limited common areas; that is, while a list of defects common to the project as a whole would not disclose defects in individual units, it may include defects in common elements or limited common elements. However, the actual overlap between the defects for which the Association brings claims and the disclaimers in the Swainston Report is not clear on the record or briefing before us.

*3 We reject Oxbow's contention, and the district court's determination, that the various agreements in this case provide a complete disclaimer for any negligence by Oxbow in the construction of Town Centre. NRS 40.640(5) provides for no such blanket disclaimer, but instead requires that each defect be disclosed in understandable language prior to the purchase of the new residence. The record requires further development to determine the specific defects in the limited common areas for which the Association brings its negligence claim. To the extent any of the alleged defects not mentioned in the Swainston Report is in a limited common area assigned to a new residence, summary judgment was not appropriate. Similarly, to the extent a defect listed in the Swainston Report was too vague or equivocal to disclose the particular defect, summary judgment was not appropriate on the Association's negligence claim for construction defect. On the record and briefing before us, we are unable to make such determinations.

As there is a genuine dispute of material fact as to whether the Swainston Report discloses each defect for which the Association makes a claim, we remand this case to the district court for further proceedings to determine the specific defects for which the Association brings claims, and which of those are waived by adequate disclosure in the Swainston Report.

Expert witness fees

The district court awarded \$40,274.47 in litigation costs, plus \$103,067 in expert witness fees, to Oxbow as the prevailing party below. As we reverse summary judgment on the Association's claim for negligence, we also reverse the award of costs and expert witness fees. See *Bayerische*

Motoren Werke Aktiengesellschaft v. Roth, 127 Nev. 122, 142, 252 P.3d 649, 662 (2011).

Breach of express warranty

The district court appropriately determined that there was no contractual privity between Oxbow and the Association that would create an express warranty. In addition, no express warranties were created or transferred under NRS Chapter 116.

NRS 116.4113 sets forth the ways in which an express warranty can be created between a seller and a purchaser, and then transferred to subsequent purchasers. See NRS 116.4113 ("Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows...."). The plain language of NRS 116.4113 requires that the creation of an express warranty be made by a seller to a purchaser. See *Westpark*, 123 Nev. at 357, 167 P.3d at 427 ("When the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning."). Because Oxbow was the general contractor of Town Centre, and never its seller, the district court correctly determined that no express warranties were created by Oxbow under NRS 116.4113.

The Association argues that, under NRS Chapter 116, an affiliate is responsible for the express warranties made by the declarant of a common-interest community, and, therefore, Oxbow is liable for express warranties made by El Capitan Associates to the Association. As support for this assertion, the Association cites to NRS 116.3104(2)(b). But this statutory provision does not support the Association's argument, because NRS 116.3104(2)(b) only holds affiliates jointly liable for a declarant's obligations if the affiliate succeeds in interest to the special declarant's rights. Here, the parties dispute whether and to what extent El Capitan and Oxbow have overlapping members and control of one another such that Oxbow is the affiliate of El Capitan, but it is undisputed that Oxbow did not succeed to any special declarant's rights involving Town Centre. As a result, NRS 116.3104(2)(b) will not extend liability to Oxbow for express warranties that were made by El Capitan in the development of Town Centre. We also reject the Association's general contention that the affiliate of a declarant is liable for express warranties made by the declarant under NRS Chapter 116. Therefore, the dispute regarding Oxbow's affiliate status is not material to the outcome of the claim for breach of express warranty, because the Association's interpretation of NRS Chapter 116 is incorrect as a matter of law. Accordingly,

2018 WL 2431690

we affirm summary judgment on the Association's claim for breach of express warranty.

Breach of implied warranty

*4 The Association's breach of implied warranty claim fails for similar reasons. *NRS 116.4114* provides that any declarant or dealer impliedly warrants that a residence will be free from construction defects. *See NRS 116.033* (A dealer is "a person in the business of selling units for his or her own account"). But, again, Oxbow was the general contractor of Town Centre; Oxbow was never a dealer or declarant, and never succeeded to any special declarant rights. The district court also properly determined there was no privity of contract between the Association and Oxbow. *See Long v. Flanigan Warehouse Co. & Inland Ladder Co.*, 79 Nev. 241, 246, 382 P.2d 399, 402 (1963) ("Where the parties to the law suit are not the immediate buyer and seller the weight of authority is that such lack of contractual privity will bar recovery on an implied warranty theory.") As such, the Association has no viable theory of breach of implied warranty by Oxbow, and we therefore affirm summary judgment on the Association's breach of implied warranty claim.

Summary judgment without further discovery

We also reject the Association's argument that the district court exceeded its authority by granting summary judgment without further discovery, even though a previous judge determined that further discovery was needed to resolve Oxbow's affiliate status.

Generally, a district court judge's decision in a case becomes the "law of the case" and cannot be overruled by a coequal, successor judge. *See Sittner v. Big Horn Tar Sands & Oil, Inc.*, 692 P.2d 735, 736 (Utah 1984) ("[T]he doctrine of 'law of the case' has evolved to avoid the delays and difficulties that arise when one judge is presented with an issue identical to one which has already been passed upon by a coordinate judge in the same case"); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (explaining that "law of the case" "merely expresses the practice of courts generally to refuse to reopen what has been decided"). Adherence to the law-of-the-case is a doctrine of self-restraint, however, and not a jurisdictional limitation. *See Moore v. City of Las Vegas*, 92 Nev. 402, 405,

551 P.2d 244, 246 (1976) (reviewing a judge's reconsideration of a prior judge's ruling in the same case for abuse of discretion); *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 217–18, 606 P.2d 1095, 1096–97 (1980) (upholding a district court's grant of summary judgment after a previous denial of the same motion when the judge became more familiar with the case and was persuaded by newly cited authority). Thus, the holding in *Rohlfing v. Second Judicial District Court* is not applicable under these circumstances. 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) ("The district courts of this state have equal and coextensive jurisdiction; therefore, the various district courts lack jurisdiction to review the acts of other district courts.").

Here, the Association initially moved for declaratory relief from Judge Earl on the issue of whether Oxbow and El Capitan had an affiliate/declarant relationship. Oxbow, on the other hand, moved for Judge Wiese to grant summary judgment. In granting summary judgment, Judge Wiese did not make a determination as to the affiliate/declarant relationship, but instead held that Oxbow is not responsible for warranties under the statutory scheme because it is not a seller. Thus, Judge Wiese did not rule on the affiliate/declarant issue, which a previous judge had determined required further discovery, but instead viewed the issue in a different light. *See Sittner*, 692 P.2d at 736 (recognizing that a "second judge may reverse the first judge's ruling if the issues decided by the first judge are presented to the second judge in a 'different light' "). Therefore, the district court did not err in granting summary judgment, as the Association contends, on the basis that it exceeded its authority by considering Oxbow's motion for summary judgment.

*5 We therefore,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

All Citations

419 P.3d 702 (Table), 2018 WL 2431690

TAB 40

2001 WL 34010613

2001 WL 34010613

Only the Westlaw citation is currently available.

United States District Court, D.
South Carolina, Beaufort Division.

David ROSMER, on behalf of himself
and as a class representative, Plaintiff,

v.

PFIZER, INC., Defendant.

No. CIV.A. 9:99-2280-18RB.

|

March 30, 2001.

Attorneys and Law Firms

Daniel Alvah Speights, Robert N Hill, Amanda G. Steinmeyer, Speights and Runyan, Hampton, Howard Hammer, Hammer Hammer Carrigg and Potterfield, Columbia, for David Rosmer, on behalf of himself and as class representative, plaintiff.

Michael Tucker Cole, Jane Thompson Davis, Jeanne M Lyles, Nelson Mullins Riley and Scarborough, Charleston, David Klingsberg, Bert L Slonim, Kaye Scholer Fierman Hays and Handler, New York, NY, for Pfizer Inc, defendant.

ORDER

NORTON, District J.

*1 Plaintiff's Motion for Conditional Class Certification for his medical monitoring claim is before me for resolution. Both Plaintiff and Defendant have briefed their positions. Thus, the matter is ripe for disposition.

This case concerns Plaintiff's allegations that he contracted hepatitis as a result of his use of oral Trovan, a prescription antibiotic designed by Defendant. Plaintiff's Complaint alleges that Defendant failed to adequately warn of the antibiotic's risk of liver toxicity and improperly designed the drug to be sold through retail pharmacies to a class of persons in non-limb and non-life threatening circumstances. Plaintiff further asserts that those who used the antibiotic have incurred and will incur the cost of obtaining periodic medical screening to diagnose and monitor their health. As a remedy, Plaintiff seeks, in part, that Defendant be ordered to contribute to a facility to be operated under court supervision to defray the

costs of future medical monitoring services for the members of the putative class. Accordingly, Plaintiff asks the court to conditionally certify a Federal Rule of Civil Procedure 23(b)(2) class limited to Plaintiff's claim for injunctive relief in the form of a medical monitoring facility. Defendant opposes the motion.

Rule 23(a) sets forth the threshold requirements applicable to all class actions: 1) that the class is so large that joinder of all members is impracticable (known as the "numerosity" factor); 2) that there exists questions of law or fact common to the class (or "commonality"); 3) that the named party's claims or defenses are typical of the class ("typicality"); and 4) that the named representative will fairly and adequately protect the interests of the class ("adequacy"). *Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). In addition to satisfying the Rule 23(a) prerequisites, a party seeking class certification must also show that the action may be maintained under the provisions of Rule 23(b). Rule 23(b)(2)¹ permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Plaintiff, as the moving party, bears the burden of proving that the requirements of certification have been met. *Windham v. American Brands, Inc.*, 565 F.2d 59, 65 n. 6 (4th Cir.1977). See also, *In Re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6th Cir.1996). Unless all of the foregoing have been satisfied, the court should not certify the class. *In Re American Medical Systems*, 75 F.3d at 1079.

¹ As Plaintiff here has expressly limited his motion to Rule 23(b)(2), I shall not address the provisions under subsections (1) or (3).

In evaluating Plaintiff's motion, the court should accept the putative class representative's allegations as true but should also go beyond the pleadings to the extent necessary to understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). In other words, the court must give "serious consideration" to each factor before concluding that a particular requirement has been met, including looking beyond the pleadings where necessary. *In re American Medical Systems*, 75 F.3d at 1082. Here, the parties were permitted to engage in discovery on class issues and have supplied the court with portions of deposition testimony, as well as documentary evidence in support of their respective positions, all of which have been taken into consideration.

The ultimate decision as to whether class certification is appropriate, however, may not be based on an evaluation of the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Rather, the court should also consider that under Rule 23(c)(1), class certification may be conditional (as is the request for certification here) and must be revisited as the litigation progresses to determine whether, in light of the emerging facts, Plaintiff continues to sustain his burden.

*2 Prior to engaging in any analysis, however, the first step in the process is to define the nature of the class Plaintiff seeks to certify. Plaintiff identifies the class members as those persons whose use of Trovan was “not warranted” according to the FDA. Presumably, this means that the purported class would consist of those persons who were prescribed the drug during the time period in which Plaintiff contends Defendant failed to adequately warn of the risk of liver toxicity and when the drug was being sold through retail pharmacies to persons with non-limb and non-life threatening circumstances. It appears that Defendant first started marketing Trovan for sale in United States pharmacies in February of 1998. Thereafter, on June 9, 1999, the Food and Drug Administration (FDA) issued a Public Health Advisory finding that the drug should be reserved for use in patients with serious, life or limb threatening infections who receive their initial therapy in an in-patient care facility. On July 20, Defendant issued an “Important Drug Warning” notifying health care professionals of an increased drug warning consistent with the FDA assessment. Thus, the class should reasonably be structured around this February 1998 to July 1999 time period. (The actual parameters will, of course, remain a question of fact based on issues such as when the warnings were received and when it is reasonable to find that health care professionals acted in accordance with the warnings.) The ultimate point for our purposes here is that the class is expected to address persons who were prescribed the drug during a finite time period. If Plaintiff is seeking a broader class, he does not set forth any argument supporting this assertion. In addition, I must assume that this class is meant to encompass all users of the medication within the United States, as Plaintiff makes no mention of limiting the class to South Carolinians or those who were prescribed or purchased the medication in this state. Therefore, my analysis will assume that the nationwide class Plaintiff seeks to have certified concerns a limited time period and involves not every person who consumed the drug but rather only those for whom its prescription was “not warranted.”

Before moving on next to an evaluation of the individual factors to be proven to support class certification, it is perhaps best to discuss Plaintiff's chief complaint which overshadows the analysis of several of the elements. Plaintiff has cried foul concerning his perception that Defendant has switched horses midstream on some of the issues relevant to class certification on which it took an opposing view in seeking to maintain federal diversity jurisdiction. In defending against Plaintiff's motion to remand, Defendant put forth several factual assertions and legal arguments pertaining to the class claim, some of which were accepted by Judge Blatt in his July 6th Order denying Plaintiff's motion. Specifically, in order to support its assertion that the putative class member's claims should be aggregated in order to satisfy the amount-in-controversy, Judge Blatt adopted Defendant's assertions that the medical monitoring relief sought was injunctive in nature and that the class member's interest therein was a “common and undivided” one. Plaintiff argues that Defendant should be judicially estopped from changing its position on these issues.

*3 “Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process.” *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir.1996)(quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28–29 (4th Cir.1995)). Certain elements must be met before courts will apply judicial estoppel. *Id.* First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation and the position sought to be estopped must be one of fact rather than of law or legal theory. *Lowery*, 92 F.3d at 224. Next, the prior inconsistent position must have been accepted by the court as part of a final disposition. *Id.* Finally, the party must be found to have “intentionally misled the court to gain unfair advantage.” *Id.* (quoting *Tenneco Chemicals, Inc. v. William T. Burnett & Co., Inc.*, 691 F.2d 658, 665 (4th Cir.1982)). Plaintiff does not begin to undertake this analysis; rather, Plaintiff proposes what is more akin to the “law of the case” doctrine, which applies to maintain a consistent ruling of law throughout subsequent stages in the same case. *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir.1999). The law of the case doctrine is not an absolute bar but rather is a discretionary limit or rule of practice. *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir.1986). This is so because as a matter progresses the natural developments of continued discovery “often provide a much improved foundation for deciding the same issue.” 18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE 2d:

Jurisdiction § 1478, at 794 (1981). Plaintiff has not provided any discussion of this doctrine either.

Nonetheless, a thorough analysis under either doctrine is unnecessary at this point because there is no need to disturb Judge Blatt's findings that the relief sought by the class is primarily injunctive in nature and that there can be found to exist a common, undivided interest among members of the putative class in a medical monitoring facility.² The parameters of "common" and "undivided" as found by Judge Blatt while examining jurisdiction, however, as compared to the more detailed analysis required now are different, even if some of the terminology is the same. Although the parties' earlier discourse touched upon some issues pertaining to the nature of the class, Judge Blatt was not undertaking the ultimate determination of whether class certification was proper. Rather, while considering the jurisdictional issues, Judge Blatt was, as a matter of course, required to assume that a class was properly certifiable. See *Gilman v. Wheat, First Securities, Inc.*, 896 F.Supp. 507, 509 (D.Md.1995) (cited in Plaintiff's Reply in Support of Motion to Remand at 4). His findings then cannot be said to be based on the merits of class certification any more than my decision here shall be based on an evaluation concerning the merits of the case, although I must consider facts which may touch on the merits.

2 The court nonetheless empathizes with Plaintiff's frustration with the seemingly suspect nature of a party proceeding with a quasi-factual position when it suits its desire to keep the case in the federal court's jurisdiction and then promoting the opposite claim when attempting to defeat class certification. Should I find that a legal position is being advanced in this manner, the law of the case doctrine would aid in preventing this inherent fraud upon the court. Plaintiff must be cautioned, however, that some of the positions he took in opposing jurisdiction are in some degree incongruous with his current position as well. Ultimately, the very nature of advocacy coupled with the limits of the language often result in such a seemingly apparent conflict. Fundamentally, however, Judge Blatt's ultimate finding that federal jurisdiction in this matter is appropriate has had no impact on this court's decision with regard to class certification.

*4 In attempting to hold Defendant to its "previous position," Plaintiff paints with a too broad brush. A determination made at such an early stage should be

considered narrowly rather than liberally interpreted to encompass matters (both legal and factual) not actually before the court during its initial determination. Judge Blatt found a common, undivided interest; he did not make findings as to numerosity, typicality, adequacy or cohesiveness to the extent required under Rule 23(a) and (b). To hold otherwise at this stage would be to shirk this court's duty to give "serious consideration" to each factor before concluding that a particular requirement has been met. *In re American Medical Systems, Inc.*, 75 F.3d at 1082. Therefore, with this in mind, I will look now to the Rule 23(a) factors relevant to my decision.

Plaintiff must first demonstrate that the purported class is so large that joinder of all members is impracticable. Whether the numerosity prong is met depends on the court's practical judgment, given the facts of the particular case. See *General Tel. Co. of the Northwest, Inc. v. E.E.O.C.*, 446 U.S. 318, 330 (1980). Plaintiff need not state a number with specificity; a good faith estimate is ordinarily sufficient. 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE 2d § 1762, at 153. In the Fourth Circuit this requirement has been found to have been met with as few as 18 class members. See *Cypress v. Newport News General and Nonsectarian Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir.1967).

Here, Plaintiff asserts that an estimated 2.5 million prescriptions were written for Trovan from the time Defendant began marketing the drug in the United States in February 1998 until the FDA limited the antibiotic's use in June of 1999. Of these, Plaintiff asserts approximately 140 cases of hepatic adverse events such as his have been documented. In addition, Plaintiff contends that around 300,000 prescriptions are currently written each month for the drug. Within this recitation of numbers, however, Plaintiff does not make any attempt to estimate how many of these prescriptions were written for persons whose use of the drug was "not warranted." Plaintiff maintains nonetheless that at least 2.5 million people were "potentially affected" during the pre-FDA warning time period and that this number is sufficient to meet the numerosity prong.

This assertion, however, is simply not adequate. As Defendant points out, the important number for our purposes here is the number of those who could have been injured by the challenged practices. *Holsey v. Armour & Co.*, 743 F.2d 199, 217 (4th Cir.1984). Thus while Plaintiff need not identify the number of persons whose injuries have been detected, he should provide a reasonable estimate of the

number of those who are believed to have been affected by the “challenged practices,” or, in other words, received the medication under conditions in which it was “not warranted.” After all, Plaintiff’s Complaint cannot be read to say that the distribution of the medication was legally improper under any and all circumstances. Rather the claim is limited to those situations in which it was administered to persons with non-life and non-limb threatening infections or who were prescribed the drug without physician supervision. One who suffered an adverse effect after taking the drug for a life-threatening infection while under in-patient observation by his physician would not, presumably, be a member of the putative class as defined by the Complaint. Accordingly, as Plaintiff has supplied no information in this regard, I cannot find that he has sustained his burden concerning the numerosity factor.³

³ In addition, although each person whose use of the drug was “not warranted” may have a common, undivided interest in a medical monitoring facility, determining from the onset who would properly be included in that class presents major hurdles. As far as I can determine, some type of evidentiary hearing will be required in order to untangle the subjective issues as to whether each potential member of the class was threatened with a life or limb-threatening infection at the time of his prescription and whether he was being monitored by his physician in a manner consistent with the FDA’s warnings. In the court’s view, given Plaintiff’s estimate that the class potentially involves 2.5 million people, this situation presents a logistical chimera for which Plaintiff has not provided a workable solution.

*5 In addition, Plaintiff has also failed to sustain his burden to demonstrate that he will adequately represent the class. In order to be an adequate class representative, a named plaintiff must not have claims which are antagonistic to or in conflict with those of the other class members and must have sufficient interest in the outcome of the case to ensure vigorous advocacy. See *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 527 (N.D.Ill.1998). A fundamental flaw with Plaintiff proceeding to represent a medical monitoring class is the fact that South Carolina has not recognized a cause of action for medical monitoring. Plaintiff blithely waives off any challenge on this point by stating that to the extent variations exist in the state

laws concerning this claim they can be addressed with subclasses. Reply Brief at 14. Plaintiff, however, has failed to undertake the detailed analysis of the differences among the various jurisdictions to aid the court in determining what these subclasses might be. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 742 (5th Cir.1996) (finding that court erred in failing to consider state law variations and their effects on class concerns); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (U.S.App.D.C.1986) (holding that nationwide class action movants must credibly demonstrate, through extensive analysis of state law variances, that class certification does not present insuperable obstacles.). See also, *Ball v. Joy Technologies*, 958 F.2d 36, 39 (4th Cir.1991) and *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W.Va.1999)(illustrating the variations of the interpretation of the cause of action simply within the Fourth Circuit). I cannot simply rely on counsel’s assurances that any problems on this point can be overcome. See *Castano*, 84 F.3d at 741.

Even if I were to reserve decision as to subclasses until a later time, however, the fundamental flaw with Plaintiff’s representation of the class is the fact that Plaintiff could not himself be eligible for the recovery sought. As such, he cannot be said to have sufficient interest in the outcome; neither he nor any of his neighbors in South Carolina, for that matter, could benefit from the monitoring facility. Simply put, he has failed to demonstrate that he has a legal interest sufficient to proceed on this cause of action. Nor can Plaintiff cure this infirmity by arguing that his inadequacy is immaterial because the court can allow an alternate plaintiff to serve as the class representative. While a “different case would be presented if the District Court has certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives,” to even conditionally certify a class when the named party’s inadequacies are apparent from the onset would constitute plain error. *Falcon*, 457 U.S. at 156; *East Texas Motor Freight*, 431 U.S. at 403.

Accordingly, IT IS ORDERED that Plaintiff’s motion to certify a medical monitoring class be DENIED.

*6 AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2001 WL 34010613

2001 WL 34010613

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 41

2011 WL 2328071

2011 WL 2728051

Only the Westlaw citation is currently available.

United States District Court, D.
South Carolina, Charleston Division.

Nathaniel SALLEY and Joseph Salley,
as Personal Representatives of the
Estate of Annie Salley, Plaintiffs,

v.

HEARTLAND-CHARLESTON OF HANAHAN,
SC, LLC, d/b/a Center-Charleston; HCR
Manorcare, Inc.; Manor Care, Inc.; Manor Care of
America, Inc.; [HCR Manorcare Medical Services
of Florida, LLC](#); the Carlyle Group, Defendants.

Civil No. 2:10-cv-00791.

|

July 12, 2011.

Attorneys and Law Firms

[Dwayne M. Green](#), [Ian S. Ford](#), [Jonathan A. Wallace](#), Green
Ford and Wallace, Charleston, SC, for Plaintiffs.

[Brian Edward Johnson](#), [Elloree A. Ganes](#), [Molly Agnes Hood
Craig](#), [Robert H. Hood](#), Hood Law Firm, Charleston, SC, for
Defendants.

ORDER[DAVID C. NORTON](#), Chief Judge.

*1 This matter is before the court on defendants' motion for summary judgment. For the reasons set forth below, the court grants defendants' motion for summary judgment for all claims against Manor Care, Inc. and HCR ManorCare, Inc.. The court also grants summary judgment to Heartland-Charleston of Hanahan, SC, LLC ("Heartland") on plaintiffs' professional malpractice and negligence per se claims and their request for punitive damages but denies summary judgment on plaintiffs' breach of contract and alternative negligence claims. Plaintiffs have agreed to dismiss their breach of fiduciary duty claim and all claims against HCR ManorCare Medical Services of Florida, LLC.

I. PROCEDURAL BACKGROUND

On February 19, 2010, plaintiffs, Nathaniel Salley and Joseph Salley, as the personal representatives of the estate of Annie Salley ("Mrs. Salley"), sued defendants in state court as a result of defendants' care for and the subsequent death of Mrs. Salley. Plaintiffs asserted the following causes of action: (1) negligence and negligence per se; (2) wrongful death; (3) survival right of action; (4) breach of fiduciary duty and misrepresentation; and (5) breach of contract. Defendants removed this case to federal court on March 29, 2010, based on diversity jurisdiction. This court dismissed all claims against The Carlyle Group for lack of personal jurisdiction on December 10, 2010.

II. FACTUAL ALLEGATIONS

Mrs. Salley was a resident of Heartland nursing home from December 2, 2008 until January 1, 2009. Plaintiffs contend that upon admission, Heartland was informed that Mrs. Salley was a fall risk and that her physical condition required assistance in toileting. Heartland nurses' records also indicate that Mrs. Salley required "extensive assistance" in toileting. On December 11, 2008, she fell while alone in her restroom at Heartland. Defendants were supposed to assist Mrs. Salley with toileting, feeding, transferring, and with her mobility. On days both before and after Mrs. Salley's fall, Heartland Assisted Daily Living ("ADL") records fail to indicate that assistance was given to Mrs. Salley in some of these areas.

On January 25, 2009, Mrs. Salley was hospitalized at the Medical University of South Carolina ("MUSC"). She died of a [subdural hematoma](#) on February 1, 2009. MUSC neurologist Dr. Ian Johnson treated Mrs. Salley and believes that the [subdural hematoma](#) resulted from her fall at Heartland.

III. STANDARD OF REVIEW

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [Fed.R.Civ.P. 56\(a\)](#). When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, the burden for summary judgment may be discharged by pointing out that there is an absence of evidence to support the nonmoving party's case. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmovant must then "make a showing sufficient to establish the existence

2011 WL 2328071

of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. The nonmovant “may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Evidence should be viewed in the light most favorable to the nonmoving party and all inferences drawn in its favor. *Id.* at 255. However, a mere “scintilla” of evidence will not preclude summary judgment. *Id.* at 252. Finally, under the recently promulgated amendments to Rule 56, the court need not consider any evidence that is not cited to by the parties.

IV. DISCUSSION

A. Negligence Claims

*2 Plaintiffs have failed to provide sufficient evidence regarding the standard of care required to make out a professional negligence claim. See *David v. McLeod Reg. Med. Cntr.*, 367 S.C. 242, 626 S.E.2d 1, 3 (S.C.2006); *Jones v. Owings*, 318 S.C. 72, 456 S.E.2d 371, 374–75 (S.C.1995); *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633, 634 (S.C.1986). In South Carolina, a professional commits malpractice by failing to “exercis[e] that degree of skill and learning that is ordinarily possessed and exercised by members of the profession in good standing acting in the same or similar circumstances.” *David*, 626 S.E.2d at 3. A plaintiff alleging malpractice must provide evidence showing “(1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendants' field ... under the same or similar circumstances, ... (2) that the defendants departed from the recognized and generally accepted standards,” and (3) “that the defendants' departure from such generally recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages.” *Id.* at 4. The South Carolina Supreme Court requires the establishment of both the first and second requirement by expert testimony “unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendants.” *Id.*

Plaintiffs have failed to provide evidence of the first requirement and instead rest on an expert's bald assertion that the standard of care was breached, see *Seignious Aff.* ¶ 8, thus conflating the first and second requirement. Viewed in the light most favorable to plaintiffs, they have failed to

provide factual support for the requirements of a professional negligence claim, however, plaintiffs have supported their complaint with sufficient facts for their alternative negligence claims to survive.

In a negligence action, plaintiff must show: (1) defendant owed a duty of care to plaintiff; (2) defendant breached the duty by negligence act or omission; (3) defendant's breach was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered an injury or damages. *Madison v. Babcock Cntr., Inc.*, 371 S.C. 123, 638 S.E.2d 650, 656 (S.C.2006) (finding that a private residential center owed a duty of care to a mentally retarded patient which included protecting her from harm). “Under South Carolina common law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger.” *Id.* There are, however, “five exceptions to this rule: (1) where the defendant has a special relationship to the victim; (2) where the defendant has a special relationship to the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; and (5) where a statute imposes a duty on the defendant.” *Id.* (citing *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 546 (S.C.2002)). In *Madison*, the South Carolina Supreme Court also found that the *Restatement Second of Torts* § 323–24 established an applicable duty of care. As in *Madison*, Heartland's relationship with Mrs. Salley potentially falls under the first, third, fourth, and fifth exceptions to *Faile*.¹ See *id.* at 657. Furthermore, in *Flinn v. Crittenden*, the South Carolina Court of Appeals agreed with a Louisiana court finding that while “[a] nursing home is not the insurer of the safety of its patients,” “[t]he nursing home does have a duty to provide a reasonable standard of care, taking into consideration the patient's mental and physical condition.” 287 S.C. 427, 339 S.E.2d 138, 139 (S.C.Ct.App.1985).

¹ Babcock Center had a special relationship with Appellant because she was a client with special needs and disabilities admitted for care and treatment at the center. Babcock Center voluntarily undertook the duty of supervising and caring for Appellant as provided in its contractual relationship with Department. Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her.... Furthermore, the center had a statutory duty to

2011 WL 2328071

exercise reasonable care in supervising Appellant.

Madison, 638 S.E.2d at 657.

*3 Plaintiffs have sufficiently demonstrated that there is a genuine issue of material fact regarding whether there was a relationship sufficient to establish a general duty of care. At this stage of litigation, plaintiffs' evidence, viewed in the light most favorable to them, demonstrates that there is a genuine issue of material fact regarding whether defendants owed a duty of care to Mrs. Salley and whether they breached that duty. There are also genuine issues of material fact concerning causation based on defendants' records and the testimony of both doctors and nurses.

B. Negligence Per Se

"Negligence per se is negligence arising from a defendant's violation of a statute." *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107, 117–18 (S.C.Ct.App.2005). A statute must permit a private cause of action in order for plaintiffs to maintain a civil suit. "In determining whether a statute creates a private cause of action [in South Carolina], the main factor is legislative intent." *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245, 248 (S.C.2007) (finding that the statute for reporting child abuse does not support a private cause of action for negligence per se against a doctor).

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty is determined primarily from the language of the statute In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.

Id. (internal citations omitted).

"The search for the legislative intent [in South Carolina] comports with the standards used for testing federal rights of action as expressed by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)." *Williams–Garrett v. Murphy*, 106 F.Supp.2d 834, 842 (D.S.C.2000). Courts determining whether federal statutes grant a private cause of action "begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist." *Ormet Corp. v. Oh. Power Co.*, 98 F.3d 799, 805 (4th Cir.1996). "By now, Congress is well aware of this presumption and how to provide private remedies." *Id.*

Nonetheless, we may infer the existence of a private cause of action by applying the well settled test which requires that we determine (1) whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; (3) whether implication of a private remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action sought is "one traditionally relegated to state law."

*4 *Id.* (quoting *Cort*, 422 U.S. at 78) (emphasis in original).

Most courts have found that the Federal Nursing Home Reform Act ("FNHRA"), 42 C.F.R. § 483. 10, does not confer a private cause of action. *See, e.g., James v. Bd. of Curators of the Univ. of Mo.*, No. 09–2066, 2011 WL 147910, at *3 (E.D.Mo. Jan.18, 2011); *Duncan v. Johnson–Mathers Health Care, Inc.*, No. 09–0417, 2010 WL 3000718, at *3 (E.D.Ky. July 28, 2010); *Brogdon v. Nat'l Healthcare Corp.*, 103 F.Supp.2d 1322, 1330 (N.D.Ga.2000); *Tinder v. Lewis Cnty. Nursing Home Dist.*, 207 F.Supp.2d 951, 957 (E.D.Mo.2001); *Grammer v. John J. Kane Reg. Cntrs.*, 570 F.3d 520, 531–32 (3d Cir.2009) (finding civil liability for 42 C.F.R. § 483 available through § 1983 suits but not independently). Other courts have found that the Medicare and Medicaid Act, of which the FNHRA is a part, does not authorize private causes of action against nursing homes. *See, e.g., Stewart v. Bernstein*, 769 F.2d 1088, 1092 (5th Cir.1985). This court joins the vast majority of the courts in finding that the language of the FNHRA fails to demonstrate an express or implicit legislative intent to create a private cause of action.

South Carolina courts have yet to find that either South Carolina code of law § 44–81–10 or § 40–33–5 permits a private cause of action. This court need not reach this question, however, as that even if a private cause of action were permitted, plaintiffs failed to allege any specific section

2011 WL 2328071

of either statute that was breached, how the breaches occurred, or how the breaches proximately caused Mrs. Salley's death. Plaintiffs insufficiently allege that defendants were negligent by "failing to perform the standards required by the Federal Nursing Home Reform Act and other federal and state statutes and regulations." Comp. ¶ 84(t). Plaintiffs did not further substantiate this allegation in their response to defendants' motion for summary judgment. Plaintiffs "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248. Rule 56 instructs that "[t]he court need consider only the cited materials." This court should not be required to guess which provisions plaintiffs allege defendants breached or how the elements of the cause of action might be made out. In the light most favorable to them, plaintiffs have failed to demonstrate that there is a genuine issue of material fact regarding any putative cause of action under §§ 44–81–10 and 40–33–5.

Plaintiffs' negligence per se claim under S.C. Reg. 61–7 also fails because the regulation does not provide for a private cause of action. No court has addressed whether this statute creates a private right of action. The regulation lacks any language indicating the legislature intended to authorize a private right of action. The statute was not "enacted for the special benefit of a private party," as Doe requires, rather, Reg. 61–7 is a licensing statute created to benefit the public in general. The regulation states its "Scope and Purpose" are for the "establishment of EMS program;" "general licensing, certification, inspection and training procedures;" "establishment of an Emergency Medical Service Council and duties of the Council;" and "Establishment of the Department of Health and Environmental Control authority for enforcement of these rules and regulations." Reg. 61–7 § 100.

*5 Section 1302(H) of the regulation states that

[p]ursuant to section 44–61–160 of the S.C.Code, a person who intentionally fails to comply with reporting, confidentiality, or disclosure of requirements in this section is subject to civil penalty of not more than one hundred dollars for a violation the first time a person fails to comply and not

more than five thousand dollars for a subsequent violation.²

² Plaintiffs do not appear to allege that defendants violated Reg. 61–7 by failing to comply with the regulation's requirements regarding reporting, confidentiality or disclosure.

The statute also provides administrative remedies for other breaches of the statute. *See, e.g., Reg. 61–17(401) (A)*. The South Carolina Supreme Court recognizes the "frequently stated principle of statutory construction ... that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Wogan*, 623 S.E.2d at 117 (citing *Northwest Airlines, Inc. v. Transp. Workers*, 451 U.S. 77, 94 n. 30, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981)). Based on the foregoing, S.C. Reg. 61–7 does not create a private right of action.

The Omnibus Adult Protection Act, S.C.Code Ann. § 43–35–5, however, does permit a private cause of action. *See Williams–Garrett*, 106 F.Supp.2d at 842.³ Again, plaintiffs do not cite which portion of the statute defendants breached, but the only portion apparently relevant to plaintiffs' complaint governs knowing and willful neglect of a vulnerable adult. § 43–35–85. Defendants moved for summary judgment on the negligence per se claims both on the grounds that private actions were not permitted by the statutes *and* that there were no genuine issue of material fact regarding breach of the statutes after the conclusion of discovery. Plaintiffs failed to cite to any specific claim under the Omnibus Adult Protection Act. Under Rule 56, the court is only required to consider cited evidence. The court also has found no evidence in the entire record which, viewed in the light most favorable to plaintiffs, demonstrates that Heartland employees knowingly and willfully neglected Mrs. Salley.

³ The South Carolina District Court in *Williams–Garrett* found that the preamble and additional provisions to the statute demonstrated that the legislature intended to permit private rights of action. The preamble states that one of the purposes of the act was "to provide civil and criminal penalties for abuse, neglect, and exploitation," and the statute permits the Attorney General to bring

2011 WL 2328071

a suit on behalf of the state “in addition to any private cause of action for violation of the statute.” See S.C.Code Ann. §§ 43–35–5(9), 43–35–80. No South Carolina state court has addressed the statute.

C. Breach of Contract

Having thoroughly considered the parties' written and oral submissions on the breach of contract claim, the court holds that genuine issues of material fact exist regarding whether defendants breached their contract to provide “comprehensive health care around the clock by experienced professionals.” Pl.s' Ex. 21. Plaintiffs' evidence could demonstrate that defendants failed to provide around the clock medical assistance based on the ADL record. Since defendants only argued that the breach of contract claim should be dismissed for lack of a contract for a specific result, defendants' motion for summary judgment as to the breach of contract claim is denied.

D. Punitive Damages

“Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights.” *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 641 S.E.2d 53, 60 (S.C.Ct.App.2007); *Austin v. Specialty Transp. Serv.*, 358 S.C. 298, 594 S.E.2d 867, 875 (S.C.Ct.App.2004). Viewed in the light most favorable to plaintiffs, the evidence fails to support plaintiffs' contention that defendants' alleged misconduct was willful, wanton, or reckless of the plaintiffs' rights.

E. Parent Companies

*6 Plaintiffs have failed to point to any act or omission Heartland's parent companies committed, except through the normal practice of corporate governance of a subsidiary. See, e.g., *Johnson v. Ross*, No. 10–1046, 2011 WL 1042246, at *6 (4th Cir. Mar.23, 2011). Piercing the corporate veil is only reluctantly allowed under South Carolina law. *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 271 S.E.2d 596, 600 (S.C.1980).

South Carolina courts analyzing piercing claims examine the following factors: (1) whether the corporation was grossly undercapitalized for the purposes of the corporate undertaking; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) insolvency of the debtor corporation; (5) siphoning of funds of the corporation by the dominate shareholder; (6) non-functioning of other officers

or directors; (7) absence of corporate records; and (8) the corporation serving as a façade for the operations of the dominant shareholder. *Hunting v. Elders*, 579 S.E.2d 803, 807 (S.C.Ct.App.2004). None of these factors are present in this case. Plaintiffs allege that Heartland did not pay rent because its parent companies own the property. Using a parent's property as if it were the subsidiary's may weigh in favor of piercing the corporate veil, however, as there is no evidence of undercapitalization or flaunting corporate formalities, this fact alone is insufficient to allow piercing. See, e.g., *Gateway I Grp., Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 877 N.Y.S.2d 95 (N.Y.App.Div.2009); *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57 (1st Cir.1993).

Demonstrating a subsidiary is merely the “alter ego” of the parent corporation by showing that the parent company controls the business decisions and actions of its subsidiary is one method of piercing the corporate veil. *Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 678 S.E.2d 819 (S.C.Ct.App.2009). While the evidence shows that Heartland's parent companies provided a starting point for plaintiffs' financial decisions, characterized as a skeleton or a floor plan, this alone fails to meet the standard for controlling business decisions or actions of a subsidiary required for piercing the corporate veil on an alter ego theory. Finally, plaintiffs have agreed to dismiss HCR ManorCare Medical Services of Florida, LLC as a defendant.

V. CONCLUSION

For the foregoing reasons, the court **GRANTS** defendants' motion for summary judgment regarding plaintiffs' negligence per se claims and request for punitive damages and all claims against Manor Care, Inc. and HCR ManorCare, Inc. and **DENIES** defendants' motion for summary judgment regarding the negligence and breach of contract claims. Furthermore, the court **FINDS AS MOOT** defendants' motion for summary judgment regarding HCR ManorCare Medical Services of Florida, LLC and the breach of fiduciary duty claim as that the parties have agreed to the dismissal of both.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2728051

2011 WL 2328071

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 42



KeyCite Yellow Flag - Negative Treatment

Distinguished by [Sherman v. Sunsong America, Inc.](#), D.Neb., February 28, 2007

1999 WL 33537914

Only the Westlaw citation is currently available.

United States District Court, D. Nebraska.

Mark SANFORD and Vicki Sanford, Plaintiffs,

v.

EKTELON/PRINCE SPORTS GROUP, INC.,

and [UVEX Winter Optical, Inc.](#), Defendants.

No. 8:97CV368.

|

Nov. 5, 1999.

ORDER

BATAILLON, J.

I. Introduction

*1 This matter is before the Court on cross motions for summary judgment (filings 127 and 142). The lawsuit in this case is a products liability action. The plaintiff Mark Sanford (hereinafter Sanford) was injured while playing racquetball on April 11, 1995. Sanford was struck by his opponent's racquet on the right lens of the protective racquetball eyewear. Sanford sustained permanent injuries to his right eye. Sanford has asked this court to strike all 18 of defendants' affirmative defenses. After the close of discovery, the fourteen affirmative defenses that remained subject to this motion include those numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16 and 17. Defendants have asked this Court to grant summary judgment on Sanford's claims for loss of consortium, strict liability, negligence, breach of express and implied warranties, punitive damages, and claims under the Magnuson-Moss Act. [15 U.S.C. § 2301 et seq.](#)

II. Summary Judgment Standard

Pursuant to [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

is entitled to judgment as a matter of law. [Fed.R.Civ.P. 56\(c\)](#). The moving party bears the initial burden of showing the absence of a genuine issue of material fact, which can be done by pointing to the lack of evidence to support an essential element of the non-moving party's claim. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323–25 (1986). Once the moving party has met its burden, the non-moving party must then set forth “specific facts showing that there is a genuine issue for trial.” [Fed.R.Civ.P. 56\(e\)](#). When viewing the evidence, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party. [Adickes v. S.H. Kress & Co.](#), 398 U.S. 144, 158–59 (1970).

The trial court's “function at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial.” [Rayes v. Eggars](#), 838 F.Supp. 1372, 1377 (D.Neb.1993) (citing [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 249 (1986)). The Eighth Circuit has recognized that primarily legal issues are amenable to summary disposition. *See, e.g., Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir.1995); [Mumford v. Godfried](#), 52 F.3d 756, 759 (8th Cir.1995); and [Crain v. Board of Police Comm'r](#), 920 F.2d 1402, 1405–06 (8th Cir.1990).

III. Arguments

A. Sanford's motion for summary judgment with respect to the fourteen affirmative defenses

Sanford contends that all eighteen (now fourteen) of the defendants' affirmative defenses should be decided as a matter of law and should not proceed to trial. However, Sanford offers no facts or significant argument in support of this motion. In fact, the majority of the issues discussed in Sanford's brief are unrelated to these remaining fourteen affirmative defenses. The moving party can meet its burden by showing a lack of evidence to support an essential element of the non-moving party's claim. [Celotex](#), at 323–25. However, this does not imply that the moving party can make assertions without meeting its burden of proof. *See Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir.1992) (where the Court states: “Procedurally, the movant has the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue.”) The Court finds that Sanford has not met his burden of proof with regard to the summary judgment.

2000 9 WLL3L502©

*2 Even though Sanford fails to adequately address these affirmative defenses as they relate to his motion for summary judgment, and on that basis alone this Court could deny the motion, the defendants in their brief in opposition to plaintiffs' motion clearly argue and support with references to the evidence, facts that create a material dispute for trial with regard to each affirmative defense.

Affirmative defenses numbered 2, 6, and 10 deal with unforeseeable conduct, intervening/superseding actions, and last clear chance to avoid the injury. Defendants allege that Sanford removed the adjustable head strap, contrary to the warnings; replaced the head strap; and was struck in the face by the act of a negligent third person. The Court finds that these facts as alleged by defendants create an issue of material fact to be decided at trial.

Affirmative defenses numbered 3, 4, 5, and 11 deal with misuse, modification, comparative negligence, and modification. The facts raised and alleged by defendants with regard to wearing head straps and replacing head straps create issues of material fact to be decided at trial.

Affirmative defenses numbered 7, 8, and 9 allege assumption of risk, implied consent, and obvious and necessary dangers of the sport. Mr. Sanford in his deposition testified that he understood the risks of racquetball. (Dep. pgs. 97–98, Evidence Index, 13). Consequently, the Court finds that there are material issues of fact with regard to these defenses that must be decided at trial.

Affirmative defenses numbered 12, 15, 16 and 17 all deal with whether Sanford's claims should be barred for failure to comply with provisions of the Magnuson–Moss Act, Neb.Rev.Stat. § 25–21, 181, and Neb.Rev.Stat. § 25–21, 182. Defendants claim that notice was not given, that no cause of action exists under the Magnuson–Moss Act, that evidence exists which shows the UVEX manufactured the Prism and Ektelon sold it, and that the evidence will show that the Prism was in conformity with the then existing state of the art technology for the eyewear. The Court deals with the Magnuson–Moss Act issues in Part “B” of this Memorandum and Order.

In summary, Sanford failed to meet his burden of proof in showing that there is no material issue of fact and that he is entitled to judgment as a matter of law. Consequently, Sanford's motion for summary judgment is denied. *Celotex*, 477 U.S. at 323–25.

B. Defendants' motion for summary judgment

1. Loss of consortium

Defendants argue that they are entitled to summary judgment on Sanford's loss of consortium claim. “Damages for loss of consortium represent compensation due to a wife who has been deprived of rights to which she is entitled by virtue of the marriage relationship, namely, her husband's affection, companionship, comfort, assistance, and particularly his conjugal society.” *Anson v. Fletcher*, 220 N.W.2d 371 (Neb.1974). However, a review of the evidence offered in support of Sanford's opposition to defendants' motion supports a finding that a material fact exists for trial. In Mrs. Sanford's deposition, she states that she is fearful of him losing his income, is worried that he will lose vision in his eye, that Mr. Sanford gets double vision and has difficulty driving their children to evening activities, that they are unable to go to movies as much because of the double vision, and that they could no longer participate to the same extent in sports activities. (Deposition of Vicki Sanford at 6:11–15; 14:22–15:4; 17:9–19; and 17:20–18:21). This testimony creates a factual dispute for trial.

2. Strict liability, strict liability against Ektelon, breach of express warranty, breach of implied warranty, negligence

*3 Defendants claim that there exists no issues of material fact with regard to strict liability, strict liability against Ektelon, breach of express warranty, breach of implied warranty or negligence. All of these theories have a common nucleus of testimony, and therefore, they will be discussed together.

A premise argued by defendants with regard to all of these issues is that the testimony of Dr. Vinger and of Dr. Sokol is inadmissible. Subsequent to the defendants filing of the motion for summary judgment, this Court held a *Daubert* hearing with regard to the testimony of Dr. Vinger and Dr. Sokol. The hearing was conducted on July 19, 1999, and was continued with regard to Dr. Vinger and concluded on October 4, 1999. Following the July 19, 1999, hearing, I issued an order stating that Dr. Vinger could testify on all issues, except an additional hearing needed to be held on the issue of causation. (Filing 184). At the conclusion of the hearing conducted on October 4, 1999, I ruled that Dr. Vinger had provided sufficient scientific testimony for me to conclude that his testimony on causation would also be admissible at trial. I had previously ruled that Dr. Sokol would

also be allowed to testify at trial, on the limited issue of the origin of the scuff mark on the eyewear. (Filing 184).

With regard to the strict liability claim, Sanford must prove:

- (1) the product was in a defective condition when it was placed on the market and left the defendant's possession;
- (2) the defect was the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended;
- (3) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and
- (4) plaintiff's damages were a direct and proximate result of the alleged defect.

Delgado v. Inryco, Inc., 433 N.W.2d 179, 185 (Neb.1988). Defendants argue that the Prism is not defective. Whether the eyewear is a product in a defective condition that is unreasonably dangerous to Sanford is a question of fact. *See, e.g., Haag v. Bongers*, 589 N.W.2d 318 (Neb.1999). The deposition testimony of Dr. Vinger creates a question of fact that must be decided by the jury. In addition, Dr. Vinger contends that the Prism and the Astrospec are substantially the same glasses. (Deposition of Vinger 76:9–89:20, 97:20–, Deposition of Sokol, Plaintiffs' Evidence Exhibits 1, and 3 through 12). Sanford contends that the eyewear was tested by an independent lab, and the lab results show that the eyewear failed. (Plaintiffs' Exhibit 6) Even though defendants disagree with this assertion, the evidence clearly creates a material fact at issue in this lawsuit. It is an issue for trial.

With regard to the strict liability claim as it relates solely to Ektelon, defendants argue that Nebraska law allows a strict liability claim only against the manufacture of the Prism. Neb.Rev.Stat. § 25–21, 181 (Reissue 1989). Defendants are correct in this regard. However, Sanford contends that the defendants jointly tested, manufactured, labeled and distributed the Prism worn by Sanford. (*See* Deposition of Philip Johnson at 15:9–15; 60:20–23; and 67:11–70:22 and Deposition of Norman Peck, Plaintiff's Exhibit Tabs 3 through 12). This testimony creates a material fact to be decided at trial. If, however, the evidence at trial does not support Sanford's allegations in this regard, the defendants might very well be entitled to a dismissal on the strict liability claim against Ektelon. Neb.Rev.Stat. § 25–21, 181 (Reissue 1989).

*4 Defendants contend that there is no express warranty because the warranty did not say anything about a racquetball “racquet.” The warranties only refer to reduction of eye injuries as it regards strikes by the “ball.” Dr. Vinger testified in his deposition that the test conducted on the “ball” is the limiting test. If the ball impact passes the test, then the racquet will also pass the test. (Deposition of Dr. Vinger, 121–22–122:2). His testimony is sufficient at this time to create an issue of fact to be determined by the jury.

Defendants further contend that there is no evidence to support Sanford's claim of implied warranty of fitness for a particular purpose. In order for Sanford to establish a claim for implied warranty of fitness, he must establish that the Prism was inadequate for use in racquetball. *See Delgado*, 433 N.W.2d at 184. However, Dr. Vinger offered expert testimony in his deposition that could establish this claim. This expert testimony creates a factual dispute to be decided at trial.

Defendants contend that they are entitled to summary judgment on Sanford's claims of negligence. In order to establish a claim for negligence, Sanford must show that the Prism was manufactured, sold and distributed by the defendants; that the defendants failed to use reasonable care to see that the product was safe for the use for which it was made; and that the failure to use such reasonable care was the proximate cause of Sanford's injuries. *Morris v. Chrysler Corp.*, 303 N.W.2d 500, 503 (Neb.1981). Again, defendants rely on their belief that Dr. Vinger will not be allowed to testify. This Court's ruling that Dr. Vinger will be allowed to testify at trial obviates the argument. The evidence offered with regard to Dr. Vinger's deposition testimony, the test results, the letter in 1991, and the testimony of Dr. Sokol are sufficient to create a material fact with regard to summary judgment on the issue of negligence.

3. Punitive damages

Defendants contend that Nebraska law applies in this case, and thus punitive damages are impermissible. Neb. Const. Art. VII, Sec. 5; “Punitive, vindictive, or exemplary damages contravene Neb. Const. Art. VII, Sec. 5, and thus are not allowed in this jurisdiction.” *Distinctive Printing and Packaging Co. v. Cox*, 443 N.W.2d 566, 574 (Neb.1989). Sanford argues that Nebraska law does not govern punitive damages issues in this case. Sanford advocates that New Jersey law, which allows punitive damages, should be applied. Sanford contends that New Jersey has a strong interest in allowing punitive damages. New Jersey Stat. 2A:58C–1 to 7; *Fischer v. Johns–Manville Corp.*, 103 N.J.

643, 656, 512 A.2d 466 (1986). As this is a diversity case, the Court must decide which law applies to the case. *Enron Corp. v. Lawyers Title Insurance Corp.*, 940 F.2d 307 (8th Cir.1991). In that regard this Court must determine which state has the “most significant relationship to the occurrence with respect to the particular issue.” *Restatement, Conflict of Laws* § 146 at fn. 19.

*5 In the case at hand the injury occurred at the Jewish Community Center in Omaha, Nebraska. Mark Sanford is a resident of Omaha, Nebraska. His wife Vicki Sanford is a resident of Omaha, Nebraska. Ektelon is a New Jersey corporation and UVEX is a Rhode Island corporation. The purchase of eyewear occurred in Boston. (Plaintiffs' Exhibit 21). The court in *Crossley v. Pacific Employers Insurance Co.*, 251 N.W.2d 383, 386 (Neb.1977), analyzed an issue similar to the one in this case. The court in *Crossley* quotes the restatement:

In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless with respect to the particular issue, some other state has a more significant relationship. Comment d under [Restatement, Conflict of Laws 2d. § 146]. That section makes clear that in virtually all instances where the conduct and the injury occur in the same state, that state has the dominant interest in regulating that conduct and in determining whether it is tortious in character, and whether the interest affected is entitled to legal protection.

Crossley, at 386.

Based on the contacts with the State of Nebraska, coupled with the clear mandate that Nebraska does not permit, as a matter of law and public policy, punitive damages, the Court finds that defendants' motion for summary judgment as to punitive damages should be granted.

4. Magnuson–Moss Act

Sanford alleges claims under the Magnuson–Moss Act as set forth in 15 U.S.C. § 2301, *et seq.* in his Third Amended Complaint. This Act affords consumers a private cause of action for violations of the substantive provisions of the Act and for breach of a written or implied warranty. 15 U.S.C. § 2310(d)(1). The Act was adopted by Congress “to make warranties on consumer products more readily understandable and enforceable, and to provide the Federal Trade Commission (FTC) with means to better protect consumers.” *Automobile Importers of America, Inc. v. State of Minnesota*, 871 F.2d 717, 718 (8th Cir.1989) (citing H.R.Rep. No. 1107, 93rd Cong., 2nd Sess., reprinted in 1974 U.S.Code and Cong. & Admin. News 7702).

Defendants argue that the Magnuson–Moss Act is not applicable under the facts of this case. First, defendants contend that the writings provided with the Prism are not warranties within the definitions of the Magnuson–Moss Act. Second, defendants state that the Magnuson–Moss Act does not apply to personal injury claims. *Hughes v. Segal Enterprises, Inc.*, 627 F.Supp. 1231, 1237 (W.D.Ark.1986); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1065 (5th Cir.1984); (citing *Bush v. American Motor Sales Corp.*, 575 F.Supp. 1581, 1582 (D.Colo.1984); *Washington v. Otasco, Inc.*, 603 F.Supp. 1295, 1296 (N.D.Miss.1985). See also, *Santarelli v. BP America*, 913 F.Supp. 324, 333 (M.D.Pa.1996); *Schomber v. Jewel Companies, Inc.*, 614 F.Supp. 210, 214 (N.D.Ill.1985) (Magnuson–Moss Act does not provide a federal cause of action for plaintiff's personal injury claims that are actually state law claims for breach of warranty). Third, defendants contend that Sanford has alleged no violations of the substantive parts of Sections 2308 and 2304 of the Magnuson–Moss Act; rather, defendants state that all claims by Sanford are based on pure state law breach of warranty claims. Fourth, defendants state that notice and opportunity to cure was not given pursuant to 15 U.S.C. § 2310(e) of the Magnuson–Moss Act of the alleged defect until after this suit was filed, and, therefore, Sanford's claims under Magnuson–Moss are barred. *Washington*, 603 F.Supp. 1295, 1296. Finally, defendants argue that Magnuson–Moss has a jurisdictional prerequisite of \$50,000.00 which Sanford is unable to meet. 15 U.S.C. § 2310(d)(3)(B). Defendants state that the amount in controversy, exclusive of interests and costs, must be set forth in the complaint. Defendants contend that Sanford failed to set forth an amount in controversy in his Second Amended Complaint (now the Third Amended Complaint, Filing No. 154).

*6 Sanford contends that the warranties involved in this case are covered by Magnuson–Moss. However, Sanford argues that the warranties are “purported” warranties that actually offer no protection. Sanford refers to the warranties as “bait and switch.” Sanford argues that this type of warranty, one that disclaims the warranty, is exactly what the Magnuson–Moss Act is designed to protect against. The language in the warranties that is relevant to Sanford's argument states: “When worn properly, Ektelon eyewear is designed to reduce the possibility of serious eye injury to a player's eyes when struck in that region by a ball in the normal course of play.” The warranties further state: “Even while properly wearing Ektelon eyewear, a player may still sustain a severe eye injury.” Sanford in his brief states that *Boelens*, 748 F.2d 1058, stands for the proposition that language in disclaimers that negates the warranty is invalid under Magnuson–Moss.

The Court must first discern whether Sanford has met the jurisdictional requirement of \$50,000 as set forth in the statute. 15 U.S.C. § 2310(d)(3). The statutory scheme requires that each individual claim must be \$25.00 or more and that the entire amount in controversy must be at least \$50,000.00. See *Rose v. A & L Motors Sales*, 699 F. Supp 75 (W.D.Pa.1988) (burden on plaintiff to demonstrate that she has met the \$50,000.00 amount in controversy requirement). See also, *Barr v. General Motors Corp*, 80 F.R.D. 136, 140 (S.D.Ohio 1978). In *Barnette v. Chrysler Corp.*, 434 F.Supp. 1167, 1168 (D.Neb.1977), the plaintiff filed a Magnuson–Moss Warranty Act case, alleging that his automobile was defective. He prayed for relief in the amount of \$7,000.00. The Court stated:

While there is no express limitation that actions brought in federal court must be class actions, the requirement that a minimum of \$50,000.00 be in controversy limits the availability of a federal forum for individual consumer actions. The claim before the Court now does not meet the minimum jurisdictional amount of \$50,000.00 and, therefore, cannot be considered by this Court. An individual consumer action such as this would more appropriately be brought in state court.

Barnette, at 1.

The Court must also decide what categories of damages can be included in the \$50,000.00 jurisdictional requirement.

I have already held that punitive damages are not allowable under Nebraska law. Because they are not recoverable under Nebraska law, they likewise are not recoverable under the Magnuson–Moss Act. See *Boelens*, 748 F.2d at 1065, 1068 (plaintiffs could not count claim for punitive damages toward satisfaction of amount due to fact that state law did not permit punitive damages); *Rose*, 699 F. Supp 75, 76; *Saval v. BL Ltd.*, 710 F.2d 1027, 1033 (4th Cir.1983); *Walsh v. Ford Motor Co.*, 627 F.Supp. 1519, 1520 (D.D.C.1986). Consequently, Sanford's claim for punitive damages cannot be considered in determining whether the \$50,000.00 jurisdictional requirement has been met.

*7 Likewise, Sanford cannot claim that his attorney fees can be attributed to the \$50,000.00 requirement. *Saval v. BL Ltd.*, 710 F.2d 1027, 1033.; *Ansari v. Bella Automotive Group, Inc.*, 145 F.3d 1270, 1271 (11th Cir.1998). The case law is clear in this regard.

The remaining category of damages is for Sanford's personal injuries. The Court must determine whether personal injury damages could be included as part of the \$50,000.00. A leading case on this issue is *Boelens*, 748 F.2d 1058, wherein the court held that personal injury actions under breach of warranty claims are not cognizable under Magnuson–Moss. *Boelens*, at 1065. However, the court further noted that if an action was brought under the substantive provisions of the Act (§§ 2308 or 2304 of the Act) such claims would be cognizable under the Magnuson–Moss Act. *Boelens*, 748 F.2d at 1065–66. The Court also noted, however, that a personal injury action brought under the substantive provisions of the Act would occur under § 2310(d)(1) for “failure ‘to comply with any obligation under this chapter,’ ” thus, it would not be a personal injury suit based on expressed or implied warranty. *Boelens*, 748 F.2d at 1065. See also *Gorman v. Saf-T-Mate, Inc.*, 513 F.Supp. 1028, 1033–35 (N.D.Ind.1981) (Congress intended to let personal injury cases remain the products of state law, unless a substantive provision of the Magnuson–Moss Act was violated); *Bush*, 575 F.Supp. 1581, 1582 (Magnuson–Moss Act does not create a federal cause of action for claims for personal injury for breach of warranty); *Hughes v. Segal Enterprises, Inc.*, 627 F.Supp. 1231, 1237 (W.D.Ark.1986); *Santareli v. BP America*, 913 F.Supp. 324, 333 (Magnuson–Moss does not create a private cause of action for personal injuries); *Washington v. Otas Co., Inc.*, 603 F.Supp. 1295, 1296 (N.D. Miss 1985) (same).

The Court wishes to note that a few courts have ruled that where diversity jurisdiction is established on other claims, the court can entertain claims for Magnuson–Moss violations that do not meet the jurisdictional requirements. *See, e.g., Wetzel v. American Motors Corp.*, 693 F.Supp. 246, 249–52 (E.D.Penn.1988); *Seybold v. Francis P. Dean, Inc.*, 628 F.Supp. 912, 915–17 (W.D.Pa.1986). However, this line of cases deals with economic and not personal injury cases and, therefore, is not dispositive of the issue. This Court finds that Sanford must show a specific substantive violation of Magnuson–Moss to support a claim for personal injuries.

The Court turns to the Third Amended Complaint and proffered evidence to determine whether a substantive claim has been made under the Magnuson–Moss Act. The Court has reviewed the Third Amended Complaint, Fourth Cause of Action, alleging violations of the Magnuson–Moss Act. This cause of action states, in its entirety:

XLVI.

The allegations contained within paragraphs I–XLV of this Petition are incorporated into Plaintiffs' Fourth Cause of Action by this reference.

XLVII.

***8** The breach of express warranties and implied warranties by Ektelon and UVEX are in violation of the Magnuson–Moss Act as set forth at 15 U.S.C. Section 2301 et seq. (1994).

XLVIII.

Ektelon and UVEX failed to comply with its obligations under its written warranties and implied warranties.

XLIX.

That within a reasonable time after Mr. Sanford discovered the breach of express and implied warranties, notice of the breach was given to Defendants UVEX and Ektelon. All allegations in the Third Amended Complaint are of a generic nature and appear to be state law claims for warranty violations. The Fourth Cause of Action alleges violations of the Magnuson–Moss Act. No violations of Sections 2308

(prohibiting disclaimer of implied warranties) or 2304(a) (prohibiting full warrantors from excluding or limiting consequential damages for breach of written or implied warranty unless exclusion or limitation conspicuously appears on the fact of the warranty) or 2304(a) (prohibiting full warrantors from limiting the duration of implied warranties) are specifically alleged. Sections 2304 and 2308 are the substantive provisions of the Magnuson–Moss Act, and nowhere are violations of the substantive provisions of the Magnuson–Moss Act specifically alleged in the Third Amended Complaint.

The Court has also reviewed the “Order on Final Pretrial Conference” (Filing No. 194) filed October 21, 1999, issued in this case by Magistrate Thomas Thalken. There is no specific mention in any of the causes of action alleging any substantive violations of any sections of the Magnuson–Moss Act. Again, there is only the generic reference to 15 U.S.C. § 2301 et seq. Nor are there any allegations in the Pretrial Order with reference to defendants' attempt to disclaim the alleged warranty, a claim that might indicate a substantive violation. Additionally, no evidence other than the warranty has been submitted to the Court that would support Sanford's claim set forth in his brief that the language in the warranty is intended to disclaim the warranty.

The Court finds that Sanford has failed to state a claim under the substantive provisions of the Magnuson–Moss Act and that his personal injury claims cannot be sustained under the Magnuson–Moss Act. On the basis of the foregoing findings, this Court finds that defendants' motion for summary judgment should be granted with regard to Sanford's claims under the Magnuson–Moss Act.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Sanford's motion for summary judgment (filing 142) should be and hereby is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment (filing 127) should be and hereby is granted with respect to Sanford's claims for punitive damages and claims arising out of the Magnuson–Moss Act, and the motion for summary judgment is denied as to all other claims.

All Citations

Not Reported in F.Supp.2d, 1999 WL 33537914

2000 9 WLL3L502©

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 43

2018 WL 4364603

2014 WL 6386803

Only the Westlaw citation is currently available.

NOT FOR PUBLICATION

United States District Court, D. New Jersey.

**SANI-PURE FOOD
LABORATORIES, LLC**, Plaintiff,
v.
BIOMERIEUX, INC., Defendant.

Civil Action No. 13-6643 (ES).

Filed Nov. 13, 2014.

Attorneys and Law Firms

Richard A. Ragsdale, Davidson, Sochor, Ragsdale, & Cohen LLC, Skillman, NJ, for Plaintiff.

Wilson David Antoine, McCarter & English LLP, Newark, NJ, for Defendant.

OPINION**SALAS**, District Judge.**I. INTRODUCTION**

*1 Pending before this Court is Defendant bioMérieux, Inc.'s ("BMI") Motion to Dismiss. (D.E. No. 5). Pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) and 9(b), BMI moved to dismiss Counts I–VII of Plaintiff Sani-Pure Food Laboratories, LLC's ("Sani-Pure") complaint. (See D.E. No. 1–3, Plaintiff's Complaint ("Compl.")). The Court has jurisdiction under [28 U.S.C. § 1332\(a\)](#). Having considered the parties' submissions in support of and in opposition to the instant motion, pursuant to [Federal Rule of Civil Procedure 78\(b\)](#), the Court decides the instant motion without oral argument. For the reasons set forth below, Defendant's motion is GRANTED.

**II. RELEVANT FACTUAL AND PROCEDURAL
BACKGROUND**¹

¹ For the purpose of adjudicating motions filed pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#), the Court is required to accept the factual allegations pled by Plaintiff as true. See *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008). Therefore, the

relevant facts presented herein are those gleaned from Plaintiff's Amended Complaint.

Sani-Pure is a commercial laboratory that performed lab tests on food, environmental samples, and pharmaceutical products for the purpose of determining the presence, or lack thereof, of bacteria and other contaminants. (Compl.¶ 1). In order for Sani-Pure's lab test results to be accepted by customers, the reagents (substance that causes chemical reactions), hardware and software systems employed in the testing process required approval by various government entities such as the Food and Drug Administration ("FDA"), the United States Department of Agriculture ("USDA"), the Environmental Protection Agency ("EPA") and American Public Health Association ("APHA"). (Compl.¶ 3).

In 2008, BMI offered to sell the Tempo system, an automated testing system using BMI's proprietary hardware, software and reagents, to Sani-Pure. (Compl.¶ 4). According to Sani-Pure, BMI's website, as well as a BMI sales representative, Bryan Demenna, represented to Sani-Pure that the Tempo system had received the required government approvals. (Compl.¶¶ 5, 6). Relying on BMI's representations, Sani-Pure agreed to purchase the Tempo system from BMI. (Compl.¶ 7).

Subsequently, Sani-Pure discovered that certain Tempo system applications were defective in that they had not received the necessary approvals from various government agencies. (Compl.¶ 8). Furthermore, Sani-Pure also discovered that the applications that were approved did not function on various samples for which they had government approval. (*Id.*). In October 2012, Sani-Pure sold its assets. The buyer, however, refused to purchase the Tempo system because of its defects and also declined to assume the purchase requirement contract that Sani-Pure had with BMI. (Compl.¶ 10).

On or about September 12, 2013, Sani-Pure filed suit in New Jersey Superior Court, Bergen County, against BMI alleging fraud, negligent misrepresentation, breach of the New Jersey Consumer Fraud Act, and breach of express and implied warranties. (Compl.¶¶ 14–19). On November 1, 2013, BMI removed the instant action. (D.E. No. 1, Notice of Removal). On November 22, 2013, BMI filed the instant motion to dismiss. (D.E. No. 5). On December 20, 2013, Sani-Pure filed its opposition. (D.E. No. 8). BMI did not file a reply. The instant motion is now ripe for adjudication.

III. LEGAL STANDARD

A. Motion to Dismiss for Failure to Comply with Rule 9(b)

*2 Federal Rule of Civil Procedure 9(b) imposes a heightened pleading requirement concerning allegations of fraud. *Mickens v. Ford Motor Co.*, 900 F.Supp.2d 427, 435 (D.N.J.2012). This heightened pleading requirement applies to New Jersey Consumer Fraud Act (“NJCA”) claims. *Id.*

Rule 9(b) requires that “a party must state with particularity the circumstances constituting the fraud or mistake.” Fed.R.Civ.P. 9(b). The intended purpose of the heightened pleading requirement is to require the plaintiff to “state the circumstances of the alleged fraud with sufficient particularity to place the defendant on notice of the ‘precise misconduct with which it is charged.’” *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir.2007) (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 223–224 (3d Cir.2004)); see also *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir.1984). “To satisfy this heightened standard, the plaintiff must plead or allege the date, time, and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation.” *Frederico*, 507 F.3d at 200. “Plaintiff must also allege who made the misrepresentation to whom and the general content of the misrepresentation.” *Lum*, 361 F.3d at 224 (internal citation omitted); *Wiatt v. Winston & Strawn, LLP*, No. 10–6608, 2011 WL 2559567, at *17 (D.N.J. June 27, 2011) (“Plaintiff must also allege who made the purported misrepresentation and what specific misrepresentations were made.”).

In sum, the Third Circuit has advised that, “at a minimum, a plaintiff must support allegations of fraud with all the essential factual background that would accompany the first paragraph of any newspaper story—that is, the ‘who, what, when, where and how’ of the events at issue.” *In re Rockefeller Center Prop. Inc. Sec. Litig.*, 311 F.3d 198, 217 (3d Cir.2002) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1422 (3d Cir.1997)).

B. Motion to Dismiss for Failure to State a Claim: Rules 12(b) (6) & 8(a)

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), “courts are required to accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party.” *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir.2008). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Furthermore, a complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citation omitted). In *Iqbal*, the Supreme Court established a two-step process for determining whether a complaint raises a right to relief above the speculative level. *Id.* First, a court must identify any conclusory allegations, as they are “not entitled to the assumption of truth.” *Id.* Second, the court must consider if the assumption of truth attributed to the non-conclusory factual allegations plausibly suggests an entitlement of relief. *Id.* Determining whether the allegations are “plausible” is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679.

*3 Additionally, Federal Rule of Civil Procedure 8(a)(2) requires a complaint to set forth “a short and plain statement of the claim showing that a pleader is entitled to relief.” While the pleading requirement announced by Rule 8(a)(2) does not require detailed factual allegations, it does demand “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. The short and plain statement required by Rule 8(a)(2) must provide notice to the defendant of the nature of the plaintiff’s claim and the basis for the claim. See *Twombly*, 550 U.S. at 545.

Finally, a district court deciding a motion to dismiss generally does not consider materials beyond the pleadings. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426. “In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents.” *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir.2010).

IV. DISCUSSION

As an initial point, Sani-Pure requested that the Court convert the instant motion into one for summary judgment because “the motion incorporates substantial material that is not in the record.” (See D.E. No. 8, Plaintiff’s Opposition Brief (“Pl.Opp.Br.”) at 1). The “substantial material” Sani-Pure refers to are the background facts that BMI provides in its moving brief that BMI admits are not germane to the disposition of the instant motion. (See D.E. No. 5–2, Brief in Support of Defendant’s Motion to Dismiss (“Def.Mov.Br.”) at 2). Additionally, Sani-Pure, proceeding as if the Court will convert the instant motion into one for summary judgment, has attached to its opposition brief a declaration by Ronald Schnitzer, a managing member of Sani-Pure. (See D.E. No.

2018 WL 4364603

8–1) (“Schnitzer Declaration”). In its opposition brief, Sani–Pure makes reference to facts contained in the Schnitzer Declaration—facts that are not in the complaint.

To be clear, this Court “may not consider matters extraneous to the pleadings.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426; *Mayer*, 605 F.3d at 230. Consequently, the Court will not consider the facts contained in the Schnitzer Declaration that Plaintiff proffers in an attempt to cure the alleged deficiencies in its complaint. See *Commonwealth of Pa. ex. rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir.1988) (“It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.”) (internal quotations omitted). Neither will the Court consider the “background facts” contained in BMI’s moving brief. The Court also declines to convert the instant motion to dismiss into a motion for summary judgment because the Schnitzer Declaration, attached to Sani–Pure’s opposition brief, is not a document that is integral to, or explicitly relied upon in Sani–Pure’s complaint. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426 (stating that a court can consider a document “integral to or explicitly relied upon in the complaint”).

A. Sani–Pure’s Fraud Based Claims (Counts I–IV)

*4 In moving to dismiss Count I (Fraud), Count II (Equitable Fraud), Count III (Negligent Misrepresentation), and Count IV (Breach of the New Jersey Consumer Fraud Act) of Sani–Pure’s complaint, BMI argues that these claims, as pleaded, do not contain the specificity required by *Federal Rule of Civil Procedure 9(b)*. (Def. Mov. Br. at 5). Specifically, BMI states that Sani–Pure’s complaint “is devoid of the dates, time, and place of the alleged fraud, or even the alleged individual to whom the alleged misrepresentations were made.” (*Id.* at 9).

In opposition, Sani–Pure does not point to any allegations in its complaint that satisfy the heightened *Rule 9(b)* pleading requirement. Instead, Sani–Pure refers to facts contained in the Schnitzer Declaration—facts that are not articulated in its complaint and therefore not to be considered by the Court. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d at 1426. Effectively conceding the deficiencies in its complaint, Sani–Pure requests: “[i]n the alternative, if the court limits the motion to the pleadings and grants the requested relief, [Sani–Pure] would request leave to file an amended complaint to cure the alleged deficiencies.” (Pl. Opp. Br. at 1).

Having reviewed Sani–Pure’s complaint, the factual averments and allegations that are relevant to the disposition of the instant motion are summarized below:

“BMI’s online literature stated that the Tempo system had received all necessary government approvals to permit SP to perform testing for SP’s food, environmental and pharmaceutical customers’ applications.” (Compl.¶ 5);

“BMI’s sales representative, Bryan Demenna, also represented to SP that the Tempo system had received all necessary governmental approvals to permit SP to perform testing for SP’s food, environmental and pharmaceutical customers’ applications.” (Compl.¶ 6);

“In reasonable reliance upon the foregoing representations, SP entered into various agreements to purchase the Tempo system hardware, software and reagents.” (Compl.¶ 7);

“Contrary to BMI’s representations, the Tempo system was defective and not as represented by BMI in material ways....” (Compl.¶ 8);

“BMI knew that the Tempo system had not received the regulatory approvals that BMI represented it had received and did not perform as represented.” (Compl.¶ 9); and

“As a result of the fraudulent and negligent misrepresentations of BMI, and the defects of the Tempo system and many of its reagents, [Sani–Pure] was damaged in various ways....” (Compl.¶ 11).

1. Fraud and Equitable Fraud (Counts I & II)

The five elements of common law fraud are: “(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.” *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350, 367 (N.J.1997) (citing *Jewish Ctr. of Sussex Cnty. v. Whale*, 86 N.J. 619, 432 A.2d 521, 524 (N.J.1981)). The only elemental distinction between common law fraud and equitable fraud is that equitable fraud does not require scienter. *Bonnco Petrol, Inc. v. Epstein*, 115 N.J. 599, 560 A.2d 655, 660 (N.J.1989) (“The elements of scienter, that is, knowledge of the falsity and an intention to obtain an undue advantage therefrom, are not essential if plaintiff seeks to prove that a misrepresentation constituted only equitable fraud.”). Claims of common law and equitable fraud are subject to the pleading requirement of *Rule 9(b)*; therefore,

2018 WL 4364603

the “circumstances constituting fraud” must be pleaded with sufficient particularity. *Fed.R.Civ.P. 9(b)*.

*5 In failing to identify whom BMI made the alleged misrepresentation to, and by not stating when the misrepresentations were made, Sani-Pure has failed to inject the necessary particularity required by *Rule 9(b)*. As such, Sani-Pure’s common law and equitable fraud claims are dismissed, *without prejudice*.

2. Negligent Misrepresentation (Count III)

To state a claim for negligent misrepresentation, a plaintiff must allege: (1) an incorrect statement; (2) that the statement was made negligently; (3) that the statement was justifiably relied upon; and (4) that economic damages were caused by reliance on the incorrect statement. *McClellan v. Feit*, 376 N.J.Super. 305, 870 A.2d 644, 650 (N.J.Super.Ct.App.Div.2005) (quoting *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A.2d 138, 142–43 (N.J.1983)). Because Sani-Pure’s claim for negligent misrepresentation sounds in fraud, it must meet the heightened pleading requirement of *Rule 9(b)*. See *In re Suprema Specialties, Inc.*, 438 F.3d 256, 270 (3d Cir.2006) (noting that where “plaintiff grounds [his claims] in allegations of fraud—and the claims thus ‘sound in fraud’—the heightened pleading requirements of *Rule 9(b)* apply”).

Sani-Pure’s claim for negligent misrepresentation is subject to dismissal for the same reasons as its fraud claims—Sani-Pure’s failure to state the time, place and the person to whom the alleged misrepresentations were made. Therefore, the Court dismisses Count III, *without prejudice*.

3. Breach of the New Jersey Consumer Fraud Act (Count IV)

To establish a claim under the NJCFA, Plaintiffs must plead “(1) unlawful conduct by the defendant; (2) an ascertainable loss by the plaintiff; and (3) a causal relationship between the unlawful conduct and the loss.” *Profl Cleaning & Innovative Bldg. Servs. Inc. v. Kennedy Funding, Inc.*, 245 F. App’x 161, 165 (3d Cir.2007); *Glass v. BMW of N. Am.*, No. 10–5259, 2011 WL 6887721, at *3 (D.N.J. Dec.29, 2011). “[T]he Act should be construed liberally in favor of consumers.” *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454, 461 (N.J.1994).

Claims brought under the NJCFA are subject to the particularity requirements of *Rule 9(b)*. See *F.D.I.C. v.*

Bathgate, 27 F.3d 850, 876–77 (3d Cir.1994) (affirming district court’s application of *Rule 9(b)* to Consumer Fraud Act claim). Accordingly, Sani-Pure must plead each element of a NJCFA claim with the requisite specificity to “place the defendant on notice of the [unlawful] conduct for which it is charged.” See *Frederico*, 507 F.3d at 200. The Third Circuit has described specificity as the “date, place or time of the fraud” or some “alternative means of injecting precision and some measure of substantiation into [the] allegations of fraud.” *Lum*, 361 F.3d at 224 (internal quotations and punctuation omitted). “Plaintiffs must also allege who made a misrepresentation to whom and the general content of the misrepresentation.” *Id.*

Although Sani-Pure’s allegations of misrepresentations by BMI regarding the Tempo system having obtained the necessary regulatory approvals were arguably sufficiently alleged, (see Compl. ¶ 6), Sani-Pure failed to state to whom the alleged misrepresentations were made. Therefore, Sani-Pure failed to adequately allege the first element of its NJCFA claim. Sani-Pure also failed to satisfy the temporal pleading requirement of *Rule 9(b)*, as Sani-Pure does not provide a date or some other sufficiently precise time-frame as to when BMI made the alleged misrepresentations. Consequently, Sani-Pure has failed to state a viable NJCFA claim.² Accordingly, the Court dismisses Count IV, *without prejudice*.

² In addition to Sani-Pure failing to adequately plead the unlawful conduct element with the particularity required by *Rule 9(b)*, the Court is also not convinced that Sani-Pure has sufficiently pleaded the ascertainable loss element. However, the Court declines to discuss this element in detail because Sani-Pure’s failure to adequately plead unlawful conduct is sufficient to warrant dismissal of the NJCFA claim.

B. Sani-Pure’s Breach of Express and Implied Warranties Claims (Counts V & VI)

*6 BMI has moved to dismiss Sani-Pure’s breach of express and implied warranties claims, arguing that Sani-Pure failed to provide pre-suit notice to BMI of the alleged breach of warranty as required by North Carolina law, and that the alleged warranties at issue were disclaimed in the parties’ 2011 Reagent Agreement. (Def. Mov. Br. at 10).³

³ The Court applies the substantive law of North Carolina with respect to Sani-Pure's breach of warranties claims because the Reagent Agreement, which contains a choice of law clause, states that the parties' agreement regarding the Tempo system is governed by the substantive law of North Carolina. (See D.E. No. 1–4, Ex. B, 2011 Reagent Agreement, ¶ 12).

In opposition, Sani-Pure contends there are factual issues as to whether the warranty disclaimers were sufficiently conspicuous to be enforceable. (Pl. Opp. Br. at 12). Additionally, Sani-Pure counters BMI's "failure to provide pre-suit notice" argument by referencing an e-mail in which Sani-Pure notified "Sam" at BMI that "[t]he Tempo has become almost unusable from a regulatory standpoint. Not approved by APHA, EPA, FDA and nutraceuticals. I'm tired of getting warning letters from regulators." (Pl. Opp. Br. at 11). Sani-Pure acknowledges that it did not aver in its complaint that it gave BMI pre-suit notice of the alleged breach of warranties. (*Id.*).

Pursuant to North Carolina's version of the Uniform Commercial Code, "[w]here a tender [of goods] has been accepted[:]" (a) the buyer must within a reasonable time after he discovers or should have discovered any breach [of warranties] notify the seller of breach or be barred from any remedy ..." N.C. Gen.Stat. § 25–2–607(3). North Carolina courts have interpreted § 25–2–607(3) as placing the burden of pleading and proving "seasonable notification" on the buyer. *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 273 S.E.2d 681, 683 (N.C.1981).

Sani-Pure admitted in its opposition brief, and a review of the complaint confirms, that Sani-Pure failed to allege that it provided BMI with notice of the alleged breach of warranties prior to initiating the instant action. (Pl. Opp.

Br. at 11). Consequently, as a matter of law, Sani-Pure is barred from recovery with respect to its breach of express and implied warranties claims. See N.C. Gen.Stat. § 25–2–607(3). Therefore, because the facts, as pled by Sani-Pure, fail to state a claim for which relief can be granted, Count V and Count VI of Sani-Pure's complaint are dismissed, *with prejudice*.

Sani-Pure's failure to plead seasonable notification of breach of warranty is an independently sufficient ground to dismiss Count V and Count VI; therefore, the Court need not address BMI's disclaimer of warranty argument.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS**, *without prejudice*, Defendant bioMérieux, Inc.'s motion to dismiss Count I (Fraud), Count II (Equitable Fraud), Count III (Negligent Misrepresentation), and Count IV (Breach of New Jersey Consumer Fraud Act).

Count V (Breach of Express Warranties), Count VI (Breach of Implied Warranties), and Count VII (Rescission)⁴ of Sani-Pure's complaint are hereby dismissed, *with prejudice*. An Order shall accompany this Opinion.

⁴ Under North Carolina law, rescission is an equitable remedy, not an independent cause of action. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240, 243 (N.C.1964) ("Rescission, an equitable remedy, is allowed to promote justice."). Sani-Pure does not oppose dismissal of Count VII. (Pl. Opp. Br. at 15).

All Citations

Not Reported in F.Supp.3d, 2014 WL 6386803

TAB 44



KeyCite Yellow Flag - Negative Treatment

Declined to Follow by [Rossi v. Whirlpool Corp.](#), E.D.Cal., October 25, 2013

2012 WL 3780451

Only the Westlaw citation is currently available.

United States District Court,
N.D. Ohio,
Eastern Division.

Adam SAVETT, Plaintiff,

v.

WHIRLPOOL CORPORATION, et al., Defendant.

No. 12 CV 310.

|

Aug. 31, 2012.

Attorneys and Law Firms

[Donna F. Solen](#), Whitfield Bryson & Mason, [Gary E. Mason](#), Mason Law Firm, Washington, DC, [Laura Killian Mummert](#), Goldman Scarlato & Karon, Wayne, PA, [Jamie E. Weiss](#), Complex Litigation Group, Highland Park, IL, [Richard J. Burke](#), Complex Litigation Group, St. Louis, MO, [Daniel R. Karon](#), Goldman, Scarlato & Karon, Cleveland, OH, for Plaintiff.

[Michael E. Smith](#), [Gregory R. Farkas](#), Frantz Ward, [Jeffrey S. Dunlap](#), [Reem Shalodi](#), Ulmer & Berne, Cleveland, OH, [Galen D. Bellamy](#), [Joel S. Neckers](#), [Michael Timothy Williams](#), Wheeler Trigg O'Donnell, Denver, CO, [S. Stewart Haskins](#), [Zachary A. McEntyre](#), King & Spalding, Atlanta, GA, for Defendant.

Memorandum of Opinion and Order[PATRICIA A. GAUGHAN](#), District Judge.**INTRODUCTION**

*1 This matter is before the Court upon Defendant Home Depot U.S.A., Inc.'s Motion to Dismiss Plaintiff's Amended Complaint (Doc. 21). Also pending is Defendant Whirlpool Corporation's Motion to Dismiss Plaintiff's Amended Class Action Complaint (Doc. 23). This is a class action involving the consumer sale of washing machines. For the reasons that follow, the motions are GRANTED.

FACTS

For the purpose of ruling on defendants' motions, the facts in the complaint are presumed true.

Plaintiff, Adam Savett, on behalf of himself and other similarly situated individuals, brings this class action lawsuit against defendants, Whirlpool Corporation (sometimes, "Whirlpool") and Home Depot U.S.A., Inc.¹ (sometimes, "Home Depot") alleging wrongdoing in connection with the sale of washing machines.

¹ Plaintiff named Home Depot, Inc. as the defendant in this matter. In its motion to dismiss, Home Depot U.S.A., Inc. indicates that it is the properly named defendant.

On November 28, 2009, plaintiff purchased a Maytag Centennial MVWC6ESWW1 washing machine at a Home Depot located in this District. The washing machine is marketed as "ENERGY STAR" compliant. The price for the washing machine was \$299.00 plus tax, which according to the complaint, includes a "substantial" price premium due to its energy efficiency.

The ENERGY STAR program is a government-backed program intended to identify and promote energy efficient products. The program is jointly administered by the Department of Energy ("DOE") and the Environmental Protection Agency ("EPA"). According to the complaint, to qualify for the ENERGY STAR program, a washing machine must be "at least 37% more energy efficient than the minimum energy efficiency standards mandated by federal law."

On September 8, 2010, Springboard Engineering laboratories completed testing on the MVWC6ESWW1. The results showed that the unit did not meet ENERGY STAR standards. Thereafter, the DOE notified Whirlpool of the test results. The DOE proceeded with additional testing. After testing four additional units, the results again showed that the units do not meet ENERGY STAR standards. The DOE again notified Whirlpool of the results. On March 16, 2011, the DOE referred the matter to the EPA for appropriate action. Plaintiff does not allege what action, if any, the EPA undertook.

Plaintiff purports to bring this class action on behalf of six different classes, including a "nationwide class," and separate state-only classes for individuals residing in Ohio, Illinois, Michigan, and Indiana. In addition, plaintiff purports to assert a nationwide class seeking declaratory relief. In addition to the model he purchased, plaintiff also seeks relief

for individuals purchasing model numbers MVWC6ESWW0 and MVWC7ESWW0. According to the complaint, these models are substantially similar to the model he purchased.

Plaintiff filed an amended complaint containing twelve claims for relief. Count one is a claim for violation of the Ohio Consumer Sales Practices Act, O.R.C. § 1345, et seq. Count two is a claim for violation of the Ohio Deceptive Trade Practices Act, O.R.C. § 4165.01. Count three is a claim for unjust enrichment and count four is a claim for fraud. Count five is asserted against Home Depot only and is a claim for breach of contract. Count six alleges a violation of the Magnuson–Moss Warranty Act, 15 U.S.C. § 2301. Counts seven and eight allege breach of express warranty and breach of the implied warranty of merchantability, respectively. Counts one through eight are brought on behalf of the nationwide class or, alternatively, the Ohio-only class. Counts nine, ten, and eleven, assert claims under the Illinois Consumer Fraud and Deceptive Business Practices Act, the Michigan Consumer Protection Act, and the Indiana Consumer Sales Act, respectively. These claims are each brought on behalf of the applicable state-only class. Count twelve seeks declaratory relief.

*2 Defendants separately move to dismiss the complaint and plaintiff opposes the motions.

STANDARD OF REVIEW

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the allegations of the complaint must be taken as true and construed liberally in favor of the plaintiff. *Lawrence v. Chancery Court of Tenn.*, 188 F.3d 687, 691 (6th Cir.1999). Notice pleading requires only that the defendant be given “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley*, 355 U.S. at 47. However, the complaint must set forth “more than the bare assertion of legal conclusions.” *Allard v. Weitzman (In Re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir.1993). Legal conclusions and unwarranted factual inferences are not accepted as true, nor are mere conclusions afforded liberal Rule 12(b)(6) review. *Fingers v. Jackson–Madison County General Hospital District*, 101 F.3d 702 (6th Cir. Nov.21, 1996), unpublished. Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 489–490 (6th Cir.1990).

In addition, a claimant must provide “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp.*

v. Twombly, 550 U.S. 544, 569, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1955, 173 L.Ed.2d 868 (2009). Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.*

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. 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. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it stops short of the line between possibility and plausibility of ‘entitlement to relief.’

Id. at 1949 (citations and quotations omitted). *See also*, *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603 (6th Cir.2009).

ANALYSIS

1. Count one (Ohio Consumer Sales Practices Act)

A. Statute of limitations

Defendants argue that plaintiff’s claim for damages is barred by the statute of limitations. According to defendants, a violation of the OCSA must be brought within two years of the occurrence of the violation that is the subject of the suit. Defendants claim that with regard to damages suits, the discovery rule does not apply. According to defendants, plaintiff purchased the washer on November 28, 2009, and did not bring this lawsuit until February 8, 2012, more than two years later. In response, plaintiff argues that he can toll the statute of limitations because defendants “engaged in a continuous misrepresentation.”

*3 Upon review, the Court finds that plaintiff's claim for damages is barred by the statute of limitations. O.R.C. § 1345.10(C) provides, "An action under sections 1345.01 to 1345.13 of the Revised Code may not be brought more than two years after the occurrence of the violation which is the subject of suit, or more than one year after the termination of proceedings by the attorney general with respect to the violation, whichever is later." The discovery rule does not apply to claims under the OCSA. See *Rosenow v. Shutrump & Assocs.*, 163 Ohio App.3d 500, 839 N.E.2d 82, 86–87 (Ohio App.2005); *Sproles v. Simpson Fence Co.*, 99 Ohio App.3d 72, 649 N.E.2d 1297, 1302 (Ohio App.1994).

Here, plaintiff points out that the OCSA applies to "an unfair or deceptive act or practice ... whether it occurs before, during, or after the transaction." O.R.C. § 1345.02(A). According to plaintiff, the use of the ENERGY STAR logo constituted a continuous misrepresentation, which tolls the statute of limitations. Plaintiff relies on *Hofstetter v. Fletcher*, 905 F.2d 897, 906 (6th Cir.1988). That case, however, is readily distinguishable. In *Hofstetter*, the defendant sold plaintiff a life insurance policy promising that it would reduce her tax liability to zero. He thereafter continued to provide tax services to plaintiff on an annual basis. The court held that the statute of limitations did not bar the claim because defendant continued to make assurances and provided "blatant improper advice," long after the sale of the original policy. Thus, because the plaintiff filed her lawsuit within two years of these unconscionable acts, the statute of limitations did not bar the claim. In this case, however, plaintiff does not allege any additional conduct subsequent to the sale of the washing machine. According to plaintiff, the mere continued use of the ENERGY STAR logo constitutes separate violations of the OCSA. The Court rejects this argument. The thrust of plaintiff's claim is that defendants represented that the washing machine was ENERGY STAR compliant as evidenced by the logo. It is undisputed that this logo was present on the machine at the time of sale. Thus, the allegedly wrongful act occurred at the time of sale and because plaintiff does not allege further affirmative misconduct distinct from the initial misrepresentation, the statute of limitations began to run at that time.² Since plaintiff failed to file his complaint within two years of the sale, plaintiff is barred from recovering damages under the OCSA.

² The Court further rejects plaintiff's argument that the Court cannot consider this issue at this stage

in the litigation. Based on plaintiff's own express allegations, the claim is time-barred to the extent it seeks money damages.

B. Class claims

A claim may be asserted under the OCSA on behalf of a class of consumers only:

Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted [by the Ohio Attorney General] before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code....

*4 O.R.C. § 1345.09(B).

In *Marrone v. Philip Morris USA*, 110 Ohio St.3d 5, 850 N.E.2d 31 (2006), the Ohio Supreme Court held that a consumer may assert a class action claim under the CSPA only if the alleged violation "is substantially similar to an act or practice previously declared to be deceptive by one of the methods identified in" Ohio Revised Code § 1345.09(B).

Defendants argue that plaintiff cannot maintain an OCSA claim on behalf of a class because plaintiff does not identify any rule or decision finding the conduct to be deceptive or unconscionable. In response, plaintiff identifies the following: the DOE correspondence, various judgment entries, O.A.C. § 109:4–3–10, and six court decisions. The Court will address each in turn.

With regard to the DOE correspondence, the Court agrees with defendants that the correspondence cannot serve as the basis for class action treatment under the OCSA because it is neither a "rule adopted by the Ohio Attorney General," or a practice determined by an Ohio court to violate the OCSA.

Further, the Court reviewed the “consent judgments” cited by plaintiff. Defendants argue that consent judgments do not satisfy the requirements of O.R.C. § 1345.09(B) because they are agreements reached between parties and not court findings. Plaintiff disputes this contention. Both parties cite law supporting their respective positions. This Court finds, however, that it need not reach the issue because the consent judgments are insufficient on other grounds. Two of the consent judgments (*State ex rel. Cordray v. The Dannon Company, Inc.* and *State ex rel. Dewine v. GlaxoSmithKline, LLC*) postdate the purchase of the washing machine at issue in this case. The statute clearly indicates that the transaction must occur “after the decision containing the determination” is available for inspection. Accordingly, those consent judgments may not serve as the basis for allowing class claims to proceed. The third consent judgment, *i.e.*, *State ex rel. Rogers v. Airborne Health, Inc.*, does not involve an act or practice “substantially similar” to the alleged misconduct in this case. Rather, the consent judgment resolved advertising pertaining to the medical efficacy of defendant's products.

The Court further finds that plaintiff's citation to O.A.C. § 109:4-3-10 is misplaced. The Supreme Court of Ohio expressly rejected this very argument in *Marrone*. See, *Marrone*, 110 Ohio St.3d at 10, 850 N.E.2d 31 (concluding that O.A.C. § 109:4-3-10 is not sufficient to put a reasonable person on notice of the prohibition against a specific act or practice).

Plaintiff further cites to six cases he believes constitute sufficient prior notice to satisfy 1345.09(B). None of those cases come close to satisfying the statutory requirement. As an initial matter, at least five of them involve different industries³. See, *Marrone*, 110 Ohio St.3d at 10, 850 N.E.2d 31. (“Cases that involve industries and conduct very different from the defendant's do not provide meaningful notice of specific acts or practices that violate the CSPA.”). The only case even arguably relevant is *Nessle v. Whirlpool Corporation*, 2008 WL 2967703 (N.D. Ohio July 25, 2008). *Nessle* involved the sale of refrigerator rated as “Gold,” and plaintiff subsequently had problems with the ice making function of the refrigerator. Plaintiff's reliance on *Nessle* is misplaced, however, because the opinion cited resolves a motion to dismiss. Therefore, it does not constitute a determination by an Ohio court that a particular act or practice violates the OCSA.⁴

3 *Sovel v. Richardson*, 1995 WL 678558 (Oh. Ct App. Nov. 15, 1995) (involving sale of used refrigerator and failing to address whether conduct is actionable); *Hoffer v. Cooper Wiring Devices, Inc.*, 2007 WL 1725317 (N.D. Ohio June 13, 2007) (involving electrical receptacles); *Delahunt v. Cyrodyne Technologies*, 241 F.Supp.2d 827 (S.D. Ohio 2003) (involving dietary supplements); *Howard v. Norman's Auto Sales*, 2003 WL 21267261 (involving the sale of defective automobile); *Brown v. Lyons*, 43 Ohio Misc. 14, 332 N.E.2d 380 (involving the sale and repair of used appliances).

4 Having so concluded, the Court need not reach defendants' alternative argument, *i.e.*, that determinations by federal courts sitting in Ohio do not satisfy O.R.C. § 1345.09(B) because they are not “Ohio courts.”

*5 Because plaintiff fails to satisfy O.R.C. § 1345.09(B)'s requirements, plaintiff may not maintain his OCSA claim as a class action.

C. Individual rescission claim

The Court now turns to whether plaintiff's individual claim for rescission is plead with the requisite degree of particularity. Defendants argue that plaintiff fails to satisfy Rule 9(b)'s particularity requirements because the complaint does not identify the date, time, and place he observed the logo. Nor does plaintiff separately inform each defendant of its own alleged wrongdoing. Rather, plaintiff groups the two together. In response, plaintiff argues that the complaint satisfies both Rule 8's notice pleading requirements, as well as Rule 9(b)'s heightened requirements.

Upon review, the Court finds that the complaint fails to allege an individual claim for rescission under the OCSA. Defendants correctly note that there is a split among the courts in this district regarding the pleading standard applicable to claims asserted under the OCSA. Nor has the Sixth Circuit addressed this issue. See, *Ferron v. Zoomego*, 276 Fed.Appx. 473 (6th Cir. 2008) (declining to address whether Rule 9(b)'s heightened pleading requirements apply to claims asserted under the OCSA). Upon review, however, the Court need not reach this issue in that the complaint fails to meet the less stringent notice pleading requirements set forth in Rule 8(a).

Defendants argue that plaintiff fails to allege that any misrepresentation impacted his decision to purchase the washer. In particular, plaintiff does not allege that he saw the logo or any advertisement, understood the significance of “ENERGY STAR,” or that the logo impacted his decision to purchase the washer. In response, plaintiff argues that he need not so allege.

The Court finds that plaintiff’s failure to allege that any connection between his decision to purchase the washer and either the ENERGY STAR logo or an advertisement is fatal to his claim. The court in *Lilly v. Hwelett-Packard Co.*, 2006 WL 1064063 (S.D.Ohio April 21, 2006) summarized the law as follows:

Although the Court’s research has not developed any Ohio cases directly addressing the issue of whether reliance is an element of a claim under § 1345.02, two unreported cases from the Sixth Circuit [] have taken divergent paths to reach a similar result. In *Temple v. Fleetwood Ent., Inc.*, 133 Fed.Appx. 254 (6th Cir.2005), the Court held that ..., the plaintiff must ‘show a material misrepresentation, deceptive act or omission that impacted his decision to purchase the item at issue.’ *Id.* at 266. Conversely, in *Butler v. Sterling, Inc.*, 2000 WL 353502 (6th Cir.2000), the Court stated that ‘a showing of subjective reliance is probably not necessary to prove a violation of the OCSA.’ *Id.* at —4. Nevertheless, the Court held [that] the plaintiff must establish that his or her damages were proximately caused by the defendant’s conduct. *Id.* In other words, there must be a nexus between the defendant’s conduct and the alleged injury.

*6 *Id.* at *5.

Thus, “where the defendant is alleged to have made material misrepresentations or misstatements, there must be a cause and effect relationship between the defendant’s acts and the plaintiff’s injuries.” *Id.* (finding that plaintiff failed to state a claim under the OCSA where the complaint did not allege that plaintiff saw or was even aware of the alleged misrepresentations). *See also, In re Porsche Cars North America, Inc.*, — F.Supp.2d —, 2012 WL 2953651 (S.D.Ohio July 19, 2012) (“To bring an OCSA claim premised on affirmative conduct, a plaintiff must allege that he “saw or was ... aware of the alleged misrepresentations at any time before or during the purchase....”).⁵

5 Plaintiff purports to cite to Ohio law on the issue of reliance. The cases plaintiff cites, however, do not address whether a plaintiff must allege the element of reliance. Rather, those cases address whether a class action can be certified without proof of actual reliance by each and every class member, or whether the evidence showed that reliance can be presumed.

Here, plaintiff fails to allege that he saw the ENERGY STAR logo or any advertisement at any point. Nor does he allege that he had any understanding of the meaning of the ENERGY STAR logo. Absent such allegations, the Court finds that plaintiff fails to state an individual claim for rescission under the OCSA.

2. Count two (Ohio Deceptive Trade Practices Act)

Defendants move to dismiss count two on the grounds that the Ohio Deceptive Trade Practices Act does not apply to consumer transactions. Plaintiff concedes and dismisses this claim. Accordingly, count two is dismissed.

3. Count three (unjust enrichment)

Defendant Whirlpool argues that plaintiff fails to state a claim for unjust enrichment because he does not allege that he conferred a benefit on Whirlpool or that Whirlpool’s conduct was unjust. Defendant further argues that the unjust enrichment claim fails *vis à vis* Whirlpool because Ohio law requires privity. In response, plaintiff claims that Ohio law does not require that plaintiff plead unjust conduct. Rather, plaintiff must simply allege that defendant’s retention of the benefit is unjust. In addition, plaintiff argues that Ohio law does not require privity in order to succeed on an unjust enrichment claim.

Defendant Home Depot argues that plaintiff’s unjust enrichment claim fails because plaintiff alleges that a contract exists between the parties. According to defendant, quasicontract theories fail in the face of express contracts. Defendant Home Depot also argues that plaintiff does not allege that it knew the washing machine was not ENERGY STAR compliant. In response, plaintiff argues that he is permitted to plead his theories in the alternative. Because defendant Home Depot denies the existence of a contract, the Court cannot dismiss plaintiff’s unjust enrichment claim.

Where “a party retains money or a benefit that in equity or justice belongs to another,” he will be liable for unjust

enrichment. *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 222 (6th Cir.1992) (citing *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (Ohio 1938)). The elements of a claim for unjust enrichment include (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 465 N.E.2d 1298, 1302 (Ohio 1984) (citing *Hummel*). Under this theory of recovery, “civil liability may be imposed where one party retains a benefit from another's labors.” *Guardian Technology, Inc. v. Chelm Properties, Inc.*, 2002 WL 31087415 at *2 (Ohio App. 8th Dist. Sept. 19, 2002) (citing *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 612 N.E.2d 1295 (Ohio App. 9th Dist.1992)).

*7 Upon review, the Court finds that plaintiff fails to state a claim against defendant Whirlpool for unjust enrichment because plaintiff does not allege that he conferred a direct benefit on this defendant. Under Ohio law, indirect purchasers may not assert unjust enrichment claims against a defendant without establishing that the purchaser conferred a benefit on the defendant through an economic transaction. *See, Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 834 N.E.2d 791, 799 (Ohio 2005) (“no economic transaction occurred between [plaintiff] and Microsoft, and, therefore, [plaintiff] cannot establish that Microsoft retained any benefit ‘to which it is not justly entitled.’”). *See also, In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 684 F.Supp.2d 942, 952 (N.D.Ohio 2009) (noting that a “chain of sale” argument is contrary to Ohio law and, absent an allegation of a direct benefit, an unjust enrichment claim against a manufacturer cannot stand).⁶ In this case, plaintiff expressly alleges that he purchased the washing machine from Home Depot (ECF 18 at ¶ 18). Notably absent is any allegation that plaintiff conferred a direct benefit on defendant Whirlpool. *See, e.g.*, ECF 18 at 70 (“plaintiff ultimately conferred a benefit upon Defendants.”). Having failed to so allege, plaintiff's claim for unjust enrichment against defendant Whirlpool fails to state a claim for which relief may be granted.

⁶ Plaintiff relies on *Paikai v. General Motors Corp.*, 2009 WL 275761 (E.D.Cal. Feb.5, 2009) and *Randleman v. Fidelity National Title Ins. Co.*, 465 F.Supp.2d 812 (N.D.Ohio 2006). These cases attempt to distinguish the Ohio Supreme Court's holding in *Johnson*. The Court disagrees with

the distinctions and finds the reasoning in *In re Whirlpool* persuasive.

With regard to defendant Home Depot, the Court finds that an unjust enrichment claim fails because an express contract governs the parties' transaction. Although plaintiff did not oppose the dismissal of his contract claim, plaintiff alleges that an express contract exists between the parties. Moreover, common sense dictates that an ordinary consumer transaction (such as that described in the complaint) is governed by a contract. Because the dispute centers around whether defendant delivered what it promised, the existence of an express contract bars an unjust enrichment claim.

4. Count four (fraud)

Defendants argue that plaintiff fails to state a fraud claim with particularity. According to defendants, the complaint does not allege specific facts, including the date, time, and place plaintiff observed the ENERGY STAR logo. In the event plaintiff is attempting to assert a fraud by omission claim, he fails to assert facts supporting a theory that defendants had a duty to disclose. In response, plaintiff argues that his fraud claim is a “fraud by omission” claim. According to plaintiff, “fraud by omission” claims require less formalized pleading.

Upon review, the Court finds that plaintiff fails to state a fraud claim for which relief may be granted.

To prove a claim for common law fraud under Ohio law, a plaintiff must prove: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

*8 A duty to disclose and corresponding liability for failure to disclose arises when: the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.

Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343 (6th Cir.2000) (emphasis added) (citations and quotations omitted).

Here, plaintiff alleges that defendants' "failure to disclose that the falsely labeled washers were not energy efficient within the parameters established by federal law and the Energy Star program, [rendered] defendants' Energy Star logo untrue and misleading." In other words, it appears that plaintiff is claiming that upon learning of the government testing in which certain washers failed DOE testing, defendants owed plaintiff a duty of disclosure.⁷ Plaintiff, however, fails to allege the necessary elements to support such a claim. Notably absent from the complaint is any allegation that plaintiff acted or refrained from acting as a result of defendants' subsequent failure to disclose the results of the DOE testing. Accordingly, plaintiff's fraud claim must be dismissed.

⁷ Plaintiff does not argue that defendants fraudulently placed the logo on the washers in the first place. Nor does it appear the allegations would support such a claim because plaintiff does not allege that defendants knew the washers were not ENERGY STAR compliant *at the time of sale*.

5. Count five (breach of contract against Home Depot)

Plaintiff asserts a claim for breach of contract against defendant Home Depot only. Home Depot moves to dismiss the claim on the grounds that plaintiff failed to give Home Depot proper notice of his claim. In addition, Home Depot argues that the claim fails because plaintiff does not allege sufficient facts to establish the necessary elements of the claim. According to defendant, plaintiff does not identify what contract term defendant breached. Defendant claims that plaintiff does not allege that Home Depot agreed to sell plaintiff an ENERGY STAR compliant washing machine. As such, plaintiff fails to state a breach of contract claim for which relief may be granted.

Plaintiff does not respond to this argument. Although plaintiff argues that he did give Home Depot notice of his claims, he does not address in any fashion Home Depot's argument that plaintiff fails to properly allege a breach of contract claim. Accordingly, the motion is unopposed on this basis. Having opted not to oppose Home Depot's arguments, the Court finds that the claim must be dismissed.

6. Count six (Magnuson–Moss Warranty Act)

The parties agree that the analysis regarding plaintiff's state law warranty claims applies with equal force to his claims under the Magnuson–Moss Warranty Act. As set forth

below, the Court finds that plaintiff fails to state a claim for breach of warranty under state law. For these same reasons, plaintiff's Magnuson–Moss Warranty Act claims also fail.

7. Count seven (breach of express warranty, O.R.C. § 1302.26)

Defendants argue that plaintiff fails to state a claim for breach of express warranty. Defendant Whirlpool argues that it provided a limited express written warranty, which contains no promises regarding the energy efficiency of the washer. Defendant Whirlpool argues that plaintiff fails to allege that this limited warranty was breached in any way. Plaintiff does not respond to this argument and the complaint does not appear to allege that defendant Whirlpool breached this warranty.

*9 Both defendants argue that plaintiff fails to allege an express warranty apart from the limited express written warranty provided by defendant Whirlpool. According to defendants, plaintiff fails to identify any affirmation of fact or promise. Defendants argue that advertisements showing the ENERGY STAR logo are insufficient to create an express warranty. Home Depot also claims that its advertisements do not constitute express warranties. In response, plaintiff argues that the ENERGY STAR logo itself constitutes an express warranty. Plaintiff also claims that the advertisements are express warranties.

Defendants further argue that plaintiff's claim fails because he does not allege that he saw, heard, or received any such affirmation of fact or promise. Defendants claim that plaintiff does not allege that he saw any advertisement.

Pursuant to Ohio law, express warranties are created as follows:

- (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

O.R.C. § 1302.26

Upon review, the Court finds that plaintiff fails to allege the existence of an express warranty because use of the ENERGY STAR logo is not an “affirmation of fact or promise” as alleged in this case. As an initial matter neither the parties nor the Court uncovered any case in which a logo has ever been held to constitute an express warranty. Moreover, the logo itself contains no assertion of fact or promise. Unlike traditional express warranties where unambiguous promises or factual assertions are made, which are clearly understood on their own footing, any meaning conveyed by the logo requires independent knowledge.⁸ In fact, plaintiff never expressly identifies a particular factual promise allegedly conveyed by the logo. For example, plaintiff alleges that “in order to qualify for the ENERGY STAR program, most washing machines must be at least 37% more energy efficient.” (Compl.¶ 14) (emphasis added). On the other hand, plaintiff also alleges that “[t]he message conveyed by the ENERGY STAR logo is that the consumer can maximize his or her energy savings while helping to protect the environment.” Yet, plaintiff does not allege that the washer he purchased wholly fails to provide some degree of energy savings. Thus, it is unclear what express factual assertion or promise plaintiff believes the logo conveys. At best, plaintiff claims that the logo conveys that the washer complied with unidentified and specific testing requirements established by the federal government for participation in the ENERGY STAR program. This Court disagrees that the logo conveys this specific promise. To the extent the logo could ever be considered as an express assertion of fact or promise, the most generous conclusion would simply be that the government approved the appliance for participation in the ENERGY STAR program. Yet, plaintiff does not allege that the government ever revoked defendants’ right to use the ENERGY STAR logo.

⁸ Notably, plaintiff does not allege that he saw or understood any purported meaning of the logo.

^{*10} The Court further rejects plaintiff’s argument that it sufficiently alleges that certain advertisements created express warranties. Regardless of whether advertisements give rise to warranties, plaintiff simply fails to make such allegations in this case. Plaintiff expressly references only one advertisement—an advertisement apparently appearing on Amazon.com on January 12, 2012. Although plaintiff alleges that “Whirlpool and its retail partners aggressively marketed the [washers] based on their ENERGY STAR rating,” the advertisement that plaintiff cites does not implicate either

defendant. (ECF 18 at ¶ 16). Rather, the advertisement is expressly alleged to have come from Amazon. Moreover, the complaint alleges that the advertisement appeared on January 24, 2012. Similarly, the only allegation directed at Home Depot alleges that “Home Depot’s advertisement of the [washers] also lists the ENERGY STAR rating as one of their features.” (ECF 18 at ¶ 17). Other than a vague allegation that defendants “aggressively” advertised, or that some undisclosed Home Depot advertisement identified the ENERGY STAR logo, there is no reference to a particular advertisement that allegedly created an express warranty. Accordingly, even under notice pleading standards, the complaint fails to put defendants on notice of the warranty allegedly breached.

Having concluded that plaintiff fails to sufficiently allege an express warranty, the Court need not address whether plaintiff must rely on any such warranty in order to state a claim for relief.

8. Count eight (breach of implied warranty of merchantability, O.R.C. § 1302.27)

Defendants move to dismiss plaintiff’s breach of implied warranty claim. Defendant Whirlpool argues that plaintiff lacks privity with Whirlpool and, as such, the claim fails. Defendant further argues that its express limited warranty modified the implied warranty of merchantability. In response, plaintiff argues that he was an intended third-party beneficiary to the contract between Home Depot and Whirlpool. As such, the lack of privity does not bar his claim against defendant Whirlpool. He further claims that the express limited warranty failed of its essential purpose. Therefore, it does not bar his implied warranty claim.

Upon review, the Court finds that plaintiff’s claim against Whirlpool fails because plaintiff does not allege that he is in privity with this defendant. Ohio law requires privity in order to sustain a breach of implied warranty claim. *See, Curl v. Volkswagen of Am., Inc.*, 114 Ohio St.3d 266, 871 N.E.2d 1141 (Ohio 2007) (“longstanding Ohio jurisprudence provides that purchasers ... may assert a contract claim for breach of implied warranty only against parties with whom they are in privity. Having reviewed the authority in Ohio, as well as that of other jurisdictions, we see no compelling reason to stray from precedent”). Even assuming an Ohio court would allow an intended third-party beneficiary to bring an implied warranty claim directly against a manufacturer, plaintiff falls far short of alleging such a relationship. The only allegation plaintiff points to is a legal

conclusion, *i.e.*, “plaintiff and class members were intended—not merely incidental—third-party beneficiaries....” (ECF 18 at ¶ 1140. Given the privity requirement, this bare allegation is insufficient to allege a breach of implied warranty claim. This is especially so in light of the common sense nature of consumer transactions. Plaintiff expressly alleges that he went to Home Depot and purchased his washing machine. Absent some additional allegation regarding plaintiff’s intended third-party beneficiary status, the Court agrees with defendant Whirlpool that the complaint alleges an ordinary downstream consumer transaction. Accordingly, plaintiff fails to assert a claim for breach of implied warranty against defendant Whirlpool. Having so concluded, the Court need not address whether Whirlpool’s limited express warranty also bars the claim.

*11 Both defendants argue that plaintiff’s claim fails because plaintiff does not allege that the washers failed of their essential purpose. According to defendants, the essential purpose of a washing machine is to wash clothes. Since plaintiff does not allege that the washers fail in this regard, plaintiff cannot sustain a breach of implied warranty of merchantability. Plaintiff alleges that the essential purpose of his washer was to “function properly as energy efficient washing machines within the parameters established by federal law and the ENERGY STAR program.” (ECF 18 at ¶ 112). According to plaintiff, whether a products fails of its essential purpose is a question of fact.

Upon review, the Court finds that plaintiff fails to state a claim for breach of the implied warranty of merchantability. Under Ohio law, an implied warranty of merchantability requires that goods be fit for the *ordinary* purposes for which such goods are used.” O.R.C. § 1302.27. Here, the Court finds that the ordinary purpose of a washing machine is to wash and clean dirty clothes. *See, e.g., Montich v. Miele USA, Inc.*, 2012 WL 1005329 (D.N.M. Mar. 27, 2012) (noting that ordinary purpose of washing machine is to wash and clean dirty clothes); *Tietzworth v. Sears, Roebuck and Co.*, 2009 WL 3320486 (N.D.Cal. Oct.13, 2009) (same). Plaintiff does not allege that the washing machine fails to wash and clean his clothes. Rather, he simply alleges that to do so requires more energy and, therefore, additional costs. This allegation is insufficient to state a claim for breach of the implied warranty of merchantability. Accordingly, plaintiff’s claim against both defendants fails for this reason.

9. Counts nine through eleven (state statutory consumer protection statute claims)

Counts nine, ten, and eleven, assert claims under the Illinois Consumer Fraud and Deceptive Business Practices Act, the Michigan Consumer Protection Act, and the Indiana Consumer Sales Act, respectively. Plaintiff expressly asserts these claims only against defendant Whirlpool. In addition, the claims are brought on behalf of a class of individuals residing in each particular state. Whirlpool argues that plaintiff lacks standing to bring claims under other state’s statutes. Defendant claims that the Court should address this issue now, as opposed to during the class certification process. In response, plaintiff argues that defendant is confusing Article III standing with Rule 23. According to plaintiff, many courts allow the certification of multi-state or even nationwide classes without requiring an individual class representative from each state.

Upon review, the Court finds that it need not address this issue. Having disposed of all of the claims plaintiff directly asserts against Whirlpool, and because plaintiff does not allege that his transaction with defendant involved any tie to Illinois, Michigan, or Indiana, the Court finds that plaintiff fails to state a claim under these statutes as well. Because plaintiff has no individual claims in this case, he cannot pursue claims on behalf of a class.

*12 Having so concluded, the Court need not reach whether the claims fail for the additional reasons outlined by defendant.

12. Count twelve (declaratory relief)

Having disposed of the substantive claims against defendant Whirlpool, the Court finds that plaintiff’s request for declaratory relief, which is not an independent cause of action, is not viable.

13. Standing regarding “other washer models”

Having disposed of all of the claims in this case, the Court need not reach whether plaintiff has standing to assert claims on behalf of purchasers of other washer models.

CONCLUSION

For the foregoing reasons, Defendant Home Depot U.S.A., Inc.’s Motion to Dismiss Plaintiff’s Amended Complaint (Doc. 21) is GRANTED. Defendant Whirlpool Corporation’s Motion to Dismiss Plaintiff’s Amended Class Action Complaint (Doc. 23) is also GRANTED.

2012 WL 8950©T1

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 3780451

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 45

2006 WL 7124778

2006 WL 7124778

Only the Westlaw citation is currently available.

United States District Court, D.
South Dakota, Northern Division.

Herman SCHUMACHER, Michael P.
Callicrate, and Roger D. Koch, Plaintiffs,
v.

TYSON FRESH MEATS, INC., Cargill Meat
Solutions Corporation d/b/a Excel Corporation,
Swift Beef Company, and [National Beef
Packing Company, L.L.C.](#), Defendants.

No. CIV 02–1027.

|
April 10, 2006.

Attorneys and Law Firms

[David F. Herr](#), [Elizabeth J. Anderson](#), [Elizabeth Snyder Poeschl](#), [James Duffy O'Connor](#), [Kirk O. Kolbo](#), [Matthew P. Lewis](#), [R. Christopher Sur](#), Maslon Edelman Borman Brand, LLP, Minneapolis, MN, [Reed A. Rasmussen](#), Siegel, Barnett & Schutz, Aberdeen, SD, [Stephen O. Broghammer](#), [Thomas M. White](#), White, Wulff & Smart, Omaha, NE, for Plaintiffs.

[Kennith L. Gosch](#), Bantz, Gosch, Cremer, Peterson, Sommers & Wager, [Jack H. Hieb](#), Richardson, Groseclose, Wyly, Wise & Sauck, Aberdeen, SD, [Mark W. Ryan](#), [Michael E. Lackey, Jr.](#), Mayer Brown LLP, Washington, DC, [Christopher Wayne Madsen](#), [Thomas John Welk](#), Boyce Greenfield Pashby & Welk, Sioux Falls, SD, [Patrick E. Brookhouser, Jr.](#), McGrath North Mullin & Kratz, PC, Omaha, NE, [Louis A. Huber, III](#), Schlee Huber McMullen & Krause, Kansas City, MO, [Louis E. Fogel](#), [Sherry A. Knutson](#), [Susan A. Weber](#), [William H. Baumgartner, Jr.](#), Sidley Austin LLP, Chicago, IL, for Defendants.

ORDER

[CHARLES B. KORNMANN](#), District Judge.

INTRODUCTION

*1 This matter was certified as a class action as to certain claims under the Packers and Stockyards Act, [7 U.S.C. §§ 181–229](#), and as to claims arising under the common law

theory of unjust enrichment on behalf of the following class of plaintiffs:

all persons or business associations that owned any interest in cattle that were intended for slaughter and who sold or permitted sale of such cattle (excluding culled dairy and beef cows and bulls) to defendants on the open spot cattle market, or on a basis affected by that market, between April 2, 2001, to and including May 11, 2001, but only as to sales made by South Dakota producers and producers in other states with laws of unjust enrichment identical to that which is the law in South Dakota.

In addition, the matter was certified as a class action with a class as to claims arising under the common law theory of unjust enrichment on behalf of the following class of plaintiffs:

all persons or business associations that owned any interest in cattle that were intended for slaughter and who sold or permitted sale of such cattle (excluding culled dairy and beef cows and bulls) to defendants on the open spot cattle market, or on a basis affected by that market, between April 2, 2001, to and including May 11, 2001, but only as to sales made by cattle producers in states with identical laws of unjust enrichment but not following the law of unjust enrichment under South Dakota law.

At the outset of this litigation, defendants contended that class certification of the pendent state law claims for unjust enrichment should be denied because these claims involve varying state common law standards of liability. I held, however, that the federal PSA claims and the common law unjust enrichment claims are predicated on the same factual

2006 WL 7124778

allegations and, even if the law of different states might ultimately govern the common law claims, certification of the class for the whole action was appropriate.

I recognized that there are some differences between or among the states and suggested that sub-classes can be established, if necessary, to group residents of various states with identical common law requirements into sub-classes. I advised the parties that if an unjust enrichment class action turns out to be unmanageable, I will de-certify one or more sub-classes.

The defendants initially proposed 13 different unjust enrichment subclasses based upon differences in the common law applied in the 50 states. Defendants contend that the court would have to determine for 39,000 class members which states have the most significant relationship to the cattle transactions at issue. Defendants contend that such individualized issues would predominate, thus resulting in an unmanageable trial. Based upon the foregoing, defendants filed a motion for decertification of the unjust enrichment classes.

Plaintiffs initially proposed that the choice of law determination should be based upon the place where the cattle were slaughtered. Defendants have beef processing plants in only nine states. Plaintiffs contended that the law of those nine states would result in only two subclasses.

*2 I advised the parties that the place of slaughter would not be considered for the purposes of determining the choice of law to be applied. I instead indicated that the choice of law inquiry would be determined by the place “where the deal is made.”

Defendants' contend that questions concerning where the deal was made for all transactions at issue in this litigation predominate, that such questions of fact are not common to the class, and therefore class treatment of the unjust enrichment claims is not appropriate.

Plaintiffs contend that the place where the deal was made can be determined by the address to which the defendants sent the check to buy the cattle. Plaintiffs contend that 90% of the total unjust enrichment claims arise in only 12 states, requiring only two subclasses. Plaintiffs have withdrawn their request to have the remaining 3,600 claims arising in 27 other states certified.

DECISION

I have previously advised the parties, both informally and on the record that I intend to decertify the two classes dealing with common law claims for unjust enrichment. I have also promised that I would provide a written order to do so prior to any jury verdict.

This court has a continuing duty to assure that a class action continues to be certifiable under Fed.R.Civ.P. 23(a). *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir.1999); *Harvey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir.1987) *General Telephone Co. v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). Decertification can occur at any time, including after trial on the merits. See *Roby v. St. Louis Southwestern Ry. Co.*, 775 F.2d 959, 961 (8th Cir.1985). Fed.R.Civ.P. 23(c)(1)(C) requires only that any order altering class certification be accomplished prior to final judgment.

The laws of the states require various elements to establish a claim of unjust enrichment, including one or more of the following:

- plaintiff conferred a benefit on defendant [some jurisdictions refer to this element as “an enrichment” (and also require proof of “an impoverishment”) or as “valuable materials were furnished”]
- defendant appreciated, acknowledged, or consciously accepted the benefit
- defendant retained the benefit under circumstances making it inequitable or unjust for defendant to retain the benefit without paying plaintiff for the value thereof [some jurisdictions refer to this element as “absence of justification”]

Defendants identified 15 other states that have legal elements identical to those of South Dakota's unjust enrichment elements: Alaska, Florida, Idaho, Iowa, Kansas, Maine, Minnesota, Nevada, North Carolina, Oregon, Ohio, Pennsylvania, Rhode Island, Tennessee, and Utah. Each of those states bars recovery where there has been an express contract. See *Ryken v. Blumer*, 307 N.W.2d 865, 868 (S.D.1981) (the theory of unjust enrichment is a quasi-contract theory which is not usually invoked when there is already a contract in existence between the parties). Defendants have identified a total of 45 states which bar

2006 WL 7124778

recovery for unjust enrichment where there has been an express contract between the parties. Defendants also contend that packers and cattle producers may enter into “deals” or contracts for the purchase and sale of cattle, thus exempting the transaction or transactions from being examined for violations of the Packers and Stockyards Act. I have rejected that legal argument and have ruled that, if the Act is violated, contracts or “deals” cannot nullify the violation or violations.

*3 Roughly half of the fifty states require knowledge on the part of the defendant that it was receiving a benefit.

Defendants have identified 39 states which bar recovery for unjust enrichment where there is an adequate remedy at law. If the plaintiff class prevails on their PSA claims, plaintiffs in those states would, of course, not be entitled to recover again under an unjust enrichment claim. It might be argued that all class plaintiffs had remedies at law available to them—they could have taken advantage of contract remedies once plaintiffs became aware that the USDA had erred in reporting the boxed beef values. However, by that time, it would be undisputed that most of the cattle sold during the class period had already been slaughtered. Rescission would not have been a viable contract remedy. There would have been nothing that could be offered to restore as is normally required of a party seeking to rescind.

Many of the fact issues are common to the class plaintiffs even though they may be subject to the common law of 50 different states.

Class treatment of the unjust enrichment claims would require this court to determine, applying choice of law principles, which law is to be applied. Jurisdiction over the unjust enrichment claims exists only based upon diversity. Where federal jurisdiction is premised on diversity of citizenship, “we look to the choice-of-law rules of the forum State to determine which law applies.” *Ferrell v. West Bend Mut. Ins. Co.*, 393 F.3d 786, 794 (8th Cir.2006). “It is well-settled that South Dakota employs the most significant relationship test when determining choice of law questions.” *Burhenn v. Dennis Supply Co.*, 2004 SD 91, ¶ 24, 685 N.W.2d 778, 784. Under the most significant relationship test, courts must take into account the following contacts to determine which state’s law is applicable:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. (quoting The Restatement (Second) of Conflict of Laws § 145). District courts must “conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying” a particular state’s law. *In re: St. June Medical, Inc. , Silzone Heart Valve Products Liability Litigation*, 425 F.3d 1116, 1120 (8th Cir.2005).

Some class members sold their cattle in the same state as their residence. Some sold cattle in a neighboring state. Some cattle sales may not have occurred at the sale barn but instead over the telephone. I have concluded that determination of the state with the most significant contacts as to each class plaintiff’s claim would swamp the common issues and defeat the requirement of predominance in this multi-state class action. The Rule 23(b)(3) element of “superiority” does not exist in this case as to the unjust enrichment claims. Class resolution of the unjust enrichment claims is not necessarily “superior to other available methods for the fair and efficient adjudication of the controversy.” Fed.R.Civ.P. 23(b)(3).

*4 There are other reasons why the plaintiffs should not be allowed to proceed with the unjust enrichment claims as a class action. Allowing the unjust enrichment claims to be tried with the Packers and Stockyards Act claims would result in a trial that would be unmanageable. It would be impossible for any election of remedies to be made. We know, of course, that under the rules of pleading, a party may pursue alternative and inconsistent remedies as long as no double recovery is awarded. Even inconsistent factual assertions may be made. I find, however, that allowing plaintiffs to “ride two horses” in a class action would result in the action becoming unmanageable. In South Dakota and the vast majority of the states, an action to recover for unjust enrichment is in action in equity. *Himrich v. Carpenter*, 1997 SD 116, 569 N.W.2d 568, 573 (cited with approval in *Action Mechanical, Inc. v. Deadwood Historical Preser. Comm.*, 2002 SD 121, 652 N.W.2d 742). The distinction between actions at law and suits in equity has long been abolished but this applies only to the form of the action. It does not rule out the inherent substantive principles which underlie the two systems of procedure. The

2006 WL 7124778

principle of law that equity has jurisdiction in such cases only if the legal remedy is not full, adequate and complete remains “good law.” Plaintiffs here have not plead any alleged inadequate remedy at law. In fact, they have plead that there is an adequate remedy at law, namely the private right of action under the Packers and Stockyards Act. I could not and would not permit any award for unjust enrichment to go to the jury in the absence of plaintiffs proving that they had no legal remedy at law which is full, adequate and complete. Of course, plaintiffs could not and would not even attempt to prove the same. It is also clear to the court that, as a matter of law, the Packers and Stockyards Act is an adequate remedy at law. It is a firmly established rule of law that a party cannot have an equitable remedy if an adequate legal remedy is available. *Weger v. Pennington County*, 534 N.W.2d 854 (S.D.1995). See also *Northwestern Pub. Serv. v. Union Carbide*, 236 F.Supp.2d 966 (D.S.D.2002).

Had I properly “thought through” these matters earlier, I would not have certified the unjust enrichment class or classes. I apologize to counsel and the parties for not having come to the correct answer much earlier.

The United States Court of Appeals for the Eighth Circuit has pointed out that the “trial of class actions is usually

bifurcated into a liability phase and a remedial phase.” *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 470 (8th Cir.1984) (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360–62, 97 S.Ct. 1843, 1867–68, 52 L.Ed.2d 396 (1977)). If plaintiffs recover for the class, we will have enough on our plates dealing with the remedies phase.

Now, therefore,

IT IS ORDERED:

- *5 1. Defendants' motion (Doc. 517) to decertify the unjust enrichment class is granted.
2. The unjust enrichment class is decertified.
3. Defendants shall cause notice of decertification to be served upon all class plaintiffs.

All Citations

Not Reported in F.Supp.2d, 2006 WL 7124778

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 46

2011 WL 8969

Only the Westlaw citation is currently available.

United States District Court,
N.D. Indiana,
Fort Wayne Division.

James F. SCOTT, et al., Plaintiffs,
v.

Timothy S. DURHAM, et al., Defendants.

No. 1:09-CV-348-PPS-RBC.

|
Jan. 3, 2011.

Attorneys and Law Firms

C. Erik Chickedantz, Jeffrey P. Smith, Hawk Haynie Kammeyer & Chickedantz LLP, Fort Wayne, IN, James M. Lewis, Tuesley Hall Konopa LLP, South Bend, IN, for Plaintiffs.

Raymond Thomas Seach, Riley Bennett & Egloff LLP, Bradley J. Schulz, Richard R. Skiles, Skiles Detrude, Indianapolis, IN, for Defendants.

OPINION AND ORDER

PHILIP P. SIMON, Chief Judge.

*1 This matter is before the Court on two motions to dismiss relating to third-party claims asserted by defendant Auburn Automotive Heritage, Inc. (the “Museum”). One motion was filed by third-party defendants Donald Lyons, Joan Lyons and the Donald Lyons Family Trust (for simplicity, I will refer to these entities collectively as “Lyons”) [DE 144]; the other was filed by third-party defendants Mark Hyman and Hyman Properties, Inc. d/b/a Hyman Limited Classic Cars (“Hyman”) [DE 145]. For the reasons discussed below, the Court **GRANTS** the motions to dismiss, albeit without prejudice to the Museum's ability to amend its claims against the moving parties.

BACKGROUND

Plaintiff James Scott sued several parties involved in the Museum's auction of a 1930 Duesenberg automobile, which Scott alleges was rigged, resulting in his paying

an artificially inflated price for the car [DE 1]. One of the defendants in Scott's original complaint is the Museum. The Museum responded by bringing the third-party actions described above. According to the Museum, defendant Timothy Durham, the car's original owner, initially consigned the Duesenberg to the Museum for the auction.¹ Subsequently, Hyman, acting as an agent for Donald Lyons, contacted Durham, who agreed to sell the car for \$1 million, notwithstanding Durham's prior consignment agreement. By the terms of the Durham/Lyons scheme, Lyons agreed that Hyman would attend the auction on Lyons' behalf, and be the highest bidder on the car. But whatever the amount of that bid, Lyons would only be obligated to pay Durham \$1 million for the car.

¹ This and the following background facts are taken from the Museum's counterclaims, cross-claims and third-party claims [DE 128 at 49–53].

Hyman submitted a bidder registration form to the Museum in advance of the auction, which did not reveal anything about Lyons' purchase agreement with Durham. Hyman then attended the auction and bid on the car on behalf of Lyons. Once the bidding reached roughly \$800,000, all bids were between Hyman and Scott. Scott was bidding via telephone. Hyman, however, backed out of the agreement to place the highest bid, leaving Scott as the highest bidder at \$2.9 million. Scott paid this amount, along with an additional \$232,000, to the Museum, for a total of \$3,132,000. Pursuant to the illicit Durham/Lyons agreement, \$1,000,000 of the sale proceeds went to Durham, and Lyons and Hyman each received \$950,000.

At issue in the pending motions to dismiss are the Museum's claims against Lyons and Hyman for actual fraud (Count I), negligence (Count IV) and violation of the Indiana Crime Victims Relief Act (“CVRA”), IC § 34–24–3–1 (Count VI) [DE 128]. In support of its actual fraud count, the Museum alleges that Lyons and Hyman defrauded the Museum by failing to disclose their ownership interest in the car [DE 128, ¶¶ 39–44]. The Museum's negligence claim is based on its contention that the Indiana Administrative Code imposed on Lyons and Hyman a duty to disclose this ownership interest, which those parties breached [*Id.*, ¶¶ 60–63]. As for its CVRA claim, the Museum alleges that Lyons' and Hyman's actions caused the Museum to suffer pecuniary losses, through violations of Indiana's deception and criminal mischief statutes, thereby triggering the CVRA's remedies for such violations [*Id.*, ¶¶ 73–79].

*2 Lyons and Hyman seek to dismiss these claims, pursuant to Rule 12(b)(6), essentially arguing that each claim requires the existence of a duty to disclose an ownership interest in the car, which they say the Museum cannot show.

DISCUSSION

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990). In reviewing a motion to dismiss under Rule 12(b)(6), the Court must take the facts alleged in the pleading as true and draw all reasonable inferences in favor of the pleader. The pleading must contain only “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed.R.Civ.P. 8(a)(2), and there is no need for detailed factual allegations. The statement, however, must “give the defendant fair notice of what the ... claim is and the grounds upon which it rests” and the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Pisciotta v. Old Nat. Bancorp.*, 499 F.3d 629, 633 (7th Cir.2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

I. Actual Fraud

The failure of Lyons and Hyman to disclose an ownership interest in the car is the sole deceptive act supporting the Museum's fraud claim against those parties. The Museum, however, does not point to any special feature of its relationship with Lyons and Hyman that would give rise to a duty to disclose such information. In the absence of such a duty, the Museum's claims for actual fraud against these parties fail.

Under Indiana law, the elements of actual fraud are: “(i) material misrepresentation of past or existing facts by the party to be charged (ii) which was false (iii) which was made with knowledge or reckless ignorance of the falseness (iv) [which] was relied upon by the complaining party and (v) [which] proximately caused the complaining party injury.” *Rice v. Strunk*, 670 N.E.2d 1280, 1289 (Ind.1996); *see also Kesling v. Kesling*, 546 F.Supp.2d 627, 638 (N.D.Ind.2008); *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244, 249 (Ind.1992).

These elements expressly require a misrepresentation. But Indiana law also recognizes that “the failure to disclose all material facts, by a party on whom the law imposes a duty to disclose, constitutes actionable fraud.” *Vaughn v. General Foods Corp.*, 797 F.2d 1403, 1413–14 (7th Cir.1986) (quoting *Grow v. Indiana Retired Teachers Cmty.*, 149 Ind.App. 109, 271 N.E.2d 140, 145 (Ind.1971) (en banc)); *see also Kesling*, 546 F.Supp.2d at 639; *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428, 431 (Ind.Ct.App.1984) (omission is actionable where there is a duty to disclose).

But “where there is no duty to speak or disclose facts, silence will not constitute actionable fraud.” *Monarch Beverage Co., Inc. v. Tyfield Importers, Inc.*, 823 F.2d 1187, 1191–92 (7th Cir.1987) (quoting *Barnd v. Borst*, 431 N.E.2d 161, 168 (Ind.Ct.App.1982)). Moreover, “the burden of showing a duty to speak is on the party alleging fraudulent concealment.” *Id.*

*3 For purposes of actual fraud, a duty to disclose may arise by virtue of a fiduciary or confidential relationship. *See Kesling*, 546 F.Supp.2d at 641; *Grow*, 271 N.E.2d at 143; *Am. United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 701 (Ind.Ct.App.2004); *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1251 (Ind.Ct.App.1998). It may also arise in the context of a buyer-seller relationship. *See Kesling*, 546 F.Supp.2d at 638; *Am. United Life Ins.*, 808 N.E.2d at 701; *Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind.Ct.App.1994).

The Museum does not allege that it stood in a fiduciary, confidential, or buyer-seller relationship with Lyons and Hyman. Instead, it argues that a duty to disclose arose here from: (1) the “superior knowledge” of Lyons and Hyman as to their ownership interest in the car; (2) those parties' partial disclosures to the Museum by means of Hyman's bidder registration form; and (3) Section 1–1–34(d) of the Indiana Administrative Code, which is an administrative regulation governing the operation of auction houses [DE 161 at 7–8]. None of these arguments, however, is persuasive.

A. Superior Knowledge

The Museum correctly observes that a duty to disclose can sometimes arise where one party enjoys a position of superiority over another by virtue of knowledge that only it possesses. But the cases that find a duty to disclose arising on this basis have done so in only narrow circumstances, and almost exclusively in the context of buyer-seller relationships. *See Kesling*, 546 F.Supp.2d at 638; *Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind.Ct.App.1994); *but see Am. United Life Ins.*, 808 N.E.2d at 701 (recognizing a bank's duty to disclose

to an account holder) (citing *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1251 (Ind.Ct.App.1998)).

And even in a buyer-seller context, a duty to disclose does not necessarily arise. See *Am. Heritage Banco, Inc. v. Cranston*, 928 N.E.2d 239, 247 (Ind.Ct.App.2010) (“As a matter of course, every buyer/seller relationship likely involves a party who possesses at least some knowledge not possessed by the other, but that fact alone does not mean that one party enjoys a position of superiority over the other so as to create a special duty and a right of reliance.”).

Cases that find a duty to disclose arising from one party's superior knowledge reason that the duty arises from the trust and reliance that one party must repose in the other. See *Am. Heritage Banco*, 928 N.E.2d at 247 (no duty to disclose in buyer-seller context because no evidence of right to rely); *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 324 (Ind.Ct.App.1991) (fraud occurs where the buyer relies on the seller's statements, and the seller has professed knowledge of their truth); *Peoples Trust and Sav. Bank v. Humphrey*, 451 N.E.2d 1104, 1111 (Ind.Ct.App.1983) (“concealment becomes fraud only when ... it appears that either one or each of the parties, in entering into the contract or other transaction expressly reposes a trust and confidence in the other”) (quoting *McNair v. Public Sav. Ins. Co. of America*, 88 Ind.App. 386, 163 N.E. 290, 293 (Ind.Ct.App.1928)); see also *Wells*, 691 N.E.2d at 1251 (“A bank is inherently in a position superior to its checking account holders, who, in order to conduct their business, must depend on the bank to protect the account holder's funds”).

*4 The Museum does not allege that it was required to place its trust and reliance on Hyman or Lyons. Nor does it characterize its relationship with those parties in a way that would permit an inference that the Museum had to a right to rely on and trust those parties, as a buyer sometimes does with a seller, or as an account holder does with a bank. And it is hard to see how the Museum could support such a characterization. After all, the Museum merely conducted the auction; it was not a bidder or potential purchaser.

Moreover, the Museum fails to point to any case law suggesting that Indiana courts would recognize a duty to disclose in the context of a bidder-auctioneer relationship. To be sure, the Museum insists that Lyons and Hyman were “far more than just ‘attendees and bidders’ at the Museum's auction” [DE 161 at 7]. But, without more, this provides no

basis for finding that any superior knowledge of Lyons and Hyman gave rise to a duty to disclose here.

B. Partial Disclosure

The Museum next argues that, once Hyman submitted the bidder registration form, he created a partial misrepresentation which Lyons and Hyman had a duty to correct by disclosing an ownership interest in the car [DE 161 at 7–8]. This argument is a nonstarter for a number of reasons.

Indiana law does impose a duty to disclose in cases where it is necessary to correct a partial misrepresentation. See *Thompson v. Best*, 478 N.E.2d 79, 84 (Ind.Ct.App.1985); see also *Kesling*, 546 F.Supp.2d at 641–42. In *Thompson*, home sellers told a buyer about the home's sump pump and drainage tiles, as well as isolated water incidents, but failed to add that there was a consistent water problem. *Thompson*, 478 N.E.2d at 81. The buyer discovered the chronic water issues only after moving in. *Id.* In finding that the buyer had presented sufficient evidence of fraud to survive summary judgment, the court observed that “[a]s soon as [the sellers] introduced [the buyer] to the fact of the sump pump and the drainage tiles around the house, it was incumbent upon [the sellers] to fully declare any and all problems associated with their function.” *Id.* at 84 (emphasis in original). In other words, once a seller tells part of the story, he assumes a duty to disclose the whole truth without concealing material facts. *Id.*; see also *Kesling*, 546 F.Supp.2d at 641–42; *Enservco, Inc. v. Indiana Securities Div.*, 623 N.E.2d 416, 426 (Ind.1993); *Am. United Life Ins.*, 808 N.E.2d at 702–3; *Indiana Bank & Trust Co. of Martinsville, Indiana v. Perry*, 467 N.E.2d 428, 431 (Ind.Ct.App.1984).

The Museum, however, provides no basis for concluding that Hyman's submission of the bidder registration form gave rise to a duty to disclose here. As with the cases that find a duty to disclose rooted in one party's “superior knowledge,” cases that find a duty to correct a partial misrepresentation do so almost exclusively in the context of buyer-seller relationships, where one party must rely on the other's professed superior knowledge or expertise. See *Am. United Life Ins.*, 808 N.E.2d at 702–3 (buyer-seller); *Thompson*, 478 N.E.2d at 84 (same); *Indiana Bank & Trust Co. of Martinsville, Indiana*, 467 N.E.2d at 431 (same). But, as I mentioned earlier, the Museum does not allege that it stood in a buyer-seller relationship with Lyons and Hyman. Nor does it attempt to analogize its relationship with those parties to the buyer-seller context. And the Court is not aware of any Indiana authority that would support an extension of the duty to correct a partial

misrepresentation from the buyer-seller context to the bidder-auctioneer context here.

*5 What is more, I failed to see how the information disclosed on the bidder registration form, which appears to be the sole basis for the Museum's partial disclosure argument [DE 161 at 8], amounts to a partial misrepresentation. That form does not require the registering bidder to make *any* representations as to his or his principal's possible ownership interest in the items at auction [DE 128–2].² Nor does the form reference the car at issue in this case, or any other property to be auctioned [*Id.*]. Indeed, in completing the form, the only information Hyman provided, and was required by the form to provide, was his name and address [*Id.*]. So even if there were a basis for extending the duty to correct a partial misrepresentation beyond the buyer-seller context, to the context here, the Museum's allegation that Lyons and Hyman created a partial misrepresentation is belied by the content of the bidder registration form, on which its partial disclosure argument relies.

² By contrast, the consignment agreement that Durham completed when he consigned the car to auction provides that the “Seller/Owner warrants that [he] is the sole and only owner of [the car]” [DE 128, ¶ 26 & 128–3 at 3, ¶ 2].

C. Section 1–1–34(d) of the Indiana Administrative Code

The Museum also fails to show how Section 1–1–34(d) of the Indiana Administrative Code could give rise to a duty to disclose here. In Indiana, auctions and auctioneers are governed by the Auctioneer and Auction Licensing Act. IC § 25–6.1–1–2. This Act governs the creation, membership and powers of the Indiana Auctioneer Commission, which is empowered to administer and enforce administrative regulations governing the operation of auction houses, of which Section 1–1–34(d) is an example. IC 25–6.1–2–5; 812 IAC § 1–1–34(d); *see also Polo Realty Inc. v. Kruse, Inc.*, No. 1:10-cv-144, 2010 WL 3038731, at *5 (N.D.Ind. Aug.2, 2010). On its face, Section 1–1–34(d) appears to provide a remedy for a buyer who unwittingly bids against an undisclosed seller:

If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty

for such bidding is reserved, the buyer may at his option avoid the sale or take the property at the price of the last good faith bid prior to the completion of the sale.

812 IAC § 1–1–34(d).

This provision plainly exists to protect buyers—not auctioneers. Nothing in the plain language of this regulation imposes a duty on sellers to disclose anything to the auctioneer, including any ownership interest in property they intend to bid on. Nor does this regulation expressly prohibit sellers from bidding on property in which they have an ownership interest. On the contrary, it appears to contemplate that such bidding will sometimes occur. Moreover, I could not locate, nor did the Museum point to, any authority finding that Section 1–1–34(d) creates a duty to disclose, or any reference to any Indiana statute or regulation that recognizes such a duty.

* * *

In sum, the Museum fails to establish a common law, statutory or other basis for finding that Lyons and Hyman had a duty to disclose an ownership interest in the car. In the absence of such a duty, the Museum's actual fraud count against those parties fails as a matter of law. *Cf. Kesling*, 546 F.Supp.2d at 643 (dismissing fraud claim based on failure to disclose because plaintiff lacked basis for duty to disclose); *Concordia Theological Seminary, Inc. v. Hendry*, No. 1:05-CV-285, 2005 WL 3005482, at *3 (N.D.Ind. Nov. 9, 2005) (same).

II. Negligence

*6 The Museum's negligence claim is also based on the alleged failure of Lyons and Hyman to disclose an ownership interest in the car. The elements of a negligence claim under Indiana law are: “(1) a duty owed to plaintiff by defendant, (2) breach of duty by allowing conduct to fall below the applicable standard of care, and (3) a compensable injury proximately caused by defendant's breach of duty.” *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 635 (7th Cir.2007) (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1216–17 (Ind.2000)). “Absent a duty there can be no negligence or liability based upon the breach.” *Kroger Co. v. Plonski*, 930 N.E.2d 1, 6 (Ind.2010).

The duty element of the Museum's negligence claim appears to be based on the contention that Section 1–1–34(d) creates a duty to disclose [DE 161 at 9; DE 128, ¶¶ 61–62]. Lyons and Hyman argue that Section 1–1–34(d) cannot ground the Museum's negligence claim because the Museum is not included in the class of persons Section 1–1–34(d) is intended to protect [DE 164 at 3].

As I noted earlier, Section 1–1–34(d) provides a remedy for buyers who unwittingly bid against sellers. But nothing in that regulation provides a remedy for auctioneers. And, as I also mentioned earlier, Section 1–1–34(d) does not expressly create *any* duties, and certainly not a bidder's duty running in favor of an auctioneer.

In any event, there is another reason why that Section 1–1–34(d) cannot support the Museum's negligence claim. The simple fact of the matter is that Indiana courts do not recognize negligence actions based on duties prescribed by administrative regulations.

It is true that Indiana courts have a long history of recognizing that the violation of a *statutory* duty can ground a negligence action. *Kho v. Pennington*, 875 N.E.2d 208, 211 (Ind.2007) (collecting cases). Specifically, the “unexcused or unjustified violation of a duty prescribed by statute or ordinance constitutes negligence *per se* if the statute is intended to protect the class of persons in which the plaintiff is included and against the risk of the type of harm which has occurred as a result of its violation.” *Vandenbosch v. Daily*, 785 N.E.2d 666, 669 (Ind.Ct.App.2003); *see also Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind.Ct.App.1988). Thus, for example, “a landlord may be liable to a tenant because of negligence which arises from the violation of a duty imposed by statute or ordinance.” *Id.* at 1160.

But the same is not true of administrative regulations. Unlike statutory violations, the violation of an administrative regulation does not constitute negligence *per se*. *Beta Steel v. Rust*, 830 N.E.2d 62, 73–74 (Ind.Ct.App.2005); *Vandenbosch*, 785 N.E.2d at 670; *Hodge*, 527 N.E.2d at 1160 n. 3. Accordingly, Indiana courts have held that negligence claims fail as a matter of law where the duty element of the claim rests solely on an administrative regulation that the defendant allegedly violated. *See Vandenbosch*, 785 N.E.2d at 670 (landlord's violation of provision of the Indiana Administrative Code was not proper basis for imposing negligence liability because provision was not a statute or

ordinance); *Hodge*, 527 N.E.2d at 1160 n. 3 (“appellants' claim of negligence could not survive a motion for summary judgment if the duty element of their claim rested solely upon the existence of an applicable administrative regulation”); *see also Andrews v. Speedway SuperAmerica LLC*, No. 1:09–cv–1242, 2010 WL 2985938, at *5 (S.D.Ind. Jul.27, 2010) (dismissing negligence claim where duty element was based on provision of Indiana Administrative Code).

*7 Here, the Museum points to no basis for the duty element of its negligence claim other than the alleged violation of Section 1–1–34(d). Because this administrative regulation is not a sufficient basis for the duty element of the Museum's negligence claims against Lyons and Hyman, those claims fail as a matter of law.

III. Indiana Crime Victims Relief Act

The Museum's claims against Lyons and Hyman under the CVRA fail because the Museum has not sufficiently alleged that it suffered a “pecuniary loss,” as it must to recover under the CVRA.

The CVRA allows a plaintiff who “suffers a pecuniary loss as a result of a violation of IC 35–43” to “bring a civil cause of action against the person who caused the loss....” IC § 34–24–3–1; *see also Gilliana v. Paniaguas*, 708 N.E.2d 895, 899 (Ind.Ct.App.1999). To establish a viable claim, “a plaintiff must show a violation of one of the specific code sections and that such violation caused the loss suffered by the plaintiff.” *McLemore v. McLemore*, 827 N.E.2d 1135, 1144 (Ind.Ct.App.2005) (citing *Yoder Grain, Inc. v. Antalis*, 722 N.E.2d 840, 850 (Ind.Ct.App.2000)). The Museum's CVRA claim is based on Lyons' and Hyman's alleged violations of two provisions of Section 35–43 of the Indiana Code: the criminal mischief statute, IC § 35–43–1–2, and the deception statute, IC § 35–43–5–3 [DE 128, ¶¶ 73–79].

Lyons and Hyman argue that the Museum fails to state a claim under the CVRA because the alleged criminal violations are based on the same allegations underlying the Museum's already defective fraud claim [DE 146 at 8]. It is true that the Museum's only allegation against those parties is that they violated the criminal statutes by failing to disclose their ownership interest in the car on the bidder registration form [DE 128, ¶ 177], which is the same allegation underlying the Museum's defective fraud claim.

Moreover, the criminal mischief and deception statutes are both anti-fraud statutes. *See ABN Amro Mortg. Group*,

Inc. v. Maximum Mortg., Inc., 429 F.Supp.2d 1031, 1042 (N.D.Ind.2006). And some district courts have dismissed CVRA claims where the alleged violations of the deception and criminal mischief statutes rest on defective common law fraud allegations. See *SMC Corp. v. Peoplesoft USA, Inc.*, No. 1:00-cv-1095, 2004 WL 2538641, at *6 (S.D.Ind. Oct.12, 2004) (dismissing CVRA claim because alleged deception statute violation was based on defective fraud claim); see also *F. McConnell & Sons, Inc. v. Target Data Systems, Inc.*, 84 F.Supp.2d 980, 987 (N.D.Ind.2000).

But the law is unclear on the issue of whether the Museum must meet the elements of common law fraud to state a claim under the criminal mischief and deception statutes. At least one Indiana court has chosen not to read the elements of common law fraud into other fraud crimes defined by statute. See *American Heritage Banco, Inc. v. McNaughton*, 879 N.E.2d 1110, 1117–18 (Ind.Ct.App.2008) (“The five elements of common law fraud are not found in the statute defining fraud on a financial institution.”).

*8 I need not resolve this issue because the Museum's CVRA claim fails for the separate reason that the Museum has not satisfied the “pecuniary loss” element of such claims. For the Museum to be entitled to recovery under the CVRA, it must show a “pecuniary loss” as a result of Lyons' and Hyman's alleged violations of the criminal mischief and deception statutes. IC § 34–24–3–1; see also *Opportunity Knocks, Inc. v. Maxwell*, 618 F.Supp.2d 920, 927 (N.D.Ind.2009); *Bridgeforth v. Thornton*, 847 N.E.2d 1015, 1028 (Ind.Ct.App.2006); *Harco, Inc. of Indianapolis v. Plainfield Interstate Family Dining Assocs.*, 758 N.E.2d 931, 944 (Ind.Ct.App.2001). “A pecuniary loss has been described as a ‘loss of money, or of something by which money, or something of money value may be acquired.’ ” *Opportunity Knocks*, 618 F.Supp.2d at 927 (quoting *Americar Leasing, Inc. v. Maple*, 406 N.E.2d 333, 335 (Ind.Ct.App.1980)); see also *Veach v. Sheeks*, 316 F.3d 690, 694 (7th Cir.2003).

The parties do not address the point, but the Museum has not alleged a pecuniary loss within the meaning of the CVRA. The only losses the Museum says Lyons and Hyman caused are expenses incurred in defending itself in this lawsuit, and

the amount of the claims that Scott and other parties have asserted against the Museum [DE 128 at 61]. These, however, are not “pecuniary losses” within the meaning of the CVRA.

The CVRA “does not allow for the consideration of attorney fees as part of the pecuniary losses required to entitle a party to recovery under the statute.” *Bridgeforth*, 847 N.E.2d at 1030; see also *Harco*, 758 N.E.2d at 945. The same goes for costs of litigation. *Id.* Moreover, no judgment has been entered against the Museum in this litigation. So at this point in time, the Museum has not suffered any pecuniary loss. *Cf. Veach*, 316 F.3d at 694 (affirming dismissal of CVRA claim because plaintiff, who did not pay any of the judgment levied against him in small claims court, suffered losses of time and effort, but not money); *Harco*, 758 N.E.2d at 944 (reversing trial court's award under CVRA because, apart from attorneys' fees and costs of litigation, plaintiff failed to establish actual damages resulting from frivolous claim filed against it). Accordingly, the Museum's CVRA claim against Lyons and Hyman must be dismissed for failure to allege the pecuniary loss required for recovery under that statute.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion to dismiss filed by Donald Lyons, Joan Lyons and the Donald Lyons Family Trust [DE 144], and **GRANTS** the motion to dismiss filed by Mark Hyman and Hyman Properties, Inc. d/b/a Hyman Limited Classic Cars [DE 145]. Accordingly, the Court **DISMISSES WITHOUT PREJUDICE** the following claims asserted by the Museum against those parties: Count I (actual fraud), Count IV (negligence) and Count VI (violation of the Indiana Crime Victims Relief Act) [DE 128]. The Museum is **GRANTED LEAVE TO AMEND** its pleadings within **30 days** of the date of entry of this Order to address the deficiencies outlined above.

***9 SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 8969

TAB 47

201WL 8 91592©©



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by *Staley v. Gilead Sciences, Inc.*, N.D.Cal., March 3, 2020

2018 WL 7197233

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

**SERGEANTS BENEVOLENT ASSOCIATION
HEALTH & WELFARE FUND,**

individually and on behalf of itself and
all others similarly situated, Plaintiff,

v.

ACTAVIS, PLC, and *Forest Laboratories, LLC*,
Merz Pharma GmbH & Co. KGaA, Merz GmbH &
Co. KGaA, Merz Pharmaceuticals GmbH, Amneal
Pharmaceuticals, LLC, Teva Pharmaceutical
Industries, Ltd., Barr Pharmaceuticals, Inc.,
Cobalt Laboratories, Inc., Upsher-Smith
Laboratories, Inc., Wockhardt Limited, Wockhardt
USA LLC, *Sun Pharmaceuticals Industries,
Ltd.*, Dr. Reddy's Laboratories Ltd., and
Dr. Reddy's Laboratories Inc., Defendants.

15 Civ. 6549 (CM)

|

Signed 12/26/2018

Attorneys and Law Firms

Ankur Kapoor, Matthew L. Cantor, Ethan Edward Litwin,
Constantine Cannon, LLP, *Elizabeth S. Metcalf*, Peter George
Safirstein, Safirstein Metcalf LLP, New York, NY, *Lori Ann
Fanning*, Pro Hac Vice, *Marvin Alan Miller*, Miller Law LLC,
Chicago, IL, for Plaintiff.

Heather McDevitt, *Kristen O'Shaughnessy*, *Martin Michael
Toto*, *Jack Pace*, *William Harold Bave, III*, *Peter J. Carney*,
White & Case LLP, New York, NY, *John Mark Gidley*, White
& Case LLP, Washington, DC, *Kevin Charles Adam*, White
& Case LLP, Boston, MA, for Defendants Actavis, plc, Forest
Laboratories, LLC.

Martin Michael Toto, White & Case LLP, New York, NY, for
Defendant Merz Pharmaceuticals GmbH & Co. KGaA.

Jay Philip Lefkowitz, Alexandra Corbett Strang, *Devora
Whitman Allon*, *Kyla A. Jackson*, Pro Hac Vice, *Steven
James Menashi*, Kirkland & Ellis LLP, New York, NY, for

Defendants Amneal Pharmaceuticals, LLC, Upsher-Smith
Laboratories, Inc.

Christopher T. Holding, Pro Hac Vice, *Sarah K. Frederick*,
Goodwin Procter, LLP, Boston, MA, for Defendants Teva
Pharmaceuticals USA, Inc., Barr Pharmaceuticals, Inc., Teva
Pharmaceutical Industries Ltd.

Christopher T. Holding, Pro Hac Vice, *Sarah K. Frederick*,
Pro Hac Vice, Goodwin Procter, LLP, Boston, MA, *Jack Pace*,
Peter J. Carney, White & Case LLP, New York, NY, for
Defendant Cobalt Laboratories, Inc.

Damon William Suden, *William Alfred Escobar*, *David Reap*,
Kelley Drye & Warren LLP, New York, NY, for Defendants
Wockhardt Limited, Wockhardt USA LLC.

Jay Philip Lefkowitz, *Steven James Menashi*, Kirkland
& Ellis LLP, New York, NY, for Defendant Sun India
Pharmaceuticals Industries, Ltd.

Eric Peter Stephens, Jones Day, New York, NY, *Jonathan
Bruce Berman*, Pro Hac Vice, Jones Day, Washington, DC,
for Defendants Dr. Reddy's Laboratories Ltd., Dr. Reddy's
Laboratories, Inc.

Jay Philip Lefkowitz, Alexandra Corbett Strang, *Devora
Whitman Allon*, *Steven James Menashi*, Kirkland & Ellis
LLP, New York, NY, for Defendant Sun Pharmaceutical
Industries Ltd.

Heather McDevitt, *Kristen O'Shaughnessy*, *Martin Michael
Toto*, *William Harold Bave, III*, White & Case LLP, New
York, NY, *Kevin Charles Adam*, White & Case LLP, Boston,
MA, for Defendants Merz GmbH & Co. KGaA., Merz
Pharmaceuticals GmbH, Merz Pharma GmbH & Co. KGaA.

Devora Whitman Allon, *Kyla A. Jackson*, Pro Hac Vice,
Kirkland & Ellis LLP, New York, NY, for Defendant Sun
Pharmaceuticals Industries, Ltd.

ORDER

McMahon, C.J.:

*1 The Complaint in this action, which was filed following
an earlier civil enforcement action by the New York Attorney
General, alleges a two-part scheme to prolong the monopoly
of Defendant Forest Laboratories, LLC ("Forest"), over the
blockbuster Alzheimer's drug memantine hydrochloride, or
Namenda®. According to the Complaint, Forest and its

patent licensor Merz¹ first entered into agreements with generic manufacturers to stay out of the market until the exclusivity period for Forest's existing, twice-a-day *Namenda* IR formulation had nearly expired ("pay for delay"). With this maneuver, Forest bought itself time to gain regulatory approval for a new, once-a-day *Namenda* XR formulation and to pull from the market the old, twice-a-day *Namenda* IR formulation (the "product hop" or "hard switch"). Although a preliminary injunction prevented Forest from withdrawing the old formulation, a successful switch would have effectively forestalled generic competition until the year 2029.

¹ "Merz" refers to three entities, all named as Defendants in the Complaint: Merz GmbH & Co. KGaA, Merz Pharma GmbH & Co. KGaA, and Merz Pharmaceuticals GmbH.

Under the United States Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745–46 (1977), indirect purchasers of products sold at supra-competitive prices lack standing to sue under federal antitrust statutes. However, under its later decision in *California v. ARC Am. Corp.*, 490 U.S. 93, 105–06 (1989), indirect purchasers may still bring suit under state antitrust laws, if a state permits such claims. Therefore, it is common in private antitrust litigation for two groups of purchasers, direct and indirect, to file separate cases arising out of the same nucleus of operative fact, but to allege different causes of action—direct purchasers under federal law and indirect purchasers under state laws.

That is precisely what happened here. In a parallel "direct purchaser" case, drug wholesaler plaintiffs, which bought *Namenda* directly from Forest, brought a suit alleging five counts under the federal antitrust laws against Forest, Merz, and Forest's parent company Actavis, plc ("Actavis"). That case, captioned *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15-cv-7488 (S.D.N.Y.), is currently pending before this Court. I refer to the drug wholesaler plaintiffs in that case as the Direct Purchaser Plaintiffs, or "DPPs," and I refer to that case as the "DP Action."

In the instant case, employee health plan Sergeants Benevolent Association Health & Welfare Fund, which purchased *Namenda* indirectly, separately brought a suit alleging 123 claims under state antitrust, consumer protection, and restitution laws.² This case, captioned *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, plc*, No. 15-cv-6549 (S.D.N.Y.), names Actavis,

Forest, Merz, and eight generic drug manufacturers³ (the "Generic Defendants"), which were not named in the DP Action. I refer to the Plaintiff here, Sergeants Benevolent Association Health & Welfare Fund, as the Indirect Purchaser Plaintiff, or "IPP," and I refer to this case as the "IP Action."

² The IPP's Complaint includes four counts, with dozens of state law claims under each count. I recognize that plaintiffs will sometimes style their complaints this way. Frankly, however, each of these state law claims should be its own cause of action, such that the IPP Complaint would properly contain 123 separate counts.

³ These are: Barr Pharmaceuticals, Inc. ("Barr"); Teva Pharmaceuticals Industries, Ltd. and Teva Pharmaceuticals USA, Inc. (jointly, "Teva"); Cobalt Laboratories, Inc. ("Cobalt"); Upsher-Smith Laboratories, Inc. ("Upsher-Smith"); Amneal Pharmaceuticals, LLC ("Amneal"); Wockhardt Limited and Wockhardt USA LLC (jointly, "Wockhardt"); Sun India Pharmaceuticals Industries, Ltd. ("Sun"); and Dr. Reddy's Laboratories Ltd. and/or Dr. Reddy's Laboratories, Inc. (jointly, "Dr. Reddy's").

*2 The complaints in the DP and IP Actions were filed around the same time. The parties, with the exception of Merz, sought consolidated briefing on motions to dismiss, (Dkt No. 63), which was granted, (Dkt. No. 64). Merz eventually joined the consolidated briefing. (*See, e.g.*, Dkt. No. 85.)

Ruling on the motions to dismiss both the DPPs' and IPP's complaints, this Court held that most of the federal antitrust counts in the DPPs' complaint survived. *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, plc*, Nos. 15-cv-6549, 15-cv-7488, 2016 WL 4992690, at *16–*17 (S.D.N.Y. Sept. 13, 2016). In the interest of efficiently resolving common factual and legal issues, it then denied without prejudice the motions to dismiss the IPP complaint, and placed all 123 state law claims on its suspense calendar while the federal antitrust claims in the DP Action were pending. *Id.* at *17.

The DP Action proceeded through class certification and denial of Defendants' motion for summary judgment before the parties expressed interest in mediation. (*See* Dkt. No. 122.)⁴ However, it was determined that mediation would be

201WL 8 91592©©

successful only if the IP Action came off of the suspense calendar and the IPP came back into the proceedings. (*Id.*)

4 Unless otherwise noted, all references herein are to the docket in *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, plc*, No. 15-CV-6549 (S.D.N.Y.).

As a result, the IPP’s 123 state law claims are presently before the Court on separate motions to dismiss by (1) Actavis, Forest, and Merz and (2) the Generic Defendants. The parties have also recently submitted supplemental briefing. (*See* Dkt. Nos. 129–33, 146, 149–56.)

For the reasons below, the motions to dismiss the IP Action are **GRANTED IN PART** and **DENIED IN PART**.

Table of Contents

I. Overview of Claims and Jurisdiction...——

II. Factual Background...——

A. The Parties...——

B. The Regulatory Scheme...——

C. Drug Substitution Laws and Product Hopping...——

D. The *Namenda* Settlement Agreements...——

E. The “Hard Switch”...——

III. Procedural History...——

IV. Standard of Review...——

V. Count One: Monopolization Under the Laws of 27 States Against Actavis, Forest, and Merz...——

A. The IPP’s Underlying Factual Allegations State a Claim for Monopolization...——

1. The IPP Has Stated a Claim for Monopolization Based on the Hard Switch from *Namenda* IR to *Namenda* XR...——

2. The IPP States a Claim for Monopolization Based on the Settlement Agreements...——

3. The Court’s Earlier Ruling Regarding the DPPs’ Overarching Scheme Claim Does Not Support Dismissing Count One...——

4. The Statute of Limitations Argument Is Inadequately Briefed With Respect to the IP Action...——

B. The IPP States a Claim for Monopolization Under the Laws of Some States But Not Others...——

1. The IPP Has Article III Standing To Bring State Law Monopolization Claims on Behalf of Class Members Who Made Purchases in Those States...——

2. The IPP Fails to State a Claim for Monopolization in Three States That Follow *Illinois Brick* (Florida, Massachusetts, and Utah)...——

3. The IPP’s Failure To Satisfy Pre-Suit Notification Requirements Does Not Warrant Dismissal of the Claims in Three States (Hawaii, Arizona, and Nevada)...——

4. The IPP Fails To State a Claim for Monopolization Under the Law of Kansas...——

C. In Conclusion, the IPP Has Stated A Claim for Monopolization Under Count One With Respect to the Laws of 23 States...——

*3 VI. Count Two: Conspiracy To Monopolize Under the Laws of 27 States Against Actavis, Forest, Merz, and the Generic Defendants...——

A. The IPP States a Claim for Conspiracy To Monopolize...——

B. Illinois...——

C. Oregon...——

D. In Conclusion, the IPP Has Stated a Claim for Conspiracy to Monopolize Under Count Two With Respect to the Laws of 25 States...——

VII. Count Three: Consumer Protection and Unfair and Deceptive Trade Practices Under the Laws of 25 States Against Actavis, Forest, Merz, and the Generic Defendants...——

201WL 8 91592©©

A. The IPP Adequately Pleads Its State Law Claims Under *Twombly* and *Iqbal*...——

B. The IPP Is Not Required to Plead Its Complaint in Accordance With [Federal Rule of Civil Procedure 9\(b\)](#)...——

C. *Illinois Brick* Does Not Bar the IPP's Consumer Protection Claims...——

D. The IPP States a Claim Under the Consumer Protection Laws of Some States But Not Others...——

1. Alabama...——

2. Arizona...——

3. California...——

4. District of Columbia...——

5. Florida...——

6. Hawaii...——

7. Idaho...——

8. Illinois...——

9. Kansas...——

10. Maine...——

11. Massachusetts...——

12. Michigan...——

13. Missouri...——

14. Montana...——

15. Nebraska...——

16. Nevada...——

17. New Hampshire...——

18. New Mexico...——

19. New York...——

20. North Carolina...——

21. Rhode Island...——

22. Tennessee...——

23. Utah...——

24. Vermont...——

25. West Virginia...——

E. In Conclusion, the IPP Has Stated a Claim for Violation of State Consumer Protection Laws Under Count Three Under the Laws of 14 States...——

VIII. Count Four: Unjust Enrichment Under the Laws of 44 States Against Actavis, Forest, Merz, and the Generic Defendants...——

A. Count Four Does Not State a Claim With Respect to the Generic Defendants Under the Laws of Any State...——

B. The Unjust Enrichment Claims Under the Laws of Ten States Are Barred By *Illinois Brick* (Alaska, Colorado, Connecticut, Delaware, Montana, New Jersey, Oklahoma, South Carolina, Virginia, and Washington)...——

C. Autonomous Unjust Enrichment Claims in States That Do Not Follow *Illinois Brick* Survive (Arkansas and Wyoming)...——

D. The IPP States a Claim for Unjust Enrichment Under the Laws of Some States But Not Others...——

1. Alabama...——

2. Arizona...——

3. California...——

4. District of Columbia...——

5. Florida...——

6. Idaho...——

7. Illinois...——

8. Kansas...——

9. Maine...——

10. Massachusetts...——

11. Michigan...——

12. Mississippi...——

13. New York...——

14. North Carolina...——

15. North Dakota...——

16. Rhode Island...——

17. Tennessee...——

18. Utah...——

19. Washington...——

20. West Virginia and Wisconsin...——

21. Wyoming...——

E. In Conclusion, the IPP Has Stated a Claim for Unjust Enrichment Under Count Four With Respect to Actavis, Forest, and Merz Under the Laws of 31 States...——

IX. Conclusion...——

BACKGROUND

I. Overview of Claims and Jurisdiction

This case, *Sergeants Benevolent Association Health & Welfare Fund v. Actavis*, No. 15-cv-6549 (S.D.N.Y.) (the “IP Action”), proceeds in parallel with the factually similar case, *In re Namenda Direct Purchaser Antitrust Litigation*, No. 15-cv-7488 (S.D.N.Y.) (the “DP Action”).

Although this Court accepted these two cases on its docket as related cases pursuant to Local Rule 13, (*see* 15-cv-7488, entry of Oct. 6, 2015), and although this Court granted certain Defendants' motion for consolidated briefing on the motions to dismiss pursuant to its individual rules, (15-cv-6549, Dkt. No. 64), it never consolidated the cases under [Federal Rule of Civil Procedure 42\(a\)](#), nor joined the claims and parties under [Federal Rules of Civil Procedure 18](#) and [19](#), respectively.

*4 As a result, the IP Action proceeds as an entirely separate action composed solely of state law claims. The complaint in the IP Action alleges a total of [123 state law](#) claims, under the law of 44 states, aggregated as four “counts”: (1) monopolization (27 state law claims); (2) conspiracy to monopolize (27 state law claims); (3) violation of consumer protection and unfair and deceptive trade practices statutes

(25 state law claims); and (4) unjust enrichment (44 state law claims).

Since not a single federal interest is implicated in the IP Action, the Court exercises jurisdiction over these [123 state law](#) claims pursuant to the Class Action Fairness Act, [28 U.S.C. § 1332\(d\)](#) (“CAFA”). CAFA’s prerequisites are met. The IPP’s Consolidated Amended Complaint (“CAC”) alleges that the aggregate amount in controversy exceeds \$5,000,000.00. (CAC ¶ 31.) In addition, the IPP, a New York trust, is diverse from several of the Defendants, including Actavis, Merz, and the majority of the Generic Defendants. (CAC ¶¶ 15–29.)

II. Factual Background

The factual nucleus from which the IP Action arises has been described exhaustively in several published opinions, including those of Judge Sweet and the Second Circuit in the earlier civil enforcement action by the New York Attorney General, and those of this Court in the parallel DP Action.

The relevant opinions are: (i) *New York v. Actavis, plc*, No. 14-cv-7473, 2014 WL 7015198 (S.D.N.Y. Dec. 11, 2014) (*Namenda I*), in which the district court (Sweet, J.) preliminarily enjoined Actavis and Forest from withdrawing Namenda IR, the twice-a-day or “immediate release” formulation, from the market; (ii) *Schneiderman ex rel. New York v. Actavis plc*, 787 F.3d 638 (2d Cir. 2015) (*Namenda II*), in which the Second Circuit upheld the preliminary injunction granted in *Namenda I*; and (iii) three opinions from the private, follow-on litigation before this Court.

The first opinion, on which the Court granted consolidated briefing, denied Actavis, Forest, and Merz’s motion to dismiss the DP Action; denied all Defendants' motions to dismiss the IP Action without prejudice; and placed the [123 state law](#) claims in the IP Action on the Court’s suspense calendar. *Sergeants Benevolent Association Health & Welfare Fund v. Actavis, PLC*, Nos. 15-cv-7488, 15-cv-6549, 2016 WL 4992690 (S.D.N.Y. Sept. 13, 2016) (*Namenda III*).

The second opinion of this Court granted in part and denied in part the DPPs' motion for collateral estoppel and partial summary judgment against Actavis and Forest, on the basis of facts established about the product hop in *Namenda I* and *Namenda II*. *In re Namenda Direct Purchaser Antitrust Litig.*, No. 15-cv-7488, 2017 WL 4358244 (S.D.N.Y. May 23, 2017) (*Namenda IV*).

The third opinion denied Actavis's and Forest's post-discovery motion for summary judgment and granted the DPPs' motion for class certification. *In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152 (S. DN.Y. 2018) (*Namenda V*).

In light of the detailed factual history discussed in these opinions, the Court provides only an abridged summary of the relevant facts here.

A. The Parties

Defendant Forest Laboratories, LLC ("Forest") is a limited liability company incorporated in Delaware with offices in New York and New Jersey. *Namenda III*, 2016 WL 4992690, at *2. It is wholly owned by Defendant Actavis, plc ("Actavis").⁵ *Id.*; (CAC ¶ 16.) The IPP also describes Actavis as Forest's successor-in-interest. (See CAC ¶ 192.)

⁵ Allergan plc was formerly known as Actavis, plc. (See *In re Namenda Direct Purchaser Antitrust Litig.*, No 18-2421 (2d Cir.), Dkt. No. 1 at 2 (corporate disclosure statement).) This opinion uses "Actavis" throughout to reflect the fact that the IPP has not moved for a substitution of parties in the IP Action.

*5 In 2000, Forest entered into a patent licensing and cooperation agreement with Merz GmbH & Co. KGaA, Merz Pharma GmbH & Co. KGaA, and Merz Pharmaceuticals GmbH (collectively, "Merz")⁶ to develop a memantine hydrochloride-based drug for the treatment of moderate-to-severe forms of Alzheimer's disease. *Namenda III*, 2016 WL 4992690, at *2; *Namenda IV*, 2017 WL 4358244, at *2.

⁶ The DPPs subsequently dismissed all three Merz entities from the DP Action on April 20, 2017. (15-cv-7488, Dkt. No. 207.) They remain parties to the IP Action, however.

The resulting drug was launched in 2004 as a twice-daily immediate release formula ("Namenda IR"), generating \$1.5 billion in annual sales for Forest in 2012 and 2013. *Namenda II*, 787 F.3d at 646–47.

Defendants Barr Pharmaceuticals, Inc. ("Barr"); Teva Pharmaceuticals Industries, Ltd. and Teva Pharmaceuticals USA, Inc. (jointly, "Teva"); Cobalt Laboratories, Inc. ("Cobalt"); Upsher-Smith Laboratories, Inc. ("Upsher-Smith"); Amneal Pharmaceuticals, LLC ("Amneal");

Wockhardt Limited and Wockhardt USA LLC (jointly, "Wockhardt"); Sun India Pharmaceuticals Industries, Ltd. ("Sun"); and Dr. Reddy's Laboratories Ltd. and/or Dr. Reddy's Laboratories, Inc. (jointly, "Dr. Reddy's") (collectively, the "Generic Defendants" and, together with Actavis, Forest, and Merz, the "Defendants") each developed generic formulations of Namenda IR and sought approval from the FDA to take these generic formulations to market. *Namenda III*, 2016 WL 4992690, at *2.

Plaintiff Sergeants Benevolent Association Health & Welfare Fund (the "IPP," or, where appropriate, the "Named Plaintiff") is a New York trust that provides prescription drug benefits for active and retired New York City Police Department sergeants and their dependents through its participant plans. *Id.*; (CAC ¶ 15). As a third-party payor of pharmaceutical claims for members of its plans, the IPP alleges that it was an indirect purchaser of branded Namenda IR during the relevant period. (CAC ¶ 15.) The IPP alleges that, beginning in April 14, 2010 and continuing through the present day (the "Class Period"), it indirectly purchased branded Namenda IR in 11 states⁷ at prices higher than it would have otherwise paid absent Defendants' unlawful anticompetitive conduct. (*Id.* ¶¶ 15, 146)

⁷ The IPP does not, however, bring claims under the laws of all 11 states. (Compare CAC ¶ 15 with CAC ¶¶ 201, 207, 215, 226.)

The IPP also alleges that it purchased (*i.e.* paid for) branded Namenda XR indirectly during the Class Period, when it would otherwise have purchased low-cost, generic Namenda IR absent Defendants' unlawful competitive conduct. (*Id.* ¶ 202.)

B. The Regulatory Scheme

The Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq.*, governs the manufacture, sale, and marketing of prescription pharmaceuticals in the United States. *Namenda III*, 2016 WL 4992690, at *2. The FDCA requires a pharmaceutical company to submit a New Drug Application ("NDA") to the FDA before it can bring a new drug to market. *Id.*

The Drug Price Competition and Patent Term Restoration Act (the "Hatch-Waxman Act"), Pub. L. No. 98-417, 98 Stat. 1585, was enacted to serve the "dual purposes of incentivizing innovation," by rewarding brand-name drug manufacturers for bringing new therapies to market, and

“lowering drug prices for consumers,” by rewarding generic drug manufacturers who attempt to compete with costly branded drugs. *Id.* at *3.

*6 Rewards under the Hatch-Waxman Act take the form of granting an exclusive share of the prescription pharmaceutical market through one of two legal regimes: patents and exclusivities. *See Frequently Asked Questions on Patents and Exclusivity*, FDA (last updated May 2, 2018), <https://www.fda.gov/drugs/developmentapprovalprocess/ucm079031.htm> (“FAQs”). Patents are property interests granted by the U.S. Patent and Trademark Office (“PTO”), while exclusivities are statutory protections granted by the Food and Drug Administration (“FDA”). *See Namenda IV*, 2017 WL 4358244, at *3; *see also* FAQs at 1.

Patents. Manufacturers may claim patents for new drug compounds, drug products, and methods of use. *See In re Actos End-Payor Antitrust Litig.*, 848 F.3d 89, 94 (2d Cir. 2017) (*Actos II*). Patents vary in duration but typically last for twenty years. *See* FAQs at 2. During the lifetime of the patent, brand manufacturers are provided a legal monopoly on their invention, which can enable favorable price-setting. *Id.* at 1.

Patent protection is so valuable to pharmaceutical companies that entering the period following patent expiration is known as going off the “patent cliff.” *Namenda III*, 2016 WL 4992690, at *3. In 2012, patent cliffs collectively caused the entire U.S. pharmaceutical market to shrink by 1%. Eric Sagonowsky, *Big Pharma faces \$26.5B in losses this year as next big patent cliff looms, analyst says*, FiercePharma, Apr. 21, 2017, <https://www.fiercepharma.com/pharma/big-pharma-faces-26-5b-patent-loss-threats-year-analyst-says>.

The Hatch-Waxman Act allows a brand-name drug manufacturer to extend any patent submitted as part of an NDA for an additional five years, to compensate for the time elapsed during the FDA’s approval process. 35 U.S.C. § 156; *Namenda III*, 2016 WL 4992690, at *3.

Exclusivity. Both the FDCA and the Hatch-Waxman Act also provide for statutory periods of “marketing exclusivity” in connection with the approval of certain NDAs. *Otsuka Pharm. Co., Ltd. v. Price*, 869 F.3d 987, 988 (D.C. Cir. 2017); *see also* FAQs at 3. “When a drug earns a period of exclusivity, the Food and Drug Administration must withhold approval of certain competing drugs,” including generics, “if

various conditions are satisfied.” *Otsuka Pharm.*, 869 F.3d at 988.

Not all NDAs will qualify for statutory exclusivities. For example, the FDA may grant exclusivities for, among other things, a new chemical entity (five years), 21 C.F.R. § 314.108; or an “orphan” drug intended to treat rare diseases (seven years), 21 C.F.R. § 316.31. *See* FAQs at 3. The FDA may also grant additional exclusivities later in the life of a drug, well after submission of the initial NDA. For instance, the FDA may grant a six-month period of exclusivity for studying the drug’s efficacy in children (“pediatric exclusivity”). 21 U.S.C. § 355a; *Namenda II*, 787 F.3d at 644.

Interaction. To a degree, exclusivity interacts with patent protection. *See* FAQs at 4. For example, when a brand manufacturer submits an NDA to the FDA, it must list any patents that claim drugs, drug products, or methods of use that are the subject of that NDA. *See In re Actos End Payor Antitrust Litig.*, No. 13-cv-9244, 2015 WL 5610752, at *1 (S.D.N.Y. 2015) (*Actos I*). The FDA lists all existing patents and exclusivities in the “Orange Book.” *Id.*; FAQs at 5.

Patent protection also interacts with exclusivity when a generic manufacturer seeks FDA approval to market a generic version of a branded drug that is still “on patent.” Specifically, the Hatch-Waxman Act provides for a 180-day period of “patent challenge” exclusivity for the first generic manufacturer to file a certification with the FDA that contests the validity of the brand manufacturer’s patent. *Namenda III*, 2016 WL 4992690, at *3; *see also* FAQs at 3. This period of exclusivity is valid against other generic manufacturers, although multiple filers may share the exclusivity period if they file on the same day. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 174–75 (2013) (Roberts, J., dissenting) (citing 21 U.S.C. § 355(j)(5)(B)(iv)(II)(bb); FDA, Guidance for Industry: 180-Day Exclusivity When Multiple ANDAs Are Submitted on the Same Day 4 (July 2003)). Patent challenge exclusivity is highly valuable, “possibly worth several hundred million dollars.” *Actavis*, 570 U.S. at 144 (citing C. Scott. Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U.L. Rev. 1553, 1579 (2006)).

*7 To win the 180-day period of patent challenge exclusivity, a generic manufacturer must file an Abbreviated New Drug Application (“ANDA”) with the FDA, which relies on the NDA submitted by the brand manufacturer to show

the drug is safe and effective. *Actavis*, 570 U.S. at 142. As part of this process, a generic manufacturer must certify that the generic drug “has the same active ingredients as, and is biologically equivalent” to the brand drug. *Id.* (internal citations omitted). In addition, and critical to gaining the 180-day exclusivity period, the first-filer generic manufacturer must also certify that the brand name drug is patented, but that the patent is invalid or the generic will not infringe it, a so-called “Paragraph IV” certification. *Id.* at 143.

The Hatch-Waxman Act allows a brand manufacturer to treat the filing of a Paragraph IV certification as an infringing action and to sue the generic filer for patent infringement. *Id.* The filing of a patent infringement action triggers an automatic, 30-month stay on the FDA’s approval of the generic manufacturer’s ANDA. *Id.* During this time, however, the FDA may tentatively approve the ANDA, such that the generic drug is set for final approval and launch after the 30-month stay expires. *Namenda IV*, 2017 WL 4358244, at *4.

At this point, a generic manufacturer defending a patent infringement action based on its Paragraph IV certification has several options. First, it may defend the patent infringement action by arguing that the underlying patent is invalid or that its generic drug does not otherwise infringe the patent. If successful, a judgment in the infringement action results not only in the invalidation of the underlying patent or a finding of non-infringement but also entitles the generic manufacturer to the coveted 180-day exclusivity period. See Shashank Upadhye, *Generic Pharmaceutical Patent and FDA Law* §§ 28:9.50, 29:5 (2018–19 ed.).

Second, a generic manufacturer may launch its generic product “at risk,” once it has gained FDA approval and the 30-month stay has expired, but while the litigation is ongoing. *Id.* § 32.

Third, the brand manufacturer and generic manufacturer may enter into a settlement agreement to resolve the litigation, which allows the generic manufacturer to extract certain concessions from the brand manufacturer (“reverse payments”). See Hemphill, *supra*, at 1568; see also *Actavis*, 570 U.S. at 140–41. Settlement agreements containing reverse payments may raise antitrust scrutiny if the payments flowing from the brand manufacturer to the generic manufacturer are “large and unjustified.” *Actavis*, 570 U.S. at 158. Brand manufacturers are particularly incentivized to settle with first-filer generics because, under the Hatch-

Waxman Act, no later-filing generic is eligible for the 180-day period of patent challenge exclusivity, thereby minimizing such “Paragraph IV” challenges.

C. Drug Substitution Laws and Product Hopping

Apart from the federal Hatch-Waxman Act, state law regimes also facilitate generic competition and the provision of cheaper prescription drugs to consumers by allowing, or in some cases requiring, pharmacists to fill a prescription for a branded drug with a “therapeutically equivalent” generic drug. *Namenda IV*, 2017 WL 4358244, at *4. States define therapeutic equivalence differently, but most use the comparatively strict definition adopted by the FDA. *Id.* at *4–*5. This definition only allows a pharmacist to substitute a generic drug if the FDA designates the generic as “AB-rated” in the Orange Book. *Namenda III*, 2016 WL 4992690, at *3.

As this Court has previously observed, “The requirement that substituted drugs meet therapeutic equivalence standards, although intended to protect patients, allows brand-name drug manufacturers to ‘game the system’ through a practice known as ‘product hopping.’ ” *Namenda IV*, 2017 WL 4358244, at *5.

*8 In a product hop, a brand manufacturer re-patents a slightly different formulation of the drug shortly before any generic competitors are legally allowed to enter the market. *Namenda II*, 787 F.3d at 643 & n.2 (citing Alan Devlin, *Exclusionary Strategies in the Hatch-Waxman Context*, 2007 Mich. St. L. Rev. 631, 658 (2007)). At its core, product hopping is regulatory arbitrage—taking advantage of the comparatively forgiving “improvement” standard under the federal patent laws and the relatively strict “therapeutically equivalent” standard under state drug substitution laws. See Devlin, *supra*, at 657 n.139. Examples of product hops have included embedding the drug’s active ingredient in a different inactive substrate, *In re Asacol Antitrust Litig.*, 323 F.R.D. 451, 462 (D. Mass. 2017) (*Asacol II*); introducing a tablet in place of a capsule, *Mylan Pharm. Inc. v. Warner Chilcott Pub. Ltd.*, 838 F.3d 421, 429 (3d Cir. 2016); or re-apportioning the “scoring” lines on a tablet that allow patients to break the pill into smaller dosages, *id.* at 429–30.

Once the re-formulated product is re-patented, but before generic versions of the old formulation can legally enter the market and gain a foothold through state drug substitution laws, a brand manufacturer may try to persuade physicians to prescribe their patients the new formulation (a “soft switch”). *Namenda II*, 787 F.3d at 648. In the alternative,

a brand manufacturer might withdraw the old formulation from the market altogether or severely restrict access, forcing physicians to adopt the new formulation in order to avoid interruptions to their patients' medication regimens ("hard switch"). *Id.*

A product hop raises antitrust scrutiny when it "coerces consumers and impedes competition." *Id.* at 652.

D. The **Namenda** Settlement Agreements

After entering into the June 2000 patent licensing and cooperation agreement with Merz, in December 2002 Forest submitted an NDA to the FDA for 5 mg and 10 mg **memantine** hydrochloride tablets for the treatment of **Alzheimer's disease**. (CAC ¶ 63.) The drug was based on **Patent No. 5,061,703 (the "703 patent")**, which was obtained in 1991 and was set to expire on April 11, 2010. (*Id.* ¶¶ 4, 64.)

In October 2003, the FDA approved Forest's NDA for **Namenda IR** tablets and listed the **'703 patent** in the Orange Book. (*Id.* ¶¶ 64–65.)

On October 16, 2007, at least fourteen generic manufacturers filed ANDAs with Paragraph IV certifications for AB-rated generic formulations of **Namenda IR**. (*Id.* ¶ 69.) Beginning in January 2008, Forest and Merz filed patent infringement lawsuits against these generic manufacturers, including the Generic Defendants, in the U.S. District Court for the District of Delaware. (*Id.* ¶¶ 70–71.) This triggered 30-month stays on these first-to-file ANDAs, which the IPP alleges would have begun to expire in April 2010. (*Id.* ¶ 72.)

Forest and Merz then obtained a patent extension on the **'703 patent** under the Hatch-Waxman Act. In March 2009, the **'703 patent** was extended for five years based on the duration of the FDA's approval process for the NDA. (*Id.* ¶ 67.)⁸ This extended the **'703 patent's** expiration date from April 11, 2010 to April 11, 2015. (*Id.*)

⁸ It is not clear from the face of the IPP Complaint how Forest was able to obtain a five-year patent extension, the maximum permitted, when the FDA approval process for the **Namenda IR** NDA allegedly took only one year.

Between July 2009 and December 2009, while the 30-month ANDA stays were in effect, Forest and Merz entered into settlement agreements with the Generic Defendants. (*Id.* ¶ 75.) Pursuant to these settlement agreements, the Generic

Defendants agreed to delay market entry until as late as July 11, 2015. (*Id.* ¶ 76.)

All of the Generic Defendants received tentative approval of their ANDAs from the FDA between January 2010 and April 2010, and all had received final approval of their ANDAs by October 2011. (*Id.* ¶ 82–83.)

^{*9} In 2014, Forest was granted an additional six months of pediatric exclusivity for **Namenda IR** based on studies of the drug's efficacy in children with **autism**. (*Id.* ¶ 68.) This tacked an additional six months of statutory market exclusivity for **Namenda IR** onto the end of the **'703 patent** protection period. (*Id.*)

E. The "Hard Switch"

On August 21, 2009, "less than a month after it had announced the first wave of settlements with generics challenging the **Namenda IR** patent," Forest submitted an NDA for a once-a-day, extended release formulation of **memantine** hydrochloride, **Namenda XR**. (*Id.* ¶ 98.) The IPP alleges that the NDA did not demonstrate that **Namenda XR** was more efficacious than **Namenda IR**. (*Id.*)

The FDA approved the NDA for **Namenda XR** on June 21, 2010, but Forest did not launch the drug until June 2013. (*Id.* ¶¶ 99, 102.)

After the launch of **Namenda XR**, Forest used aggressive marketing to begin encouraging patients and physicians to switch from **Namenda IR** to **Namenda XR**. (*Id.* ¶ 105.) The IPP alleges that, when that "soft switch" strategy failed, Forest began implementing a strategy in February 2014 that involved discontinuing and/or severely limiting the distribution of **Namenda IR**. (*Id.* ¶ 95, 127–28.) This "hard switch" strategy included: (i) seeking to have the Centers for Medicare and Medicaid Services ("CMS") remove **Namenda IR** from its reference list; (ii) signing an exclusive distribution agreement with a mail-order only pharmacy; and (iii) requiring physicians to certify that it was medically necessary for patients to take **Namenda IR** rather than **Namenda XR**. (*Id.* ¶ 95.) Forest planned to discontinue retail sales of **Namenda IR** in January 2015. (*Id.*)

In September 2014, New York State filed a complaint against Actavis and Forest alleging violations of the federal Sherman Antitrust Act and New York's Donnelly Act on the basis of the hard switch, and seeking to preliminarily enjoin the

defendants from withdrawing Namenda IR from the market. *Namenda II*, 787 F.3d at 649.

In December of 2014, the U.S. District Court for the Southern District of New York (Sweet, J.) entered an order preliminarily enjoining Actavis and Forest from withdrawing Namenda IR from retail shelves. *Namenda I*, 2014 WL 7015198, at *46. The Second Circuit upheld the injunction. *Namenda II*, 787 F.3d at 663.

The enforcement action was followed by several private, follow-on suits seeking treble damages under federal and state antitrust laws, which are described below.

III. Procedural History

The IP Action was filed in August of 2015 as a putative class action on behalf of:

All persons or entities in the United States and its territories who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for branded Namenda IR 5 or 10 mg tablets, or Namenda XR capsules, for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries, other than for resale, at any time during the period from April 14, 2010 and continuing until the anticompetitive effects of Defendants' unlawful conduct ceases (the "Class Period").

(CAC ¶ 146.)

The DP Action was filed the following month.⁹ Both the IP Action and the DP Action were placed on this Court's docket as related actions shortly thereafter. (See 15-cv-7488, entry of Oct. 6, 2015.)

⁹ Plaintiff Rochester Drug Co-Operative, Inc., also filed a complaint on behalf of direct purchasers that did not name the Generic Defendants. (15-CV-10083, Dkt. No. 1.) On January 26, 2016,

Plaintiffs JM Smith Corporation and Rochester Drug Co-Operative, Inc. stipulated to consolidating the cases. (15-cv-7488, Dkt. No. 65.)

*10 Like the enforcement action, the private plaintiffs sought damages on the basis of the "hard switch," but they also alleged damages stemming from the settlement agreements entered into with generic manufacturers. (See, e.g., CAC ¶ 84–86.)

Early in the litigation, this Court granted the parties' request for consolidated briefing on the motions to dismiss both the DP and IP Actions. (Dkt. No. 64.)¹⁰ Thereafter, Actavis, Forest, and Merz submitted a single memorandum of law in support of their motion to dismiss the DP and IP Actions. (Dkt. No. 85 or "Forest Br.") The Generic Defendants, who had not been named in the DP Action, submitted a separate memorandum of law in support of their motion to dismiss the IP Action. (Dkt. No. 81 or "Gen. Defs. Br.")

¹⁰ As discussed, Merz did not join the motion for consolidated briefing, (Dkt. No. 63 at 2 n. 1), but later joined Actavis and Forest's brief, (Dkt. No. 85).

Roughly speaking, Actavis, Forest, and Merz's briefing challenged the sufficiency of the facts alleged in the DPPS' and IPP's Complaints as a whole, while the Generic Defendants' briefing challenged the IPP's ability to bring individual claims as a matter of state law. Each group of Defendants expressly adopted the arguments of the other group, to the extent applicable, in full.

In the IP Action, the IPP filed two separate memoranda of law in opposition to (i) Actavis, Forest, and Merz's motion and (ii) the Generic Defendants' motion. (Dkt. No. 87 or "IPP Resp. to Forest Br."; Dkt. No. 88 or "IPP Resp. to Gen. Defs. Br.") Actavis, Forest, and Merz filed one reply, and the Generic Defendants filed another. (Dkt. No. 90 or "Forest Reply"; Dkt. No. 89 or "Gen. Defs. Reply.")

On September 13, 2016, this Court issued an order (i) denying in part and granting in part Actavis, Forest, and Merz's motion to dismiss the DP Action; (ii) denying without prejudice Actavis, Forest, and Merz's and the Generic Defendants' motions to dismiss the IP Action; and (iii) placing the 123 state law claims from the IP Action on the Court's suspense calendar pending resolution of the federal antitrust claims in the DP Action.¹¹ *Namenda III*, 2016 WL 4992690, at *16–*17.

11 This Court had previously ordered that “the Indirect Purchaser Plaintiff’s claims are *severed* and placed on the Court’s suspense calendar.” *Namenda III*, 2016 WL 49992690, at *17 (emphasis added). The use of the word “sever,” however, did not connote that the cases had been consolidated under Rule 42(a) or joined for purposes of Rules 18 and 19.

The DP Action proceeded through discovery, summary judgment, and class certification. See *Namenda IV*, 2017 WL 4358244; *Namenda V*, 2018 WL 3970674. Defendants in the DP Action recently sought and were denied leave to appeal this Court’s grant of class certification. (15-cv-7488, Dkt. No. 600.)

On September 10, 2018, after the parties to the DP Action expressed interest in mediation, this Court lifted its stay of the IP Action and referred the parties to Magistrate Judge Lehrburger for supervision of “such non-duplicative discovery as is necessary to get the parties to the IPP case up to speed[.]” (Dkt. No. 122 at 2.) The order of September 10, 2018 acknowledged that the 123 state law claims in the IP Action were the subject of a pending motion to dismiss and had yet to be addressed. (*Id.*)

*11 Subsequently, Actavis, Forest, Merz, and the Generic Defendants filed renewed motions to dismiss the IP Action, along with supplemental briefing. (Dkt. No. 131-1 or “Gen. Defs. Suppl. Br.”; Dkt. No. 133 or “Forest Suppl. Br.”; Dkt. No. 152 or “IPP Resp. to Forest Suppl. Br.”; Dkt. No. 158 or “IPP Resp. to Gen. Defs. Suppl. Br.”; Dkt. No. 159 or “Forest Suppl. Reply”; and Dkt. No. 160 or “Gen. Defs. Suppl. Reply.”) Defendants again divided the briefing, with Actavis, Forest, and Merz focusing on the sufficiency of the factual allegations regarding the underlying anticompetitive conduct, and the Generic Defendants briefing the requirements of each state’s laws in detail.

Presently before the Court are the motions of (1) Actavis, Forest, and Merz and (2) the Generic Defendants to dismiss all 123 state law claims in the IP Action.

DISCUSSION

IV. Standard of Review

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe all claims, accept all factual

allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. See *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 44 (2d Cir. 2003); see also *Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir. 2007).

To survive a motion to dismiss, “a complaint must contain sufficient factual matter ... to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “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.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

Finally, a motion to dismiss must be supported by “information contained in the ‘four corners’ of the complaint.” *Hayden v. Cty. of Nassau*, 180 F.3d 42, 54 (2d Cir. 1999). This principally includes facts alleged in the complaint and materials attached to or incorporated by reference into the complaint. *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). It also includes information of which the court takes judicial notice. *Id.*

V. Count One: Monopolization Under the Laws of 27 States Against Actavis, Forest and Merz

The IPP first brings 27 separate state law claims grouped under the heading “Count One: Monopolization Under State Law.” (CAC at 46.) These 27 state laws are all state antitrust or fair competition laws. (CAC ¶ 201.) The IPP asserts these claims against Actavis, Forest, and Merz, but not against the Generic Defendants. (CAC ¶ 201.)

Count One alleges unlawful monopolization based on two separate, anticompetitive acts: (i) the “hard switch” from *Namenda IR* to *Namenda XR* and (ii) the “pay to delay” settlement agreements with generic competitors. (CAC ¶¶ 193–96.)

The IPP alleges that both of these acts were part of an “overall scheme,” (CAC ¶ 195), perpetuated to “maintain and extend [Forest’s] monopoly power in the memantine hydrochloride market,” (CAC ¶ 197). In turn, “Forest’s unlawful anticompetitive scheme to prevent, delay, and or minimize the success of the introduction into the United States marketplace of any generic versions of *Namenda IR* enabled Forest to continue charging supra-competitive prices for memantine hydrochloride without a substantial loss of sales.” (*Id.*)

The bulk of the parties' briefing is directed to this Count and to Count Two, for conspiracy to monopolize.

Actavis, Forest, and Merz bring a full arsenal of arguments to dismiss Count One, *viz.*:

- Judge Sweet's preliminary injunction in the earlier enforcement action prevented any "hard switch" from Namenda IR to Namenda XR from occurring, and in any case the IPP will be unable to offer any evidence that its plan participants or any member of the Class switched to Namenda XR as a result of the withdrawal announcement, (Forest Br. at 15–34);
- *12 • The IPP has expressly disclaimed that it is relying on a theory of unlawful "reverse payments" under *Actavis*, 570 U.S. at 158, to show anticompetitive conduct with respect to the settlement agreements, and, even if the IPP were to rely on such a theory, it cannot plausibly allege that any of the reverse payments made pursuant to the agreements were improper, (Forest Br. at 34–60);
- The IPP's "injuries" caused by the settlement agreements are purely speculative, (Gen. Defs. Br. at 26);
- Because this Court previously dismissed the DPPs' claim for an "overarching scheme," and because the IPP has failed to plead any independently anticompetitive conduct with respect to either the hard switch or the settlement agreements, this Count must be dismissed, (Forest Br. at 60–62); and
- The antitrust laws of 26 states have limitations periods of five years or fewer making it "likely" that all of the state law claims asserted under Count One are time-barred, (*id.* at 65 n.42).

Actavis, Forest, Merz, and the Generic Defendants also argue for the dismissal of particular state law claims that are part of Count One, *viz.*:

- The IPP lacks Article III standing to assert claim in states where it has not made purchases and thereby suffered injury-in-fact, which are all but nine states, (Forest Br. at 65–66);
- *Illinois Brick* bars the IPP's claims in five states¹² that have not enacted so-called "*Illinois Brick* repealer statutes," (Gen. Defs. Suppl. Br. at 10–11);

- The IPP has failed to satisfy statutory requirements in four states that any plaintiff first notify the state's attorney general before filing a private damages suit, (Gen. Defs. Suppl. Br. at 11–13); and
- Claims for unilateral monopolization are inactionable under the laws of three states, (Forest Br. at 82).

12

Generic Defendants also argue that *Illinois Brick* bars the IPP's claims under two additional states—Illinois and Oregon—under Count One. (Gen. Defs. Suppl. Br. at 10–11.) However, the IPP Complaint does not allege Illinois and Oregon claims under Count One; instead, it alleges them only under Count Two. (See CAC ¶ 201.) This Court therefore addresses the Illinois and Oregon arguments in the portion of the opinion that discusses Count Two.

A. The IPP's Underlying Factual Allegations State a Claim for Monopolization

1. The IPP Has Stated a Claim for Monopolization Based on the Hard Switch from Namenda IR to Namenda XR

"Well-established case law makes clear that product redesign is anticompetitive when it coerces consumers and impedes competition." *Namenda II*, 787 F.3d at 652. While withdrawing an old product and substituting a new product does not constitute anticompetitive conduct *per se*, "when a monopolist combines product withdrawal with some other conduct, the overall effect of which is to coerce consumers rather than persuade them on the merits, and to impede competition, its actions are anticompetitive[.]" *Id.* at 654 (internal citations omitted).

As part of Count One, the IPP alleges that the IPP "unlawfully switched the conversion of the memantine hydrochloride market from Namenda IR to Namenda XR" through a variety of anticompetitive measures, including "(i) publicizing to doctors, caregivers and the general public that the discontinuation of Namenda IR was imminent; (ii) significantly limiting or attempting to limit the distribution of Namenda IR; and (iii) requesting that CMS remove Namenda IR tablets from the 2015 Formulary Reference File," all while knowing that Namenda XR was neither safer nor more effective than Namenda IR. (CAC ¶ 195.)

*13 In its original, consolidated briefing, Actavis, Forest, and Merz argued that both the DPPs and the IPP had failed to state claims for the hard switch because Judge Sweet's preliminary injunction in the earlier enforcement action, *Namenda I*, had prevented the withdrawal of Namenda IR and therefore any alleged exclusionary conduct from occurring. (Forest Br. at 15.) Defendants also argued that both the DPPs and the IPP had failed to allege injury in fact and to adequately plead antitrust injury resulting from the announcement that Forest was discontinuing Namenda IR. (*Id.* at 30.) Defendants have renewed these arguments in supplemental briefing. (Forest Suppl. Br. at 10.)

a) Actavis and Forest Are Collaterally Estopped From Arguing That the Anticompetitive Hard Switch Took Place

“Collateral estoppel, or issue preclusion, prevents the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding.” *Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 734 (2d Cir. 1991). In order to establish that an issue was determined in a former adjudication, a party asserting collateral estoppel must establish four things: (1) the issues in the prior proceeding and the current proceeding are identical; (2) the issue raised in the current action was in fact actually decided in the prior proceeding; (3) there was full and fair opportunity to litigate the issue in the prior proceeding; and (4) the issue previously litigated and decided was necessary to support a valid and final judgment on the merits. *In re PCH Assocs.*, 949 F.2d 585, 593 (2d Cir. 1991).

After discovery in the parallel DP Action had closed, the DPPs sought partial summary judgment on the first count of their Complaint, which alleged that the Defendants' February 2014 announcement of the upcoming withdrawal of Namenda IR from the market constituted unlawful monopolization in violation of Section 2 of the Sherman Act. *Namenda IV*, 2017 WL 4358244, at *9.

In *Namenda IV*, this Court ruled, as against Actavis and Forest, that they were collaterally estopped from “relitigating the questions of (1) whether [Forest] possessed monopoly power over the U.S. memantine market up until the entry of generic competition; (2) whether its February 2014 announcement of the upcoming discontinuation of Namenda IR was coercive and anticompetitive; and (3) whether Forest had any non-pretextual procompetitive justification for its

illegal conduct.” 2017 WL 4358244, at *9–*16. However, this Court denied the DPPs' motion for collateral estoppel with respect to the issue of whether plaintiffs had suffered an antitrust injury, *i.e.*, been forced to switch from Namenda IR to Namenda XR as a result of Forest's withdrawal announcement. *Id.* at *16.¹³

¹³ Later, in *Namenda V*, this Court ultimately found that the DPPs, which were drug wholesalers, could rely on classwide economic models at trial to show that they had suffered antitrust injury. *Namenda V*, 331 F. Supp. 3d at 177. In addition, although the DPPs had originally moved for collateral estoppel on Count One against Actavis, Forest, and Merz, (15-cv-7488, Dkt. No. 134), the parties subsequently stipulated to the dismissal of Merz from the action, (15-cv-7488, Dkt. No. 207). In an accident of timing, therefore, Merz was dismissed after the parties had submitted briefing on the collateral estoppel motion but before this Court had ruled on that motion.

The IPP sought the same relief in connection with the IP Action, (Dkt. Nos. 112, 113), which the Court stayed, (Dkt. No. 120 at 1).

The stay has now been lifted, and the motion is ripe for decision.

The Court grants the motion. For the reasons discussed in *Namenda IV*, 2017 WL 4358244, at *9–*16, Actavis and Forest are collaterally estopped from relitigating the issues of “(1) whether [Forest] possessed monopoly power over the U.S. memantine market up until the entry of generic competition; (2) whether its February 2014 announcement of the upcoming discontinuation of Namenda IR was coercive and anticompetitive; and (3) whether Forest had any non-pretextual procompetitive justification for its illegal conduct.” *Id.* at *16. The same findings with respect to *Namenda I* and *II* that created estoppel in that case apply equally here.

*14 By the same token, Actavis and Forest are not estopped from making arguments related to the IPP's injury. Their injury argument is addressed in subpart c), *infra*.

b) Even Though Merz Is Not Collaterally Estopped From Arguing That the Hard

***Switch Took Place, the IPP Nonetheless States
a Claim That the Hard Switch Occurred***

Merz, the only other party named in Count One, is not collaterally estopped from arguing that the IPP fails to state a claim against it because the product hop did not occur. (See Dkt. No. 116 at 1.)¹⁴ Merz was not a party to the action in *Namenda I* or *Namenda II*, and the IPP did not move for collateral estoppel with respect to Merz in this action. (See Dkt. No. 113.)

¹⁴ Merz would also not be collaterally estopped from arguing that, under the facts alleged in the IPP Complaint, it had absolutely nothing to do with the hard switch. However, likely because Merz chose to be represented by the same counsel as Actavis and Forest, and likely because these parties chose to submit a consolidated brief in support of their motions to dismiss both the DPP and IPP Complaints, Merz never raised this argument separate and apart from Actavis and Forest. (See Forest Br. at 15–33.) The Court therefore does not address it.

Nonetheless, for the same reasons discussed in *Namenda III*, I find that the IPP has stated a plausible claim that the product hop occurred.

In *Namenda III*, I found it persuasive for purposes of the DPPs' federal claims that both the *Namenda I* and *Namenda II* courts had identified exclusionary conduct that occurred prior to the entry of the preliminary injunction. See *Namenda III*, 2016 WL 4992690, at *10–*11. As a result, I held that the DPPs had alleged an injury on the basis that “they were forced to pay for certain patients' *memantine* treatment at brand-name prices because these patients switched to *Namenda XR* prior to the entry of the injunction.” *Namenda III*, 2016 WL 4992690, at *12 (emphasis in original). Plaintiffs' injury, the Court found, was that they were forced to pay for *Namenda XR* “after generic entry—when absent Defendants' anticompetitive conduct, their patients' prescriptions would have been filled by a far cheaper generic.” *Id.* (emphasis in original). In other words, the DPPs had adequately pled that Forest's announcement discontinuing *Namenda IR*, as well as the tactics that accompanied the announcement, was sufficiently coercive.

The very same reasoning applies to the IPP Complaint. The IPP alleges it was injured because it was deprived of the opportunity to buy lower-priced generic *Namenda IR* and

forced to buy more expensive branded *Namenda XR*. (CAC ¶ 202.) Further, like the DPP Complaint, the IPP Complaint alleges that once patients switched their prescriptions as a result of the “hard switch” tactics, “reverse commuting” back to *Namenda IR* was highly unlikely. (*Id.* ¶ 126.) These allegations are substantively identical to those in the DPP Complaint, and they therefore survive a motion to dismiss for the same reasons articulated by this Court in *Namenda III*.

***c) The IPP Sufficiently Pleads That It Was
Injured as a Result of the Hard Switch***

According to Actavis, Forest, and Merz, the IPP has failed to allege a cognizable antitrust injury based on Forest's announcement that it was discontinuing the *Namenda IR* formulation, because the IPP will not be able to establish “antitrust injury,” *i.e.*, that these tactics actually caused consumers to switch from *Namenda IR* to *Namenda XR*. (Forest Suppl. Br. at 10.)

*15 “Antitrust injury” is a component of antitrust standing under federal law. “Unlike the United States government, which is authorized to sue anyone violating the antitrust laws, a private antitrust plaintiff must show ‘standing’ to sue” in a federal antitrust case. Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.01[A] (4th ed. 2018 suppl.). Among other standing requirements, a plaintiff must show that it has suffered “antitrust injury,” which is “defined as the kind of injury that the antitrust laws were intended to prevent and ‘flows from that which makes defendants' acts unlawful.’ ” *Id.* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

Previously, with respect to the DP Action, this Court held that the DPPs would be required to show at the summary judgment stage that “patients switched to *Namenda XR* because of the announced withdrawal of *Namenda IR* ... prior to the injunction.” *Namenda III*, 2016 WL 4992690, at *12. However, that holding related to the *wholesaler plaintiffs'* claims *under federal law*, which unquestionably requires that a private plaintiff demonstrate antitrust standing before he can proceed with his claim.

Here, however, the IPP alleges no claims under federal law. So that argument fails as a matter of law. To the extent Actavis, Forest, and Merz raise the federal requirement of “antitrust injury” as grounds for dismissal of the 27 *state law* claims in Count One, this argument is irrelevant.

Actavis, Forest, and Merz have not briefed whether each of the 27 state laws under which the IPP brings monopolization claims each contains a similar “antitrust injury” or “antitrust standing” requirement. (See Forest Suppl. Br. at 10–11.) *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), cited by Actavis, Forest, and Merz, is inapposite, not the least because it is a RICO case—with federal mail and wire fraud as the predicate acts—and not an indirect purchaser case based on state antitrust laws. *Id.* at 222. Therefore, I conclude that they have no basis to argue that the IPP has not sufficiently alleged injury under any of the 27 state law monopolization theories.

In supplemental briefing, Actavis, Forest, and Merz argue for the first time that the IPP Complaint does not plausibly allege any antitrust injury because the plaintiffs’ expert in the DP Action “disclaimed any need to assess why patients switched to Namenda XR.” (Forest Suppl. Br. at 10.) They highlight the fact that one of the DPPs’ experts in that Action, Dr. Russell Lamb, calculated “aggregate overcharge damages” rather than “individualized analysis” for purposes of class certification. *Namenda V*, 2018 WL 3970674, at *10. In the DP Action, the Court found that this was sufficient to defeat Defendants’ motion for summary judgment, because direct purchasers would have been indifferent to individual consumers’ choices and instead would have paid attention to the market as a whole. *Id.* at *30.

The methodology used by the DPPs’ expert—namely, evidence on a motion for summary judgment in the DP Action—is of no relevance in deciding whether the IPP has pleaded (not proven) a state antitrust violation. This argument is a red herring and entirely unpersuasive on a motion addressed to the pleadings.

2. The IPP States a Claim for Monopolization Based on the Settlement Agreements

As discussed, when a patent holder provides favorable terms to an alleged infringer as part of a settlement agreement, this is called a “reverse payment.” *Actavis*, 570 U.S. at 141. The Supreme Court has held that “a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects.” *Id.* at 158. Reverse payments comprised of cash, nominally conferred as compensation for avoided litigation costs, are most suspect, but reverse payments may also provide value in the form of early entry

licenses, a period of exclusivity, or cash for avoided litigation costs. *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 403 (3d Cir. 2015) (“We do not believe *Actavis*’s holding can be limited to reverse payments of cash.”); accord *In re Loestrin 24 Fe Antitrust Litig.*, 814 F.3d 538, 552 (1st Cir. 2016).

*16 As mentioned above, Count One for monopolization under the laws of 27 states alleges that, in addition to engaging in an anticompetitive hard switch, Actavis, Forest, and Merz “entered into unlawful agreements” with generic manufacturers “to settle patent infringement suits as part of an overall anticompetitive scheme.” (CAC ¶¶ 193.)

Actavis, Forest, and Merz have moved to dismiss Count One on the ground that the IPP has failed to state a claim that the settlement agreements were, in and of themselves, unlawful. (Gen. Defs’ Suppl. Br. at 3; Forest Suppl. Br. at 4.)

a) The IPP Brings a Reverse Payments Case Under Actavis

Defendants first argue that the IPP actually disclaims reliance on a reverse payment theory under *Actavis*, 570 U.S. 136. (Gen. Defs’ Suppl. Br. at 3; Forest Suppl. Br. at 4.) They support this argument with several quotations from the IPP’s brief in opposition to their original motions to dismiss. (Gen. Defs’ Suppl. Br. at 4; Forest Suppl. Br. at 4.) These include the following statements made by the IPP, among others: “Forest desperately tries to convert the [IPP]’s theory of its case into a reverse payment settlement case, which it is not.” (IPP Resp. to Forest Br. at 25.) “The [IPP] has not pled any reverse payment agreement claims.” (*Id.*)

However, despite this language, the IPP argues, in this very same brief, “Even under an *Actavis* analysis, the [IPP]’s Complaint survives. See Directs’ Brief, which the [IPP] adopts and incorporates by reference.” (*Id.* at 27.) Over several pages, the IPP then fleshes out a claim under *Actavis*, including that the early entry licenses should trigger scrutiny because the negotiated entry dates fell after expiration of the ‘703 patent and only three months before expiration of the pediatric exclusivity period, (*id.* at 27) and that the acceleration clauses in the settlement agreements, like most favored nation clauses, constitute reverse payments under *Actavis*, (*id.* at 29). In supplemental briefing, moreover, the IPP argued that the payments in the settlement agreements

were unlawful because they exceeded expected litigation costs. (IPP Resp. to Forest Suppl. Br. at 10.)

So the pertinent question is: does the CAC allege facts that adequately plead a claim under *Actavis*, even if the IPP identified the proper legal theory only in the alternative?

b) The IPP States a Claim for Unlawful Reverse Payments in the Form of Early Entry Licenses, Cash Payments, and Unspecified Benefits

Defendants argue—as they did in their original motion to dismiss—that early entry licenses are *per se* pro-competitive and do not constitute reverse payments in violation of the rule laid out in *Actavis*. (Forest Suppl. Br. at 6.) In particular, Defendants point out that the early entry licenses permitted the Generic Defendants to enter three months before the pediatric exclusivity period expired. (Gen. Defs. Suppl. Br. at 5.)

Defendants also argue that any monetary payments the Generic Defendants received as part of the settlement agreements constituted avoided litigation costs, as lawfully permitted by *Actavis*. (Forest Suppl. Br. at 6–7; Gen. Defs. Suppl. Br. at 5–7.)

Finally, they state that the IPP’s allegations with respect to the reverse payments are bare and conclusory, and they therefore must be dismissed under *Twombly*, 550 U.S. at 557. (Forest Suppl. Br. at 6; Gen. Defs. Suppl. Br. at 6–7.)

*17 In *Namenda III*, this Court held that the DPPs had stated a claim against Actavis, Forest, and Merz based on the reverse settlement agreements with generic manufacturers. 2016 WL 4992690, at *15. As part of that decision, the Court said it could not determine as a matter of law that the settlement agreements were *not* anticompetitive simply because they allowed for entry prior to the end of exclusivity. *Id.* The Court distinguished *Actos I*, 2015 WL 5610752, at *13, which had found that certain early entry licenses did not constitute anticompetitive reverse payments, because the plaintiffs in that case had not alleged a two-step anticompetitive scheme involving a post-settlement product hop. *Id.*

This same reasoning is applicable to the instant motion. Defendants have not cited any new, controlling case law which holds that, as a matter of law, early entry licenses are immune from antitrust scrutiny. And as discussed

above, the opinions in *King Drug*, 791 F.3d at 403, and *Loestrin 24 Fe*, 814 F.3d at 552, suggest that no item of value that was transferred from plaintiff to defendant is immune from antitrust scrutiny as a matter of law. Rather, all benefits conferred as part of a settlement agreement are subject to antitrust review under the Rule of Reason. See also 2 William C. Holmes, *Intellectual Property and Antitrust Law* § 38:3 (Sept. 2018 update) (recent decisions on reverse payments “appear to favor a burden-shifting analysis keyed into the size of the reverse payment, proof of demonstrated anticompetitive effects, and the presence or absence of plausible justifications for the payment, with the trier balancing anticompetitive effects against procompetitive justifications”).

Regarding the alleged cash payments for avoided litigation costs, the Court held in *Namenda III* that *Actavis* required courts to compare a given payment to estimated future litigation costs and to “consider whether a payment ‘reflects traditional settlement considerations, such as avoided litigation costs or fair value for services’ to determine if it was justified.” 2016 WL 4992690, at *14 (internal quotation omitted). “These intrinsically fact-based determinations,” the Court found, “cannot be made on a pre-answer motion to dismiss.” *Id.* The Court also rejected Defendants’ argument that the FTC had created a universal safe harbor for litigation costs up to \$7 million. *Id.* at 29.

Actavis, Forest, and Merz now argue for the first time in supplemental briefing that “the FTC has subsequently extended the safe harbor to additional reverse payment consent orders.” (Forest Suppl. Br. at 7). The Court has read these consent orders. They do exclude “compensation for saved future litigation expenses of up to \$7 million.” See, e.g., Stip. Order at 3–4, *FTC v. Altergan*, No. 17-cv-312 (N.D. Cal. Jan. 23, 2017), ECF No. 4. But they do not announce a shift in FTC policy that would automatically immunize all payments under \$7 million in all lawsuits and contexts from allegations of anticompetitive conduct under *Actavis*.

Finally, the Court disagrees with the Defendants that the IPP has not met its burden under *Twombly* with respect to the reverse payments simply because the Complaint does not estimate the value of the payments or anticipated litigation costs. (Gen. Defs. Suppl. Br. at 6.) The Complaint alleges that the Generic Defendants “very likely received something of value in exchange for the agreement to delay entry,” (CAC ¶ 76) and no more is required at the motion to dismiss stage. Courts do not “require that the plaintiffs

provide precise figures and calculations at the pleading stage” because “very precise and particularized estimates of fair value and anticipated litigation costs may require evidence in the exclusive possession of the defendants, as well as expert analysis.” *Loestrin*, 814 F.3d at 552; see also *In re Opana ER Antitrust Litigation*, 162 F. Supp. 3d 704, 718 (N.D. Ill. 2016) (“precise valuation may require discovery”).

c) The IPP Sufficiently Alleges That It Was Injured as a Result of the Settlement Agreements.

*18 Finally, Defendants argue that the IPP fails to adequately plead that the settlement agreements caused it antitrust injury. (Gen. Defs. Br. at 26.) The IPP’s injuries are too speculative, they argue, because “Plaintiffs sole theory of harm ... is that consumers would have been able to purchase lower-price generic products earlier” had the litigation not settled. (*Id.*) Obviously, this would have lowered the amount the IPP would have to reimburse individual consumers who were beneficiaries under its plans.

The IPP alleges that, absent the unlawful settlement agreements, one of three events would have occurred that would have allowed for earlier entry of generic Namenda: (i) the generics would have prevailed in the patent litigation against Forest and Merz; (ii) the Generic Defendants would have launched “at risk” prior to the resolution of the patent litigation; or (iii) Forest and Merz would have settled the litigation legally with an earlier generic entry date. (CAC ¶ 81.)

The IPP’s theory is similar to that of the DPPs, and in *Namenda III* this Court found that the DPPs had adequately alleged antitrust injury as a result of the settlement agreements. *Namenda III*, 2016 WL 4992690, at *15.

Specifically, with respect to the first early entry scenario, this Court held that, while the DPPs had alleged no facts to suggest that Forest’s and Merz’s patent was invalid or that the Generic Defendants would have prevailed in litigation, this could be left to the summary judgment stage. *Id.* (“To survive a motion for summary judgment, [the DPPs] will have to substantiate these allegations with evidence suggesting that the settlement agreements did, in fact, delay generic entry and that the delay had the effect of allowing Forest to complete the hard switch.”). There is no reason this Court should now find otherwise with respect to the CAC in the IP Action.

With respect to the second possible early entry scenario, an “at risk” launch, the IPP has alleged that the FDA tentatively approved the ANDAs of several of the generic companies in early 2010, (CAC ¶ 82, 83), and that an unusually large number of generic manufacturers (14) submitted ANDAs with Paragraph IV certifications for *Namenda IR*, as compared to other branded drugs, (*id.* ¶ 69). Defendants argue that this is insufficient to show that an “at risk” launch was anything more than speculative, particularly given the expense of “at risk” launches and the fact that the Delaware court had issued claim construction opinions in the patent litigation that were unfavorable to the generic manufacturers. (Forest Br. at 41–42.) Again, however, this Court heard these very same arguments in *Namenda III* and found that they were more appropriately determined after discovery at the summary judgment stage. 2016 WL 4992690, at *15.

Finally, with respect to the third, “alternative settlement” theory, the IPP alleges that, in the absence of unlawful settlement agreements that caused the Generic Defendants to act against their self-interest when settling, earlier entry would have been possible. (CAC ¶ 84.) Defendants argue that this impermissibly second guesses an otherwise pro-competitive settlement. (Forest Br. at 44 (“Plaintiffs [*sic*] cannot premise an antitrust theory on the claim that they [*sic*] could imagine a different agreement that might have been *even more* procompetitive.”) (emphasis in original).) Once again, however, the Court rejected this argument in *Namenda III*, 2016 WL 4992690, at *15; and other courts have expressly recognized the viability of the “alternative settlement” theory in this type of litigation, *In re Androgel Antitrust Litig. (No. II)*, No. 09-md-2084, 2018 WL 2984873, at *16 (N.D. Ga. June 14, 2018) (collecting cases).

*19 This Court thus concludes that the IPP has stated a claim for monopolization on the basis of the settlement agreements.

3. The Court’s Earlier Ruling Regarding the DPPs’ Overarching Scheme Claim Does Not Support Dismissing Count One

Defendants next argue that the IPP fails to state a claim for an “anticompetitive scheme” under Count One. (Forest Suppl. Br. at 9.) Defendants argue that, because the IPP fails to state a claim for either an anticompetitive hard switch or for anticompetitive settlement agreements, it cannot use an “overarching scheme” claim to tie this conduct together. But since this Court has already found that the IPP does state a

201WL 8 91592

claim on the basis of both the hard switch and the settlement agreements, this argument fails.

In addition, any ruling regarding the duplicative nature of the overarching scheme claim was confined to the DP Action. The DPPs had brought five claims, the first three of which alleged violations of Section 2 of the Sherman Act. (15-cv-7488, Dkt. No. 29 ¶¶ 237–65.) In the DPP Complaint, Count I was based on the hard switch, and Count III was based on the settlement agreements. (*Id.*) Count II alleged an “overarching scheme” based on the hard switch and settlement agreements. (*Id.*) Counts I through III were all asserted against Actavis, Forest, and Merz. (*Id.*) In *Namenda III*, this Court held that the “overarching scheme” claim was duplicative of the claims related to the product hop and the settlement agreements. 2016 WL 4992690, at *16.

The IPP Complaint is structured differently. It contains four Counts, the first two of which allege antitrust offenses under the laws of 27 states. (CAC ¶¶ 191–210.) As discussed earlier in this opinion, Count One alleges monopolization against Actavis, Forest, and Merz based on both the hard switch and the settlement agreements. (*Id.*) Count Two alleges a conspiracy to monopolize against all Defendants—Actavis, Forest, Merz, and the Generic Defendants—and bases these allegations on the settlement agreements but not on the hard switch. (*Id.*) Plainly, Counts One and Two are not duplicative because (i) they are asserted against different groups of defendants, and (ii) they are grounded in different conduct (conspiracy to monopolize being a separate theory from actual monopolization).

The Court therefore denies Actavis, Forest, and Merz’s motion to dismiss Count One.

4. The Statute of Limitations Argument Is Inadequately Briefed With Respect to the IP Action

In their original brief in support of their motion to dismiss both the DP and IP Actions, Actavis, Forest, and Merz argued that the DPPs’ claims were time-barred. (Forest Br. at 62–65.)

In *Namenda III*, this Court rejected Defendants’ argument that the DPPs’ claims based on the settlement agreements were time-barred because the DPP Complaint was filed more than five years after the last settlement agreement was executed. 2016 WL 4992690, at *16. Relying on *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295–96 (2d Cir. 1979),

it held that “a purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations periods”—but confined the damages period to four years before the filing of the DP Action based on the four-year statute of limitations in the Sherman Act. *Id.*

*20 The original brief’s discussion of the statute of limitations and the IPP Complaint was limited to two footnotes. The first footnote urged the Court to limit the IPP’s damages “to four years prior to the filing of the Complaint—August 19, 2011, as opposed to the damages period asserted by IPPs [*sic*] as of April 14, 2010.” (*Id.* at 62 n.41.)

This I cannot do. As Defendants themselves have acknowledged, the limitations period for each state’s antitrust law is not uniformly four years. (*See* App’x 2.) Moreover, the parties have not briefed whether *Berkey Photo*, 603 F.2d at 267–68, which considered the question of ongoing injury with respect to the Sherman Act, is applicable to antitrust claims brought under state law.

In their second footnote, Defendants argue: “[T]he antitrust laws of 26 states alleged by IPPs [*sic*], the consumer protection laws of 21 states alleged by IPPs [*sic*], and the unjust enrichment claims of 28 states alleged by the IPP have limitations periods of five years or less (*see* Appendices 2–4), making it likely that these claims are also time-barred.” (*Id.* at 65 n.42.)¹⁵

¹⁵ The Generic Defendants adopt this argument in Actavis, Forest, and Merz’s brief with their own footnote: “For the reasons set forth in Forest’s motion to dismiss, Plaintiffs’ claims are also barred by the statute of limitations.” (Gen. Defs. Br. at 50 n.27.) My holding above applies equally to the Generic Defendants.

“Likely” is not a standard that results in dismissal. This Court cannot make a sweeping inference about statutes of limitation for state antitrust laws on the basis of federal cases interpreting the Sherman Act. Nor will it independently undertake a review each state’s requirements, armed with only a number in the cell of a table and without the movants’ having briefed the issues. If the issue is important enough to movants, they can call relevant cases under relevant laws to the court’s attention. I will not do Defendants’ work for them.

As a result, Actavis, Forest, and Merz's motion to dismiss—or, in the alternative, shorten—the Count One claims on statute of limitations grounds is denied without prejudice. However, as I will not immediately entertain a new motion, they will have to wait until discovery is over to make any renewed motion.

B. The IPP States a Claim for Monopolization Under the Laws of Some States But Not Others

I now turn to Defendants' arguments regarding the individual state law claims alleged under Count One.

1. The IPP Has Article III Standing To Bring State Law Monopolization Claims on Behalf of Class Members Who Made Purchases in Those States

Defendants argue that the IPP may bring class claims only under the laws of eleven states—Delaware, Florida, Georgia,¹⁶ Kansas, Nevada, New Jersey, New York, Pennsylvania,¹⁷ South Carolina, and Virginia—because, as the Named Plaintiff, the IPP “lack[s] standing to assert claims under the laws of the states in which they [*sic*] do not reside or in which they [*sic*] suffered no injury.” (Forest Br. at 65–66; Gen. Defs. Br. at 32–33.)

¹⁶ The IPP Complaint does not allege any claim under Georgia law, under any of Counts One through Four, (CAC ¶¶ 191–231.)

¹⁷ The IPP Complaint does not allege any claim under Pennsylvania law, under any of Counts One through Four. (CAC ¶¶ 191–231.)

In supplemental briefing, however, Defendants concede that, pursuant to the Second Circuit's recent ruling in *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 96 (2d Cir. 2018), this is a “question of predominance under Rule 23(b) (3), not a question of standing under Article III.” (Gen. Defs. Suppl. Br. at 9 (quoting *Langan*, 897 F.3d at 96.))

*21 In *Langan*, which came before the Second Circuit on review of a grant of class certification, the Second Circuit denied Defendants' motion to de-certify the class and dismiss the case because the named plaintiff had not suffered injury-in-fact in each state where she asserted claims:

[W]e write to make explicit what we previously assumed in *In re Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013): as long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3), *id.* at 126–27, not a question of ‘adjudicatory competence’ under Article III[.]

897 F.3d 88, 93 (2d Cir. 2018). Since *Langan*, a number of district court opinions have followed its reasoning to deny motions to dismiss state law claims on Article III standing grounds because the named plaintiff did not make in-state purchases and thereby suffer injury-in-fact in those states. See, e.g., *Daniel v. Tootsie Roll Indus., LLC*, No. 17-cv-7541, 2018 WL 3650015, at *5 (S.D.N.Y. Aug. 1, 2018) (applying *Langan* to hold that named plaintiffs had Article III standing to assert claims on behalf of “nonparty class members with claims subject to different state laws”); *Donnenfeld v. Petro, Inc.*, No. 17-cv-2310, 2018 WL 4356727, at *12 (E.D.N.Y. Sept. 12, 2018) (denying defendant's motion to dismiss state consumer protection claims in states in which the plaintiff did not reside); *Holve v. McCormick & Co., Inc.*, No. 16-cv-6702, 2018 WL 3861406, at *10 (W.D.N.Y. Aug. 14, 2018) (holding that named plaintiff had Article III standing to bring class claims under Maryland state law). Thus, the Court will not presently grant Defendants' motion to dismiss a broad swath of the IPP's state law claims for lack of Article III standing.

I write briefly to note that *Langan* gives rise to certain prudential concerns for CAFA class actions. It seems clear enough that Sergeants Benevolent cannot state a claim under the laws of at least some states whose laws are pleaded in its Complaint. Put otherwise, if there were no CAFA and the IPP brought a monopolization claim under the law of, say, Utah, that action would be dismissed on motion because the IPP could not state a claim under the relevant law. No state court would allow it to continue as a plaintiff on the theory that the proper time to deal with this question was at class certification. An entity that has no claim fails to state a claim

—not as a matter of Article III standing (the issue addressed in *Langan*) but under Rule 12(b)(6) or its state court equivalent. Yet a number of courts, purporting to follow *Langan*, have concluded that, because a class plaintiff who fails to state a claim under a particular state’s law (*i.e.*, it cannot recover for the alleged violation of law for its own account) nonetheless has Article III standing, the issue of whether the plaintiff fails to state a claim should abide a decision on a motion for class certification.

This court does not read *Langan* any more broadly than it purports to reach. Nothing in *Langan*, as I read it, precludes a defendant from moving to dismiss a CAFA plaintiff’s claims under a particular statute pursuant to Rule 12(b)(6), on the grounds that the plaintiff fails to state a claim for its own account—a question entirely different from whether it has constitutional standing. CAFA—which confers no substantive rights on any litigant, but simply permits certain cases that do not otherwise belong in a federal court to be brought here—cannot be read to enable plaintiffs to state claims when the laws of the several states specifically provide to the contrary. It is imperative that too much not be read into *Langan* since neither CAFA nor state consumer protection laws require counsel to compete with other advocates for the positions of class counsel and lead plaintiff, both of which create healthy incentives to find the best class representative(s) possible.

*22 For those courts that read *Langan* more broadly than I do, it is enough that a district court can conclude that a class plaintiff is not an appropriate class representative because he/it fails to state a claim at the class certification stage. But that comes at cost. A district court’s inability to address these arguments at the motion to dismiss stage increases a plaintiff’s leverage with respect to settlement negotiations, without any additional effort on its part.

So while I accept that *Langan* forecloses any argument that a CAFA plaintiff’s claims should be dismissed on motion for lack of Article III standing, I decline to read it as foreclosing consideration of a properly made Rule 12(b)(6) motion at the motion to dismiss stage—a subject that the Court of Appeals nowhere addressed.

2. The IPP Fails to State a Claim for Monopolization in Three States That Follow *Illinois Brick* (Florida, Massachusetts, and Utah)

Defendants next argue that the IPP fails to state a claim under Rule 12(b)(6) under the antitrust laws of Florida, Massachusetts, Puerto Rico, Rhode Island, and Utah, because these states follow the rule of *Illinois Brick* and prohibit indirect purchaser actions. (Forest Br. at 66; Gen. Defs. Br. 35–36; Gen. Defs. Suppl. Br. at 10 n.4.)¹⁸ They are correct about three of these states.

¹⁸ Defendants also argue that any states that have not expressly adopted or rejected *Illinois Brick* should be treated as barring indirect purchaser claims. (Gen. Defs. Br. at 36 n.16 (citing *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011)).) However, Defendants have not indicated which states these would be.

a) Florida

Count One of the IPP Complaint alleges a claim for monopolization under Fla. Stat. §§ 501.201, *et seq.* (CAC ¶ 201(d).) Actavis, Forest, and Merz argue that because the Florida Antitrust Act applies *Illinois Brick*, the IPP cannot recover as an indirect purchaser. (Forest Suppl. Br. at 10 n.4.)

I first note that the IPP incorrectly cites to the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Fla. Stat. §§ 501.201, *et seq.*, rather than the Florida Antitrust Act, *id.* §§ 542.15, *et seq.* I construe this as a typographical error but hold that Defendants are correct that the Florida Antitrust Act does not permit indirect purchaser recovery. “Florida adheres to the ‘direct purchaser’ rule enunciated in *Illinois Brick*.” *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 102 (Fla. Dist. Ct. App. 1996).

The Court therefore **DISMISSES** the IPP’s Florida Antitrust Act claim under Count One.

b) Massachusetts

Count One of the IPP Complaint alleges a claims for monopolization under Mass. Gen. Laws, ch. 93A. (CAC ¶ 201(i).) Defendants move to dismiss the Massachusetts law claim under Count One on the basis that Massachusetts follows *Illinois Brick*. (Gen. Defs. Suppl. Br. at 10 n.4 (citing *Ciardi v. Hoffman-La Roche, Ltd.*, 762 N.E.3d 303, 308 (Mass. 2002)).)

Again, I note that the IPP has incorrectly cited to chapter 93A, Massachusetts' consumer protection statute, rather than chapter 93, its antitrust statute. I again treat this as a typographical error, particularly since the IPP's conspiracy to monopolize claim is brought under chapter 93. I dismiss the claim anyway because *Ciardi* is squarely on point. Chapter 93 A (consumer protection) allows indirect purchaser claims; chapter 93 (antitrust) does not. "Because the Antitrust Act is to be construed in harmony with judicial interpretations of comparable Federal antitrust statutes, the rule of law established in *Illinois Brick Co. v. Illinois ...* would apply with equal force to preclude claims brought under G.L. c. 93 by indirect purchasers in Massachusetts." *Ciardi*, 762 N.E.2d at 308; see also *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-md-2785, 2018 WL 3973153, at *32 n.20 (D. Kan. Aug. 20, 2018).

*23 The Court therefore **DISMISSES** the IPP's Massachusetts law claim under Count One.

c) Puerto Rico

Count One of the IPP Complaint alleges a claim for monopolization under the Puerto Rico Antitrust Act ("PRAA"), 10 P.R. Laws §§ 263, *et seq.* (CAC ¶ 201(aa).) Defendants move to dismiss because, while Puerto Rico does not expressly prohibit suits by indirect purchasers, the PRAA is modeled after the Clayton Act, under which indirect purchasers lack standing pursuant to the Supreme Court's decision in *Illinois Brick*. (Forest Suppl. Br. at 10 n.4.) The IPP counters that the PRAA does not limit standing to direct purchasers. (IPP Resp. to Gen. Defs. Br. at 11–12 (citing *Rivera-Muniz v. Horizon Lines Inc.*, 737 F. Supp. 2d 57, 61 (D.P.R. 2010)).)

Again, the correct citation for the PRAA is 10 L.P.R.A. §§ 257, *et seq.*, as section 263 covers price discrimination, specifically. The monopolization offense is found at 10 L.P.R.A. § 260. I once again construe this as a typographical error.

The Court recognizes that many district courts in the continental United States have dismissed indirect purchaser claims under the PRAA for lack of standing, based on the idea that the PRAA is modeled on federal statutes that do not extend standing to indirect purchasers. See, e.g., *Opana ER*, 162 F.Supp.3d at 723 (collecting cases); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 413 (S.D.N.Y. 2011).

Nonetheless, this Court finds that the U.S. District Court for the District of Puerto Rico has more faithfully interpreted the standing requirements of the PRAA, in light of how the Supreme Court of Puerto Rico reads that statute. *Rivera-Muniz*, 737 F. Supp. 2d at 61 (citing *Pressure Vessels P.R. v. Empire Gas P.R.*, 137 D.P.R. 497, 520 (P.R. 1994)).

In *Pressure Vessels*, the Supreme Court of Puerto Rico interpreted the private damages section of the PRAA to hold that private remedies were available to any plaintiff who met the following conditions: (1) the person was harmed in his business or property (2) by reason of (3) actions prohibited by law. 137 D.P.R. at 518. The Supreme Court of Puerto Rico reasoned that, in order to satisfy this second prong, a plaintiff need only allege that "as a consequence of the legal violation, he has been injured." *Id.* at 520. Based on this interpretation of the PRAA in *Pressure Vessels*, the Court in *Rivera-Muniz* held, "Because Puerto Rico liberally construes its standing requirements in private antitrust cases, it is immaterial whether Plaintiffs are direct or indirect purchasers." *Rivera-Muniz*, 737 F. Supp. 2d at 61 (internal citation omitted).

Defendants' motion to dismiss this claim is, therefore, **DENIED**.

d) Rhode Island

Count One of the IPP Complaint alleges a claim for monopolization under R.I. Gen. Laws §§ 6-36-1, *et seq.* (CAC ¶ 201(t).) Defendants move to dismiss this claim on the grounds that Rhode Island's *Illinois Brick* repealer statute went into effect on July 15, 2013. (Forest Suppl. Br. at 10 n.4.) Several federal district courts have held that the statute does not have retroactive application. See, e.g., *In re Effexor Antitrust Litig.*, No. 11-cv-5661, 2018 WL 4466050, at *16 (D.N.J. Sept. 18, 2018) (also analyzing general presumption against retroactive application in Rhode Island law); *In re Niaspan Antitrust Litig.*, 42 F. Supp. 3d 735, 759 (E.D. Pa. 2014) (same).

*24 The Court agrees with Defendants and with the weight of federal case law and finds that the IPP cannot bring claims under Rhode Island's antitrust law for conduct occurring before July 15, 2013. As a result, the Court **DISMISSES IN PART** the Rhode Island law claim under Count One, to the extent it seeks damages prior to that date. See *Niaspan*,

42 F. Supp. 3d at 759 (restricting end payor plaintiffs from “recover[ing] for any overcharges incurred before the ... Rhode Island repealer statute took effect”).

e) Utah

Count One of the IPP Complaint alleges a claim for monopolization under [Utah Code §§ 76-10-1301, et seq.](#) [sic].¹⁹ (CAC ¶ 201(w).) Defendants move to dismiss this claim on *Illinois Brick* grounds, arguing, “Indirect purchasers may only bring claims under the Utah Antitrust Act if they are citizens or residents of Utah.” (Gen. Defs. Br. at 35–36 n.15 (citing [Utah Code § 76-10-3109](#)).)

¹⁹ Since this provision governs prostitution offenses, and since Count Two cites the Utah Antitrust Act at [Utah Code §§ 76-10-3101, et seq.](#), (CAC ¶ 207(x)), the Court once again assumes this is a typographical error.

Despite Defendants' characterization, this is not in fact an *Illinois Brick* argument but instead an argument about the ability of the Named Plaintiff to state a claim under the Utah Antitrust Act pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). The statute reads, in relevant part: “A person who is a citizen of this state or a resident of this state and who is injured or is threatened with injury in his business or property by a violation of the Utah Antitrust Act may bring an action for injunctive relief and damages, regardless of whether the person dealt directly or indirectly with the defendant.” [Utah Code § 76-10-3109](#).

“The majority of courts that have been presented with this statute require at least one Utah citizen or resident be a named plaintiff.” *Effexor*, 2018 WL 6003893, at *17 (collecting cases); see also *GEICO Corp. v. Autoliv, Inc.*, No. 16-13189, 2018 WL 5077767, at *27 (E.D. Mich. Aug. 30, 2018) (dismissing Utah antitrust claim with prejudice.)

Sergeants Benevolent, the sole Named Plaintiff in this case, has not alleged anywhere in the Complaint that it is a citizen or resident of Utah. Therefore, it fails to plead an element required to state a claim under the Utah Antitrust Act. The possibility that some beneficiary of the IPP may have retired to Utah is not enough, because none of the IPP's beneficiaries is a *named* plaintiff. Defendants' motion to dismiss the Utah monopolization claim under Count One pursuant to [Rule 12\(b\)\(6\)](#) is, therefore, **GRANTED**.

3. The IPP's Failure To Satisfy Pre-Suit Notification Requirements Does Not Warrant Dismissal of the Claims in Three States (Hawaii, Arizona, and Nevada)

In supplemental briefing, Defendants argue for the first time that the IPP's state antitrust claims under the laws of Arizona, Hawaii, and Nevada fail because the IPP has not alleged that it has complied with state law notice requirements. (Forest Suppl. Br. at 12; Gen. Defs. Suppl. Br. at 12–13.)

*a) Hawaii*²⁰

²⁰ Although this Court would ordinarily proceed through the state law claims in alphabetical order, there exists much more fulsome case law regarding the pre-suit notice requirement under the Hawaii Antitrust Act than there does for any of the other states.

Count One of the IPP Complaint alleges an antitrust under Haw. Rev. Stat. §§ 480, *et seq.* (CAC ¶ 201(e).) The Hawaii Antitrust Act reads, in relevant part: “A class action for claims for a violation of this chapter other than claims for unfair or deceptive acts or practices may be filed, and may be prosecuted on behalf of indirect purchasers by a person other than the attorney general as follows: (1) A filed copy of the complaint and all relevant supporting and exculpatory materials in possession of the proposed class representative or its counsel shall be served on the attorney general not later than seven days after filing of the complaint.” [Haw. Rev. Stat. § 480-13.3\(a\)](#).

*²⁵ Generic Defendants argue that notice of suit must be provided to the state's attorney general and that failure to do so requires dismissal. (Gen. Defs. Suppl. Br. at 12 (citing [Haw. Rev. Stat. § 480-13.3](#)).) The IPP responds that at least two courts have allowed plaintiffs to proceed under the Hawaii Antitrust Act, despite their failure to comply with pre-suit notice requirements. (IPP Resp. to Gen. Defs. Suppl. Br. at 16 (citing *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 253–54 (D. Conn. 2015) (*Aggrenox I*); *In re Aftermarket Filters Antitrust Litig.*, No. 08-md-4883, 2009 WL 3754041, at *6 (N.D. Ill. Nov. 5, 2009)).)

The Court finds the cases cited by the IPP to be persuasive on the question of whether failure to comply with the statutory

requirement is fatal to a claim under the Hawaii Antitrust Act. In *Aftermarket Filters*, 2009 WL 3754041, at *6, the court held that the statutory scheme did not imply that dismissal was the proper remedy for failing to comply with the notification requirement. Moreover, defendants could not use the notification requirement “as a shield to avoid answering for alleged anti-competitive behavior.” *Id.* The court in *Aggrenox I*, 94 F. Supp. 3d at 253–54, adopted this reasoning.

The case cited by Defendants, *In re Asacol Antitrust Litig.*, No. 15-cv-12370, 2016 WL 4083333, at *14 n.14 (D. Mass. July 20, 2016) (*Asacol I*), is not persuasive. There, the court admitted that “[c]ourts are divided on whether Hawaii’s statute necessitates dismissal” but dismissed the claim without looking specifically to Hawaii law. *Id.*

However, even if I were to find that the Hawaii statute required dismissal of the IPP’s claim in Hawaii state court, I would find that Federal Rule of Civil Procedure 23 is comprehensive with respect to pre-filing requirements in federal court, as held by the United States Supreme Court in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393 (2010). “The Second Circuit has not taken up the problem of the effect of *Shady Grove*’s split opinions.” *In re Aggrenox Antitrust Litig.*, No. 14-md-2516, 2016 WL 4204478, at *5 (D. Conn. Aug. 9, 2016) (*Aggrenox II*). According to Justice Scalia’s plurality opinion, “the only test of a Rule’s validity under the Rules Enabling Act is ‘whether it regulates procedure,’ ” which the Court “found that Rule 23 did.” *In re Trilegiant Corp.*, 11 F. Supp. 3d 82, 116 (D. Conn. 2014). According to Justice Stevens’ concurrence, if the state rule conflicts with Rule 23, the state rule will yield only if it is not “so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy.” *Shady Grove*, 559 U.S. at 419–20 (Stevens, J., concurring).

I find that Hawaii’s limitation on class actions is “a state law that restricts the types of claims eligible for class treatment beyond the limits established by Rule 23.” *In re Restasis Antitrust Litig.*, No. 18-md-2819, 2018 WL 5928143, at *6 (E.D.N.Y. Nov. 13, 2018). It thus conflicts with the federal rule. *Id.* Under the plurality approach, therefore, the Hawaii Antitrust Act’s notice provision would yield to Rule 23.

Moreover, a majority of federal courts have held that, pursuant to Justice Stevens’ approach, the pre-suit notice requirement is not substantive. See, e.g., *Restasis*, 2018 WL 5928143, at *6. *Aggrenox I*, 94 F. Supp. 3d at 254, is

particularly persuasive. There, the court reasoned that the plain language of the Hawaii statute itself “does not appear ... to create a substantive right to recovery that only ‘vests’ after some action or inaction of the state attorney general. Rather, it creates a right to ‘bring an action based on unfair methods of competition’ in section 480–2, without any reference to notice, and delineates procedural prerequisites for class actions under the chapter in section 480–13.3.” *Id.* The court there also observed that defendants had not drawn the court’s attention to any arguments, e.g., from the legislative history, that would counsel a different reading. *Id.*

*26 This Court agrees with the weight of federal case law, which holds the pre-suit notice provision in the Hawaii Antitrust Act would, first of all, not require dismissal of the suit in state court and that, even if it did, would not override Rule 23 to bar a claim in federal district court.

The Court therefore **DENIES** Defendants’ motion to dismiss the Hawaii law claim under Count One.

b) Arizona

Count One of the IPP Complaint alleges an antitrust claim under Ariz. Rev. Stat. §§ 44-1403, *et seq.* (CAC ¶ 201(a).) The Arizona Antitrust Act provides, in relevant part: “A person filing a complaint, counterclaim or answer for any violation of the provisions of this article shall simultaneously with the filing of the pleading in the superior court or, in the case of pendent state law claims in the federal court, serve a copy of the complaint, counterclaim or answer on the attorney general.” Ariz. Rev. Stat. § 44-1415(a).

In supplemental briefing, Defendants argue that notice of suit must be provided to the state’s attorney general when the complaint is filed, and that failure to comply with the notice provision is grounds for dismissal. (Gen. Defs. Suppl. Br. at 12 (citing *Effexor*, 2018 WL 4466050, at *10–*11; *Asacol I*, 2016 WL 4083333, at *14–*15).) In response, the IPP cites *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 817 (N.D. Ill. 2017), where the district court allowed claims under Arizona’s Antitrust Act to proceed, despite the plaintiffs’ failure to comply with the statutory notice requirements. (IPP Resp. to Gen. Defs. Suppl. Br. at 16.)

This Court does not see a meaningful distinction between the pre-suit notification requirement under the Hawaii Antitrust Act and that under the Arizona Antitrust Act, even if other

courts have found to the contrary. Moreover, in addition to requiring those filing complaints to notify the attorney general, the statute by its terms also obliges those *answering* complaints to notify the attorney general. It is hard to imagine that failure to comply with this requirement would necessitate dismissal.

The Court is not persuaded by the reasoning in *Effexor*, 2018 WL 4466050, at *10–*11, or in *Asacol I*, 2016 WL 4083333, at *14–*15, which found that there was no conflict between Rule 23 and the Arizona pre-filing requirement. Instead, this Court agrees with the court in *Restasis*, 2018 WL 5928143, at *6, which found that the United States Supreme Court had held in *Shady Grove* that Rule 23 is “not silent on the question of whether a particular claim is eligible for class treatment.” *Restasis*, 2018 WL 5928143, at *6. Rule 23 contains its own limitations on those claims eligible for class treatment; “[t]herefore, a state law that restricts the types of claims eligible for class treatment beyond the limits established by Rule 23 conflicts with the federal rule.” *Id.* Like Hawaii’s statute, therefore, this Court could only find that this requirement was grounds for dismissal if it also found the requirement to be substantive.

For the reasons already discussed, however, because this Court finds that, Arizona’s pre-suit notice requirement is purely procedural, Defendants’ motion to dismiss the Arizona antitrust claim under Count One is **DENIED**.

c) Nevada

Count One of the IPP Complaint alleges an antitrust claim under Nev. Rev. Stat. §§ 598A.060, *et seq.* (CAC ¶ 201(n).) The Generic Defendants argue that notice of suit must be provided to the state’s attorney general or the claim cannot proceed. (Gen. Defs. Suppl. Br. at 12 (citing Nev. Rev. Stat. § 598A.210(3)).) The statute states, in relevant part: “Any person commencing an action for any violation of the provisions of this chapter shall, simultaneously with the filing of the complaint with the court, mail a copy of the complaint to the Attorney General.” Nev. Rev. Stat. § 598A.210(3).

*27 Defendants argue that failure to notify the attorney general requires dismissal. (Gen. Defs. Suppl. Br. at 12 (citing *Effexor*, 2018 WL 4466050, at *10–*11; *Asacol I*, 2016 WL 4083333, at *14–*15).) In response, the IPP does not cite any cases that discuss Nevada law particularly, but instead argues generally that “pre-suit notice requirements are procedural

and, therefore, superseded by federal law.” (IPP Resp. to Gen. Defs. Suppl. Br. at 16 (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 346 (7th Cir. 1997)).)

Only scant federal case law interprets the Nevada Antitrust Act’s statutory notice requirement in light of *Shady Grove*, and the Court is not aware of any Nevada cases that discuss whether the requirement is substantive or procedural in nature.

Again, however, the Court sees no meaningful difference between the text of Nevada’s statute and that of Hawaii’s. The Court remains unpersuaded by the reasoning of the two cases cited by Defendants, for the reasons discussed above.

As a result, Defendants’ motion to dismiss the Nevada law claim under Count One is **DENIED**.

4. The IPP Fails To State a Claim for Monopolization Under the Law of Kansas

Defendants argue that the IPP may not maintain a claim for monopolization (as opposed to conspiracy to monopolize) under the laws of Kansas, New York, and Tennessee because those statutes do not permit recovery for unilateral anticompetitive conduct. (Forest Br. at 67.)²¹ For example, commentators have observed that “Section 50-132 [of the Kansas Restraint of Trade Act] would not appear to extend to cases of unilateral monopolization.” 6 Julian von Kalinowski, Peter Sullivan, & Maureen McGuirl, *Antitrust Laws and Trade Regulation* § 116.03 (2d ed. 2018); *see also Commonwealth Electrical Inspection Servs. v. Town of Clarence*, 6 A.D.3d 1185, 1186 (N.Y. App. Div. 2004) (New York’s Donnelly Act does not create a cause of action for unilateral anticompetitive conduct); *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1109 (N.D. Cal. 2007) (the Tennessee Trade Practices Act does not create a cause of action for unilateral monopolization).

²¹ Although Actavis, Forest, and Merz purport to seek dismissal of the IPP’s monopolization claims at CAC ¶¶ 207(g), 207(p) and 207(w), those paragraph numbers actually correspond to Count Two of the IPP Complaint—conspiracy to monopolize—which is not unilateral conduct by definition. As it has several times throughout this opinion, the Court assumes that this is a

typographical error, and it treats the pleadings as if Actavis, Forest, and Merz instead move to dismiss the equivalent state law claims under Count One of the IPP Complaint.

But the IPP Complaint does not allege monopolization via unilateral action. It pleads “plead some sort of concerted action” in support of its non-conspiracy monopolization claims. (See Forest Br. at 67.) The most obvious example is the IPP’s allegation, in support of Count One, that Forest and Merz “entered into unlawful agreements with the Generic [] Defendants.” (CAC ¶ 193). That is by definition *not* unilateral action. The IPP Complaint also plausibly alleges that Forest’s hard switch was executed with the participation of other parties; those parties may not have been named as defendants but they did not have to be. For example, Forest signed “an exclusive distribution contract in November, 2014 for Namenda IR with Foundation Care, a mail-order-only pharmacy.” (CAC ¶ 95). Forest also “agreed to pay rebates to health plans to make sure they put Namenda XR on the same tier as Namenda IR so that members would not have an incentive to choose Namenda IR and patients did not have to pay higher co-payments for Namenda XR.” (CAC ¶ 110). There is nothing unilateral about any of this. Unilateral conduct might include, in the pharmaceutical context: launching a false advertising campaign against a competitor; filing a sham petition with the FDA; filing a sham patent with the PTO; or initiating sham litigation against a competitor. None of that is alleged here.

*28 However, Actavis, Forest, and Merz also argue that, under the law of these three states, monopolization, absent conspiracy, is not a cognizable cause of action. Since Count Two alleges conspiracy to monopolize, in effect what Defendants argue is that Counts One and Two are necessarily duplicative insofar as they are raised under the law of these three states.

a) Kansas

Defendants cite *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 283 (D. Mass. 2004), for the proposition that Kansas “prohibits combinations and conspiracies only” and move to dismiss on that basis. (Forest Br. at 67.) The IPP argues that it has pled concerted action in the form of the settlement agreements as the foundation for its Kansas law claim under Count One. (IPP Resp. to Gen. Defs. Br. at 14.)

The Kansas Restraint of Trade Act (“KRTA”) provides, in relevant part, “No person, servant, agent or employee of any person doing business within the state of Kansas shall conspire or combine with any other persons, within or without the state for the purpose of monopolizing any line of business[.]” Kan. Stat. § 50-132; see also *Good v. Dickinson*, 278 P. 730, 732 (Kan. 1929) (sale of business, although bilateral conduct, did not constitute trust or combination as required to allege monopolization). The Kansas Supreme Court has observed (albeit in dicta) that, when bringing a claim for monopolization, conspiracy is “legal requirement under Kansas antitrust law.” *Bergstrom v. Noah*, 974 P.2d 520, 528 (Kan. 1999); but see *Bellinder v. Microsoft Corp.*, Nos. 00-c-0855, 00-C-00092, 99-cv-17089, 2001 WL 1397995, at *1 (Kan. Dist. Ct. Sept. 7, 2001) (certifying class action under Kan. Stat. § 50-132 where plaintiffs alleged that Microsoft “abused its monopoly power” but did not allege conspiracy). The weight of published, appellate case law in Kansas holds that the IPP may not proceed on a theory of monopolization unless accompanied by allegations of conspiracy.

Other federal district courts have agreed that monopolization, absent conspiracy, does not state a claim under the KRTA. *Relafen*, 221 F.R.D. at 283; *EpiPen*, 2018 WL 3973153, at *33.

Obviously, the IP’s claim for conspiracy to monopolize is in Count Two, not Count One, and this court will dismiss duplicative counts, Defendants’ motion to dismiss the Kansas claim under Count One is, therefore, **GRANTED**.

b) New York

The Donnelly Act prohibits “[e]very contract, agreement, arrangement or combination” that establishes a monopoly or restrains competition. N.Y. Gen. Bus. Law § 340(1). As the New York Court of Appeals has held, the term “arrangement” “must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, ‘contract’, ‘combination’ or ‘conspiracy’.” *State v. Mobil Oil Corp.*, 344 N.E.2d 357, 359 (N.Y. 1976); see also *Glob. Reins. Corp. U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 192 (N.Y. 2012) (“An antitrust claim under the Donnelly Act ... must allege both concerted action by two or more entities and a consequent restraint of trade within an identified relevant product market.”)

In other words, a plaintiff must allege concerted action to bring a claim under the Donnelly Act, which the IPP does here. (*See supra.*) However, unlike the Kansas statute, there is no requirement that a plaintiff use the word “conspiracy” in order to state a claim.

*29 At least one other federal district court has refused to dismiss a Donnelly Act claim that alleged concerted action but not conspiracy. *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, 2008 WL 2660782, at *3 n.15 (D.N.J. Mar. 10, 2008).

Defendants' motion to dismiss the New York claim under Count One is, therefore, **DENIED**.

c) Tennessee

Similar to the Donnelly Act, the Tennessee Trade Practices Act (“TTPA”) declares unlawful “[a]ll arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition,” as well as those “designed, or which tend to” control prices. Term. Code. § 47-25-101. The Supreme Court of Tennessee interprets the TTPA broadly. “Its broad and comprehensive provisions cover every conceivable case of an agreement or contract made to lessen or destroy competition and control prices.” *Standard Oil Co. v. State*, 100 S.W. 705, 716 (Tenn. 1907). *See also Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 522 (Tenn. 2005) (observing that “the language of Tennessee’s antitrust statutes have not changed significantly since *Standard Oil*” and finding that the TTPA prohibits “agreements” and “arrangements” that affect competition).

Defendants cite no relevant law in support of the proposition that the TTPA requires a plaintiff to allege conspiracy.

Accordingly, Defendants' motion to dismiss the Tennessee claim under Count One is, therefore, **DENIED**.

C. In Conclusion, the IPP Has Stated A Claim for Monopolization Under Count One With Respect to the Laws of 23 States

In sum, the Court finds that the IPP has adequately pled facts supporting its allegations of monopolization based upon both the hard switch and the settlement agreements.

The Court also finds that, as a matter of law, the IPP may pursue its Count One claims for monopolization under the laws of all states **except** Florida, Kansas, Massachusetts, and Utah. Those claims are hereby **DISMISSED**. The IPP’s claim for monopolization under Rhode Island law is hereby **DISMISSED IN PART** to the extent it seeks damages for injuries occurring before July 15, 2013.

VI. Count Two: Conspiracy To Monopolize Under the Laws of 27 States Against Actavis, Forest, Merz, and the Generic Defendants

Second, the IPP brings an additional 27 state law claims grouped under the heading “Count Two: Conspiracy to Monopolize Under State Law.” (CAC at 52.) The claims under Count Two are, for the most part, identical to the 27 claims under Count One. (*Id.* ¶ 207.)

Count Two differs from Count One in three significant respects.

First, Count Two alleges conspiracy to monopolize rather than actual monopolization. “Defendants have intentionally and unlawfully conspired in order to allow Forest monopolize [*sic*] the market for memantine hydrochloride in violation” of state laws. (*Id.*)

Second, the IPP asserts claims for conspiracy to monopolize under Count Two against Actavis, Forest, Merz, and the Generic Defendants, who are not named in Count One. (*Id.* at 52.)

Third, whereas Count One alleges injuries to indirect purchasers stemming from both the hard switch and the settlement agreements, Count Two alleges injuries to indirect purchasers stemming from the settlement agreements only. (*Id.* ¶ 205.)

*30 Beyond that, there are extremely minor, and likely inadvertent, differences between the state law causes of action underlying Counts One and Two. For example, Count One alleges monopolization under the laws of Florida and New Hampshire but does not allege monopolization under the laws of Illinois or Oregon. (*Compare id.* ¶¶ 201, 207.) Count Two, by contrast, alleges conspiracy to monopolize under the laws of Illinois and Oregon but does not allege conspiracy to monopolize the laws of Florida and New Hampshire. (*Id.*) There are also several differences—again, probably typographical errors—in the citations to the state codes. (*See, e.g., id.* ¶¶ 201(i), 207(i).)

Defendants move to dismiss Count Two in all or large part for many of the same reasons as they did for Count One, including:

- The IPP has expressly disclaimed reliance on *Actavis*, 570 U.S. at 158, and, in any event, cannot prove that the agreements contained unlawful “reverse payments,” (Forest Br. at 34–60);
- Any injuries the IPP alleges it suffered due to the settlement agreements is purely speculative, (*id.* at 40–46);
- The claims are “likely” time-barred by the applicable state statutes of limitations, (*id.* at 65 n.42).
- The IPP lacks Article III standing to assert claims in states where it has not made purchases and thereby suffered injury in fact, which are all but nine states, (*id.* at 65–66);
- *Illinois Brick* bars the IPP’s claims in six states, (Gen. Defs. Suppl. Br. at 10–11); and
- The IPP has failed to satisfy pre-suit notice requirements in four states, (Gen. Defs. Suppl. Br. at 11–13).

For the reasons discussed in the preceding sections of this opinion, none of these arguments has merit, with the exception of the arguments that (i) Massachusetts bars indirect purchasers from recovering under its antitrust act; (ii) Utah bars indirect purchasers from recovering under its antitrust act unless they are citizens or residents of Utah; and (iii) Rhode Island barred indirect purchasers from recovering under its antitrust act until the amendments of July 15, 2013. Therefore, the Massachusetts and Utah claims under Count Two are hereby **DISMISSED**, and the Rhode Island claim under Count Two is hereby **DISMISSED IN PART**, to the extent it seeks damages for injuries occurring before July 15, 2013.

Defendants also raise a handful of arguments specific to Count Two, *viz.*:

- The IPP does not adequately allege a conspiracy because it pleads only parallel conduct without the necessary “plus factors” that would be indicative of agreement; (Gen. Defs. Br. at 20; Forest Br. at 60);

- The Illinois Antitrust Act grants a right to bring a class action to the Illinois attorney general only (Gen. Defs. Br. at 35 n.15); and
- Oregon adheres to the law of *Illinois Brick* and therefore precludes recovery for indirect purchasers, (Gen. Defs. Br. at 35).

As with Count One, the Court first analyzes the argument of general applicability, and then turns to the Illinois and Oregon arguments.

A. The IPP States a Claim for Conspiracy To Monopolize

Defendants argue in their original briefing²² that the IPP fails to allege a conspiracy, thereby necessitating dismissal of Count Two, because it has not pled sufficient “plus factors” to support an inference of conspiracy. (Forest Br. at 60; Gen. Defs. Br. at 20.)

²²

By way of background, I note briefly that the Court did not previously have occasion to consider the conspiracy issue in the DP Action. The DP Action did not expressly assert conspiracy as a cause of action, (15-cv-7488, Dkt. No. 29 ¶¶ 237–65), and the DPPs later informed the Court that they had abandoned any “inter-generic conspiracy claim” raised under Count IV of their Complaint, *Namenda V*, 2018 WL 3970674, at *25.

*31 This is, of course, an argument with respect to the elements of an antitrust conspiracy under *federal* law. Neither party has briefed the elements of conspiracy—let alone what is adequate at the motion to dismiss stage—under each state’s law. However, both parties have apparently used federal antitrust law as a guidepost, and this Court does the same. The Court reminds the IPP that it will be required to show at the class certification stage that common legal issues with respect to the conspiracy elements of each state’s law predominate over any individual issues.

Under the guideposts laid out by federal law, the IPP has pled sufficient circumstantial evidence to support a conspiracy to monopolize.

“[C]ourts have not given much attention to conspiracy to monopolize as a distinct antitrust offense,” 2-16 Earl W. Kintner et al., *Federal Antitrust Law* § 16.39 (2017).

Nonetheless, “in deciding whether there is concerted action, courts routinely apply the same analysis under both Sections 1 and 2” of the Sherman Act. 2 von Kalinowski, Sullivan, & McGuirl, *supra*, § 26.02; *see also* Areeda & Hovenkamp, *supra*, § 41.01 [A]. “In order to establish a conspiracy in violation of § 1, whether horizontal, vertical, or both, proof of joint or concerted action is required; proof of unilateral action does not suffice.” *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012). Put another way, “Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as ‘plus’ factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.” *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987).

Defendants argue principally that parallel contingent launch provisions, on their own, are insufficient to establish a conspiracy. (Gen. Defs. Suppl. Br. at 8 (citing *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 55 (1st Cir. 2016))). Indeed, some courts in this district have found that pleading only contingent launch provisions does not survive a motion to dismiss. *See Actos I*, 2015 WL 5610752, at *23. Moreover, it is true that when plaintiffs build their conspiracy cases on contingent launch clauses alone, they often fail at the summary judgment stage. *See, e.g., King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, Nos. 06-cv-1797, 06-cv-1833, 06-cv-2768, 2014 WL 2813312, at *14 (E.D. Pa. June 23, 2014). Finally, the *Nexium* court found that, at trial, the absence of evidence other than contingent launch provisions entitled the defendants to judgment as a matter of law on the conspiracy claim. *Nexium*, 842 F.3d at 55.

However, this Court disagrees that more is presently required because, “to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment ... or a trial.” *Anderson News*, 680 F.3d at 184 (internal citations omitted).

First, the IPP has met its burden to show parallel conduct, as it has alleged that the Generic Defendants entered into settlement agreements around the same time with Forest and Merz that contained the same pertinent provisions. (*See* IPP Resp. to Forest Br. at 36–37; *see also* CAC ¶ 76.) For example, Plaintiff alleges that the Generic Defendants entered

into the settlement agreements in July, September, October, and December of 2009. (CAC ¶ 75.) Plaintiff also alleges that each of these agreements contained acceleration clauses, which led to agreement not to launch any competing generic formulations until July 11, 2015. (CAC ¶¶ 76, 79.) Even at the summary judgment stage, for example, the *Nexium* court found it significant for inferring the existence of a conspiracy that each generic competitor “agreed to delay its market entry on the express condition that every other Generic Defendant do the same.” *Nexium*, 842 F. Supp. 3d at 254. The Court will not ignore this potent allegation merely because other courts have found that, after discovery, additional support is required.

*32 Second, the IPP adequately alleges “plus factors” that support an inference of conspiracy at the motion to dismiss stage. The IPP Complaint directly alleges that the settlements were “negotiated collectively” or in such a manner that each Generic Defendant was informed of the pertinent terms of the other agreements. (CAC ¶¶ 75, 77.) Such collective negotiations, if true, would certainly constitute circumstantial evidence of a conspiracy.

The IPP Complaint also adequately alleges behavior against interest, which, combined with allegations of parallel conduct, can be indicative of concerted rather than independent action. *See, e.g., Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928, 935 (7th Cir. 2000); *Apex Oil*, 822 F.2d at 254. Forest, Merz, and the Generic Defendants entered into the settlement agreements between July and December of 2009, which allowed for generic entry no earlier than July 11, 2015. (CAC ¶ 19–29.) The FDA’s automatic, 30-month stays allegedly began to expire in April 2010. (CAC ¶ 72.) The FDA tentatively approved the generics’ ANDAs in January and April of 2010. (CAC ¶ 82.) This translates to a delay of roughly five years in exchange for only three months’ competition within the exclusivity period, which certainly states a claim against interest that is plausible on its face.

Finally, the presence of contingent launch clauses, which are analogous to “most favored nation” provisions, raises antitrust scrutiny, even if they may have certain procompetitive effects. *See, e.g., U.S. v. Apple, Inc.*, 952 F. Supp. 2d 638, 701 (S.D.N.Y. 2013).

The Court finds that the IPP states a claim for conspiracy to monopolize.

B. Illinois

Count Two (but not Count One) of the IPP Complaint alleges claims under the Illinois Antitrust Act (“IAA”), 740 Ill. Comp. Stat. 10/3, *et seq.* (CAC ¶ 207(e).) Defendants move to dismiss this claim because the statute states, in relevant part, “no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State’s Attorney General.” 740 Ill. Comp. Stat. 10/7(2); (Forest Suppl. Br. at 10 n.4). *See also Gaebler v. KM. Potash Corp.*, 676 N.E.2d 228, 230 (Ill. App. Ct. 1996); *Bobrowicz v. City of Chicago*, 522 N.E.2d 663, 669 (Ill. App. Ct. 1988).

The IPP responds that the restriction “does nothing more than dictate the manner in which the procedural device of a class action can proceed” and does not apply in federal court pursuant to the Supreme Court’s holding in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). (IPP Resp. to Gen. Defs. Br. at 8–10.)

Courts in this circuit have split as to whether the indirect purchaser class action bar in the IAA is procedural or substantive, under Justice Stevens’ concurrence in *Shady Grove*. Compare *Dig. Music*, 812 F. Supp. 2d at 416, with *Aggrenox II*, 2016 WL 4204478, at *6. However, the Court agrees with those cases in this circuit that have treated the IAA as stating a procedural rule applicable in Illinois state courts, rather than a substantive rule applicable to federal courts sitting in diversity jurisdiction in New York.

First, the same paragraph of the statute begins by stating that “[n]o provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.” 740 Ill. Comp. Stat. 10/7(2). The statute therefore does not limit the substantive rights of an injured party in an individual action. *See Aggrenox II*, 2016 WL 4204478, at *6 (“[A]ny indirect purchaser procedurally blocked from participation in a class action would still have the same remedy in an individual action.”)

*33 Moreover, were the IAA to prohibit class actions altogether, the statute would read no differently than the New York class actions bar at issue in *Shady Grove*—a fact observed by at least one other court in this circuit. *Aggrenox II*, 2016 WL 4204478, at *6 (“I cannot square *Shady Grove*’s allowance of a Rule 23 class action despite New York’s class-action bar with the dis allowance of a Rule 23 class action in the case of Illinois’s class-action bar simply on the basis that Illinois’s bar is narrower.”).

Defendants’ motion to dismiss the Illinois claim for conspiracy to monopolize under Count Two is **DENIED**.

C. Oregon

Defendants argue that “the laws of Oregon bar recovery for at least part of the period for which Plaintiff seeks damages.” (Gen. Defs. Br. at 35 (citing *Niaspan*, 42 F. Supp. 3d at 759).) The IPP responds that “[t]his is a non-issue” given that the class period begins after the enactment of Oregon’s *Illinois Brick* repealer. (IPP Resp. to Gen. Defs. Br. at 13.)

Oregon’s *Illinois Brick* repealer statute became effective on January 1, 2010. *See Or. Rev. Stat. § 646.780*; Laws 2009, c.304, § 1, eff. Jan. 1, 2010. The IPP has proposed a Class Period beginning April 14, 2010. (CAC ¶ 146.) There is therefore no *Illinois Brick* problem for purposes of this case.

Defendants’ motion to dismiss the Oregon claim for conspiracy to monopolize under Count Two is **DENIED**.

D. In Conclusion, the IPP Has Stated a Claim for Conspiracy to Monopolize Under Count Two With Respect to the Laws of 25 States

In sum, the Court finds that the IPP has adequately pled facts supporting its allegations of conspiracy to monopolize.

The Court also finds that, as a matter of law, the IPP may pursue its Count Two claims for conspiracy to monopolize under the laws of all states **except** Massachusetts and Utah. Those claims are hereby **DISMISSED**. Moreover, the IPP’s claim for conspiracy to monopolize under Rhode Island law is hereby **DISMISSED IN PART** to the extent that it seeks to recover for injuries incurred prior to July 15, 2013.

VII. Count Three: Consumer Protection and Unfair and Deceptive Trade Practices Under the Laws of 25 States Against Actavis, Forest, Merz, and the Generic Defendants

The IPP Complaint next alleges an additional 25 state law claims grouped under the heading “Count Three: Consumer Protection and Unfair and Deceptive Trade Practices.” (CAC at 56.) The IPP asserts this cause of action against all Defendants: Actavis, Forest, Merz, and the Generic Defendants. (*Id.*)

This cause of action alleges that “Defendants engaged in unfair competition or unfair acts or unconscionable [*sic*]

acts or practices in violation of state consumer protection statutes.” (CAC ¶¶ 212.) Specifically, “There was a gross disparity between the price that [the IPP] and [Class] members paid for the brand product and the value received, given that a less expensive substitute generic product should have been available.” (*Id.* ¶ 213.) Count Three also alleges that the IPP and the Class “were deprived of the opportunity to purchase a generic version of Namenda IR 5 or 10 mg tablets and forced to pay higher prices for Namenda XR.” (*Id.* ¶ 214.) Together, these allegations form the factual nucleus on which the 25 state law consumer protection claims are based.

As they have done with respect to Counts One and Two of the IPP Complaint, Defendants first advance several broad-based arguments aimed at dismissing Count Three of the IPP Complaint as a whole or in large part, *viz.*:

- *34 The claims are “likely” time-barred under the applicable statute of limitations (Forest Br. at 65 n.42);
- The IPP lacks Article III standing to bring claims in states where it has not made purchases and thereby suffered injury-in-fact, (Gen. Defs. Br. at 31);
- The IPP must satisfy the pleading requirements of Fed. R. Civ. P. 9(b) since state consumer protection claims are grounded in fraud, (Gen. Defs. Br. at 38);
- In the alternative, IPP has failed to satisfy the Fed. R. Civ. P. 8 pleading standard under *Twombly* and *Iqbal*, (*id.* at 37).

For the reasons already discussed, this Court denies the motion to dismiss the claims as “likely” time-barred. In addition, the Court has already held that it will not dismiss a broad swath of claims for lack of Article III standing, on the basis that the IPP did not suffer injury-in-fact in states where it did not make purchases. However, the Court must consider the other Rule 9(b) and Rule 8 arguments.

Defendants next make several separate state-specific arguments, *viz.*:

- The IPP may not bring state consumer protection claims where the state follows *Illinois Brick*, (*id.*);
- The IPP has failed to satisfy the pre-filing requirements under certain states’ statutes, (Gen. Defs. Br. at 40; Gen. Defs. Suppl. Br. at 13);

- Certain states require a showing of consumer deception, which the IPP does not and cannot allege, (Forest Br. at 67 n.47);
- Some states require that the claim be based on a consumer transaction or conduct that is consumer-oriented, which the IPP does not plead, (Forest Br. at 67–68 n.48);
- A subset of consumer protection statutes do not cover antitrust conduct, (Forest Br. at 68 n.49; Gen. Defs. Br. at 40);
- Recovery is possible under certain consumer protection statutes only when the conduct complained of is primarily intrastate, (Forest Br. at 68 n.50; Gen. Defs. Br. at 40, 41–42);
- Certain state statutes confer a right of action only on consumers who are natural persons with regard to transactions made primarily for personal or household purposes, (Forest Br. at 68 n.51), or on consumers who are elderly or disabled, (Forest Br. at 68 n.52; Gen. Defs. Br. at 40); and
- Some states’ consumer protection laws prohibit nationwide class actions or prohibit class actions altogether, (Forest Br. at 68 n.53; Gen. Defs. Br. at 39, 41–42).

Defendants raise one or several of these arguments as a defense to each state law claim under Count Three. The table in Appendix 3 of Actavis, Forest, and Merz’s original brief provides a mostly accurate overview of which arguments correspond to which claims. (*See* Forest Br. App’x 3.)

As this Court has done with the other Counts of the IPP Complaint, it first addresses Defendants’ arguments of general applicability and then addresses each state law claim.

A. The IPP Adequately Pleads Its State Law Claims Under *Twombly* and *Iqbal*

Defendants argue that the IPP does not properly plead its claim for violation of state consumer protection laws under Count Three because (i) it does not cite to specific provisions of the consumer protection statutes and (ii) it does not plead the elements of each state’s law. (Gen. Defs. Br. at 37, 42.) Merely listing citations to the state codes, they argue, does not satisfy *Iqbal*, 556 U.S. at 678 (2009) or *Twombly*, 550 U.S. at 570.

*35 The Court disagrees.

First, the IPP is not required to identify the particular sections of the code under which the claims are brought, as long as defendants are on notice of the theory plaintiffs are pursuing. *See, e.g., In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 729 (S.D.N.Y. 2017) (denying defendants' motion to dismiss even though indirect purchasers did not specify the state code sections under which the claims were brought).

Moreover, the factual allegations that support the IPP's claims are well-pleaded throughout the Complaint, and it is not necessary that the IPP reiterate each of them when listing its causes of action in the final section of the Complaint. *See In re Domestic Drywall Antitrust Litig.* No. 13-cv-2437, 2016 WL 3769680, at *11 (E.D. Pa. July 13, 2016) ("To the extent Defendants' one-paragraph [*Twombly*] argument is an invitation for the Court to comb through all of Plaintiffs' consumer protection claims and determine whether the elements have been adequately pleaded, the Court respectfully declines the invitation."); *see also In re Petrobras Sec. Litig.*, 152 F. Supp. 3d 186, 197 (S.D.N.Y. 2016) (in securities fraud case, complaint "as a whole" adequately pleaded specific statements made or authorized by specific defendants, actual reliance, and failure to comply with statutory requirements).

Finally, although state laws may vary to some degree in the elements that they require, the IPP has made an effort to limit its claims to state laws that share substantive foundational features—such as a right of action for "unfair," as opposed to "deceptive," trade practices. *See, e.g., Propranolol*, 249 F. Supp. 3d at 729 (finding that a high level of detail was "not necessary at the pleading stage because the 'elements of unjust enrichment are similar in every state.'") (citing *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476, 2014 WL 4379112, at *18 (S.D.N.Y. Sept. 4, 2014)).

B. The IPP Is Not Required to Plead Its Complaint in Accordance With Federal Rule of Civil Procedure 9(b)

Defendants next argue that because "allegations of deceptive trade practices ... amount to allegations of fraud," the IPP must satisfy the heightened pleading standard of Rule 9(b)." (Gen. Defs. Br. at 38 (citing *NCC Sunday Inserts, Inc. v. World Color Press, Inc.*, 692 F. Supp. 327, 330 (S.D.N.Y. 1988)); Gen. Defs. Reply at 24.)

The IPP responds that it "has carefully limited its consumer fraud claims to the 'unfair methods' and 'unfair trade practices' prongs of the statutes." (IPP Resp. to Gen. Defs. Br. at 17.) (*See also* CAC ¶ 214 (alleging injury "as a direct and proximate result of Defendants' unfair competition, unfair or unconscionable acts and practices").) The IPP also responds that *NCC Sunday Inserts*, 692 F. Supp. at 330, was binding only with respect to the Connecticut Unfair Trade Practices Act, under which the IPP does not bring a claim. (*Id.* at 17.)

Courts regularly distinguish between state consumer protection claims that proceed under a theory of "deceptive practices" and those that proceed under a theory of "unfair practices." *See, e.g., In re Packaged Seafood Prods. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1074 (S.D. Cal. 2017); *In re Auto. Parts Antitrust Litig. (Instrument Panel Clusters)*, No. 12-md-2311, 2014 WL 2993753, at *19 (E.D. Mich. July 3, 2014). This is consistent with the federal FTC Act, which allows recovery for "unfair" as well as "deceptive" acts or practices, 15 U.S.C. §§ 45(a)(1), 45(n), and on which "virtually every" state consumer protection law is based, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 Harv. L. Rev. 1621, 1622 (1983).

*36 As for *NCC Sunday Inserts*, that decision—which addresses a statute not at issue in this case, the Connecticut Unfair Trade Practices Act—does not hold that the heightened pleading standards of Rule 9(b) apply to allegations under state consumer protection laws. That case held only that, "To the extent that fraud is being alleged under the rubric 'deceptive trade practices,' Rule 9(b) governs the pleading procedures." *NCC Sunday Inserts*, 692 F. Supp. at 330.

The IPP does not allege anything under the rubric of "deceptive trade practices"—deliberately so. In the absence of any "developed argument or legal authority" for Defendants' argument that I must treat the CAC as alleging deception rather than unfair acts, the claims may proceed. *Dig Music*, 812 F. Supp. 2d at 408 n.10.

Defendants' motion to dismiss all Count Three claims on these grounds is, therefore, **DENIED**.

C. Illinois Brick Does Not Bar the IPP's Consumer Protection Claims

Defendants argue—but do not cite any persuasive authority—that consumer protection claims brought by indirect purchasers are barred in all states that follow *Illinois Brick*.

(Gen. Defs. Br. at 31–34.) Instead, the cases they cite focus overwhelmingly on unjust enrichment claims brought by indirect purchasers. (*Id.*)

The Generic Defendants cite only one case in which a court dismissed a consumer protection act claim that was duplicative of a state antitrust claim; in that instance, however, the district court based its finding on a case from the Supreme Court of Illinois that specifically barred plaintiffs from invoking the Consumer Fraud Act to recover for conduct not covered by the Illinois Antitrust Act. *In re Wellbutrin XL Antitrust Litig.*, 260 F.R.D. 143, 162 (E.D. Pa. 2009).

The Court **DENIES** without prejudice the Defendants' motion to dismiss the majority of claims under Count Three in one fell swoop. I will consider the *Illinois Brick* arguments to the extent that the Defendants have briefed them with respect to each state's law.

D. The IPP States a Claim Under the Consumer Protection Laws of Some States But Not Others

I now turn to the arguments aimed at individual state law claims.

At this particular stage, the Court notes that it has been tasked with determining the intricacies of 25 states' consumer protection laws, in many cases with the benefit of very little briefing. For certain claims, Defendants' arguments for dismissal consists of little more than a footnote in its brief, which in many cases is a citation to either a single federal district court opinion in a similar, nationwide class of indirect purchasers, or a particular statutory provision, with little or no explanation of how state courts have interpreted this particular provision.

As is its duty, the Court has taken these arguments seriously. Nonetheless, the Court cautions that, to the extent this very limited briefing invites the Court to *sua sponte* “comb through all of Plaintiffs' consumer protection claims and determine whether the elements have been adequately pleaded, the Court respectfully declines the invitation.” *Domestic Drywall*, 2016 WL 3769680, at *11. In other words, this Court responds to the arguments that are affirmatively raised in Defendants' briefing but does not undertake an independent assessment of arguments that are not pointed out by the Defendants—who are represented by able counsel.

Because of Defendants challenge each state's law on multiple grounds, this opinion proceeds state by state.

1. Alabama

*37 Generic Defendants move to dismiss the Alabama claim under Count Three because the IPP cites to Alabama's antitrust statute, Ala. Code § 8-10-3, rather than to its consumer protection statute, Ala. Code § 8-10-5. (Gen. Defs. Br. at 37 n.17.) As this Court has done throughout this opinion for the benefit of both the IPP and the Defendants, it takes the IPP at its word that this is a typographical error. (*See* IPP Resp. to Gen. Defs. Br. at 18 n.8.)

For the first time in supplemental briefing, Defendants argue that the IPP fails to satisfy the pre-filing notice requirement under Alabama's consumer protection statute. (Gen. Defs. Suppl. Br. at 13 (citing Ala. Code § 8-19-10(e)).) That provision states, in relevant part: “At least 15 days prior to the filing of any action under this section, a written demand for relief shall be communicated to any prospective respondent by placing in the United States mail or otherwise.” Ala. Code § 8-19-10(e).

It also states: “The demand requirements of this subsection shall not apply if the prospective respondent does not maintain a place of business or does not keep assets within the state, but such respondent may otherwise employ the provisions of this section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this section.” *Id.*

Defendants have not argued that they maintain a place of business or keep assets within the state, and nothing in the CAC alleges that they so do. (*See* CAC ¶¶ 16–30.) Even if this Court were to determine that Defendants maintain a place of business or keep assets in the state, nothing in the statute suggests that notifying defendants is a prerequisite to suit or that an action that failed to comply with this provision would require dismissal in state court. Indeed, the relatively flexible notice provisions for out-of-state defendants suggests otherwise. Moreover, the tenor of the provision as a whole suggests that it operates much like a Rule 68 offer of judgment and is aimed at encouraging settlement.

Effexor, 2018 WL 4466050, cited by Defendants, did not analyze the language of the various notice provisions at issue or opine on their purpose. That case also did not examine whether, under the laws of each state, the proper remedy for

non-compliance with the notice remedy would be dismissal. Beyond *Effexor*, Defendants cite no case for the proposition that defendant notification requirements under these statutes would require dismissing the claim here.

Defendants' motion to dismiss the Alabama law claim under Count Three is **DENIED**.

2. Arizona

The IPP has withdrawn this claim. (IPP Resp. to Gen. Defs. Br. at 17 n.7.)

3. California

Defendants first argue that the California Unfair Competition Law ("CUC") requires a showing of consumer deception. (Forest Br. at 67 n.47.) The IPP responds that it has limited its state consumer protection claims to the "unfair methods" and "unfair trade practices" prongs of state statutes. (IPP. Resp. to Gen. Defs. Br. at 17).

Here, the IPP has the better of the arguments. For purposes of CUC, unfair practices include, among other things, "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. Moreover, California's Supreme Court has held "that because the prohibitions on 'unlawful,' 'unfair' or 'fraudulent' practices are written in the disjunctive, each of those 'prongs' gives rise to a separate and distinct theory of liability." 1-16 Cheryl Lee Johnson (ed.), *California Antitrust and Unfair Competition Law* § 16.04 (revised ed. 2018) (citing *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999)); see also *Podolsk v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 102 (Cal. Ct. App. 1996) (nursing home's practice of requiring relatives of patients on Medicare/Medicaid to sign guarantees could fall under "unlawful" prong of the CUC, even if not deceptive). Therefore, the IPP is correct that it need not allege deceptive behavior to survive a motion to dismiss.

*38 Defendants next argue that the IPP must plead primarily intrastate conduct in order to allege a claim under the CUC. (Forest Br. at 68 n.50). The IPP responds that the Complaint alleges intrastate effects and that, as a matter of law, a nationwide antitrust class action satisfies "intrastate" pleading requirements. (IPP Resp. to Gen. Defs. Br. at 32.)

The Court agrees that the IPP has pleaded intrastate effects in its Complaint, insofar as the IPP alleges both that it indirectly purchased Namenda in California, (CAC ¶ 15), and that hundreds of thousands of consumers nationwide, including, presumably, California residents, were affected, (*id.* ¶ 48).

The only case cited by Defendants is inapposite, as it discusses wholly extraterritorial application of the statute and says nothing about whether the conduct must occur "primarily" within the state. *Meridian Project Sys., Inc. v. Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214, 1225 (E.D. Cal. 2005). In other cases, California courts have allowed class members who were either California residents or for whom the relevant transaction had occurred in state to bring claims under the CUC. *Norwest Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (Cal. Ct. App. 1999) (class members who were either California residents or for whom the defendant had purchased insurance within California could bring claims).

Finally, Defendants argue that the IPP has not satisfied California's pre-filing notice requirement. (Gen. Defs. Br. at 41 (citing *Cal. Bus. & Prof. Code § 17209*)). That provision reads: "If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General ... and on the district attorney of the county in which the lower court action or proceeding was originally filed." *Id.* (emphasis added). That provision, by its terms, applies only to appellate proceedings in state court. Since this is a diversity case in a federal district court, the statute does not apply.

As a result, the Court **DENIES** the Defendants' motion to dismiss the California claim under Count Three.

4. District of Columbia

Defendants argue that the IPP fails to state a claim under the D.C. Consumer Protection and Procedures Act ("DCCPPA") because it is not a "consumer" within the meaning of that statute. (Forest Br. at 67-68 n.48 (citing *D.C. Code § 28-3905(k)*)).

The relevant provision of the DCCPPA states: “A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.” *D.C. Code* § 28-3905(k)(1)(A). “When used as a noun,” a “consumer” means “a person who, other than for purposes of resale, does or would purchase, lease (as lessee), or receive consumer goods or services, including as a co-obligor or surety, or does or would otherwise provide the economic demand for a trade practice.” *Id.* § 28-3901(a)(2)(A). A “trade practice” means “any act ... [involving] ... a sale, lease or transfer, of consumer goods or services.” *Id.* § 28-3901(a)(6). When used as an adjective, “consumer” relates to things “receive[d] and normally use[d] for personal, household or family purposes.” *Id.* § 28-3901(a)(2)(B)(i).

*39 Sergeants Benevolent, the only Named Plaintiff in this Action, does not fit the definition of “consumer” under the plain language of the statute. Additionally, the D.C. Court of Appeals has clarified that “the CPPA was designed to police trade practices arising only out of consumer-merchant relationships, and does not apply to commercial dealings outside the consumer sphere.” *Ford v. Chartone, Inc.*, 908 A.2d 72, 81 (D.C. 2006) (internal quotations omitted). “[T]he CPPA does not protect merchants in their commercial dealings with suppliers or other merchants.” *Id.* at 83. For example, D.C. courts have held that a taxi driver’s claims for coerced purchases of gasoline and other supplies against his taxi-owners association do not state a claim under the DCCPPA. *Mazanderan v. Indep. Taxi Owners’ Ass’n, Inc.*, 700 F. Supp. 588, 591 (D.D.C. 1988). The relevant question is whether the plaintiff’s activity is akin to that of a merchant. *Ford*, 908 A. 3d at 83.

In addition, “Courts overseeing multidistrict litigation as well as state courts in the District of Columbia have ... held that transactions along the distribution chain that do not involve the ultimate retail customer are not ‘consumer transactions’ that the [DCCPPA] seeks to reach. Rather, it is the ultimate retail transaction between the final distributor and the individual member of the consuming public that the [DCCPPA] covers.” *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, No. 14-m-2508, 2015 WL 5166014, at *30 (E.D. Tenn. 2015).

Sergeants Benevolent is not an “individual member of the consuming public.” *Id.* Moreover, it is immaterial that Sergeants Benevolent pays for pharmaceuticals prescribed to its members, who do use them for “personal, family, or household purposes.” *D.C. Code* § 28-3901(a)(2)(B)(i). As

other courts have held, “when an insurance plan makes a purchase, it does so, not for personal purposes, but for the plan’s business purposes, *i.e.*, to fulfill its side of a contractual relationship with its members, who pay premiums for its coverage.” *Restasis*, 2018 WL 5928143, at *7 (collecting cases).

Because the IPP fails to state a claim under the DCCPPA under *Rule 12(b)(6)*, the Court **GRANTS** Defendants’ motion to dismiss.²³

23 Defendants also argue that the DCCPPA requires plaintiffs to allege deceptive conduct, (Forest Br. at 67 n.47), and is inapplicable to antitrust conduct, (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19). However, because the Court dismisses the DCCPPA claim under Count Three for failure to state a claim based on a retail purchase for personal, family, or household purposes, it does not reach these arguments.

5. Florida

Defendants move to dismiss the claim under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) on the grounds that the IPP does not sufficiently allege intrastate conduct. (Forest Br. at 68 n.50; Gen. Defs. Br. at 40–41 n.20.) Relatedly, Defendants argue that a plaintiff may not use the FDUTPA to bring claims on behalf of a nationwide class. (Gen. Defs. Br. at 39 n.18).

The cases cited by Defendants, however, say nothing about an intrastate conduct requirement and instead stand for the proposition that the FDUTPA covers only those individuals who live or make purchases in Florida. It is intrastate *injury*, not conduct, which implicates the FDUTPA.

For example, in *Oce Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So.2d 1037, 1040 (Fla. Dist. Ct. App. 2000), the court held that plaintiffs, a class of users, brokers, and servicers of Siemens/Oce ultra-high speed printers, possessed viable causes of action under FDUTPA only if they were also Florida consumers, and that they would not be entitled to recovery merely on the basis that Siemens/Oce had entered into certain anticompetitive agreements or otherwise engaged in unlawful conduct within the state of Florida. *Id.*

*40 Likewise, the court in *Montgomery v. New Piper Aircraft*, 209 F.R.D. 221, 228 (S.D. Fla. 2002), held that a nationwide class of aircraft owners could not recover under the FDUTPA merely because the defendant's unlawful conduct had taken place within the state. *Id.* Instead, only Florida consumers could take advantage of the FDUTPA. *Id.*

Finally, *Coastal Physician Servs. of Broward Cty., Inc. v. Ortiz*, 764 So.2d 7, 8 (Fla. Dist. Ct. App. 1999), held that the FDUTPA was "for the protection of in-state consumers for either in-state or out-of-state debt collectors." *Id.*

The IPP alleges that it "indirectly purchased, paid and/or provided reimbursement for Namenda in ... Florida." (CAC ¶ 15.) Moreover, although the IPP brings the IP Action on behalf of a nationwide Class, it does not purport to enable all members of the Class to recover under the FDUTPA. For these reasons, Defendants' motion to dismiss the Florida claim under Count Three is **DENIED**.

6. Hawaii

Defendants argue that the Hawaii Unfair and Deceptive Acts or Trade Practices statute ("HUDAP") only "allow[s] suits by consumers who are natural persons with regard to transactions made primarily for personal or household purposes." (Forest Br. at 68 n.51). The statute reads, in relevant part: "No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." Haw. Rev. Stat. § 480-2(d). The preceding section of the statute defines "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." Haw. Rev. Stat. § 480-1.

Sergeants Benevolent Association Health & Welfare Fund is not a natural person. It is a trust, incorporated in New York, which reimburses either pharmacies or its members for purchases of Namenda. Additionally, Sergeants Benevolent also does not pay for Namenda "primarily for personal, family, or household purposes," regardless of how its member insureds use Namenda. *See Restasis*, 2018 WL 5928143, at *7. Therefore, it fails to state a claim under Rule 12(b)(6) with respect to the HUDAP.

Defendants' motion to dismiss the Hawaii law claim under Count Three is **GRANTED**.

7. Idaho

Defendants first argue that plaintiff has failed to plead deceptive conduct, as required by the Idaho Consumer Protection Act ("ICPA"). (Forest Br. at 67 n.47.) The IPP responds that the ICPA confers a right of action based on "unfair" conduct. (IPP Resp. to Gen. Defs. Br. at 17.) Defendants also argue that the ICPA makes unlawful only specific types of conduct, including misrepresentations, and does not include antitrust conduct. (Gen. Defs. Br. at 40 n.19 (citing *Ida. Code* § 48-603).) These arguments are treated together.

Like many state consumer protection laws, most of the conducted enumerated in the ICPA focuses on deceptive, fraudulent, or misleading practices. *Idaho Code* § 48-603. Nonetheless, there is no firm requirement that a plaintiff show deception since, for example, "engaging in any unconscionable method, act, or practice in the conduct of trade or commerce" is expressly contemplated by the Act. *Ida. Code* § 48-603(18); *id.* § 48-603C. Other courts have found that plaintiffs may state a claim for anticompetitive conduct, even if that conduct is not deceptive, under this prong of the ICPA. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 184 (D. Me. 2004).

*41 Moreover, the ICPA contains a harmonization provision with the federal FTC Act. *Idaho Code* § 48-604(1). And, the Supreme Court of Idaho has held that the ICPA must be "liberally construed to effect the legislative intent to deter deceptive or unfair trade practices and to provide relief for consumers exposed to proscribed practices." *In re W. Acceptance Corp., Inc.*, 788 P.2d 214, 216 (*Ida.* 1990) (emphasis added) (internal quotation omitted). The Court therefore denies Defendants' motion to dismiss the ICPA claim.

Defendants next argue that the ICPA requires that the underlying conduct involve a consumer transaction or conduct that is consumer-oriented. (Forest Br. at 67–68 n.48 (citing *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, plc*, 737 F. Supp. 2d 380, 409 (E.D. Pa. 2010)).)

In *Sheet Metal Workers*, the court referenced a state court decision, *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.*, 106 P.3d 428, 435 (Ida. 2005), which examined the unconscionability provisions of the ICPA and found that they were “designed to prohibit unconscionable ‘sales conduct’ that is directed at the consumer.” *Id.* (emphasis added). *Wasden*, however, hinged on two factors: whether the alleged price-fixing of sorbates, an antimicrobial food and animal feed additive, was “sales conduct” for purposes of the ICPA and whether the defendants had ever sold sorbates to consumers in Idaho. *Id.* at 430, 435.

Here, by contrast, the Defendants are alleged to have marketed and sold *Namenda* to consumers at inflated, anticompetitive prices by, among other things, restricting consumer access to generic versions of *Namenda* and announcing the withdrawal of the *Namenda* IR formulation directly to consumers. Thus, construing the allegations in the light most favorable to the Plaintiff, I find that the IPP has adequately alleged “consumer conduct” within the meaning of the statute. See also *New Motor Vehicles*, 350 F. Supp. 2d at 185 (upholding claim for antitrust conduct under ICPA).

Defendants' motion to dismiss is **DENIED**.

8. Illinois

Defendants first argue that plaintiffs must allege deception in order to state a claim under the Illinois Consumer Fraud Act (“ICFA”). (Forest Br. at 67 n.47.) See also *Sullivan’s Wholesale Drug Co., Inc. v. Faryl’s Pharmacy, Inc.*, 573 N.E.2d 1370, 1376 (Ill. App. Ct. 1991) (plaintiff’s “cause of action must stand or fall on whether defendants’ conduct was deceptive”) (citing *Laughlin v. Evanston Hosp.*, 550 N.E.2d 986, 993 (Ill. 1990)). The IPP argues that it can plead its claim under the “unfairness” prong of the ICFA, which is separate from the “deception” prong. (IPP Resp. to Gen. Defs. Br. at 17.)

At bottom, it is unclear whether *Laughlin*’s statement that the ICFA’s “reach was to be limited to conduct that defrauds or deceives consumers or others” was intended to bar all future claims brought under its “unfairness” prong, or whether its holding was, instead, restricted to the price discrimination claims alleged in that particular case. 550 N.E.2d at 993. Subsequent cases in Illinois imply that “unfairness” has survived *Laughlin*: “[a] plaintiff may allege that conduct is unfair under the [I]CFA without alleging that the conduct is

deceptive.” *Hill v. PS Illinois Tr.*, 856 N.E.2d 560, 568 (Ill. Ct. App. 2006). “A deceptive practices claim must meet Rule 9(b)’s heightened pleading standard, while an unfair practices claim need not because it is not based on fraud.” *Wheeler v. Assurant Specialty Prop.*, 125 F. Supp. 3d 834, 842 (N.D. Ill. 2015). I will follow the lead of those Illinois courts and decline to dismiss the IPP’s claim as a matter of law on these grounds.

*42 Second, Defendants argue that the ICFA is inapplicable to antitrust conduct. (Forest Br. at 68 n.49 (citing 815 Ill. Comp. Stat. 505/2; *Laughlin*, 550 N.E.2d at 993); Gen. Defs. Br. at 40 n.19.) The IPP responds that the ICFA “should be interpreted in the same manner and to the same extent as Section 5 of the FTC Act,” which unquestionably includes conduct that violates the antitrust laws. (IPP Resp. to Gen. Defs. Br. at 26 (citing 815 Ill. Comp. Stat. 505/2).)

Again, this Court is not persuaded that *Laughlin* bars the current claims. *Laughlin* held that price discrimination, which was not actionable under the IAA, was similarly not actionable under the ICFA. 550 N.E.2d at 993 (“There is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust enforcement mechanism.”); accord *Butler v. Jimmy John’s Franchise, LLC*, No. 18-cv-0133, 2018 WL 3631577, at *8 (S.D. Ill. July 31, 2018) (“the Illinois Supreme Court has instructed that plaintiffs cannot use the [ICFA] to get around the fact that their theory does not fly under the [IAA].”). As a result, *Laughlin* stands for the proposition that the ICFA is not a safety net that serves to catch residual anticompetitive behavior, although it does not speak to whether the ICFA countenances claims that are also actionable under the IAA.

A subsequent case, *Gaebler v. KM. Potash Corp.*, 676 N.E.2d 228, 230 (Ill. App. Ct. 1996), relied on *Laughlin* to bar claims for anticompetitive conduct that were brought pursuant to the ICFA *only*—presumably because plaintiffs had tried to skirt the IAA’s prohibition on indirect purchaser class actions. *Id.* (“[C]lassic antitrust allegations dressed in Consumer Fraud Act clothing” did not state a claim). However, federal courts in Illinois and the Seventh Circuit have questioned whether *Gaebler*, which interprets *Laughlin* as preventing the ICFA from ever being a remedy for anticompetitive conduct, states the law too broadly. *Siegel v. Shell Oil Co.*, 480 F. Supp. 2d 1034, 1049 n.12 (N.D. Ill. 2007) (noting that no other Illinois appellate courts have interpreted *Laughlin* in this manner). And, consistent with both *Laughlin* and *Gaebler*, other federal courts have held that “[i]t remains possible ... that an unfair

practice might be covered by both the antitrust law and the Consumer Fraud Act,” *Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827, 831 (7th Cir. 2014). The Court finds these recent cases, as well as the lack of subsequent appellate case law in Illinois, persuasive on the question of whether *Gaebler* bars recovery for anticompetitive conduct under the ICFA.

Third, Defendants argue that the ICFA bars class actions. (Gen. Defs. Br. at 39, n.18; Forest Br. at 68, n.53). However, they fail to cite to any provision of the ICFA that does so. Instead, they cite to the IAA, which does not purport to apply to other statutes. 740 Ill. Comp. Stat. § 10/7(2) (“no person shall be authorized to maintain a class action ... for indirect purchasers asserting claims under *this Act*”) (emphasis added). In the absence of any arguments, case law, or citations to the consumer fraud statute, the Court finds that this argument does not provide sufficient grounds for dismissing the ICFA claim.

Finally, Defendants argue that the ICFA requires plaintiffs to allege a consumer transaction or conduct that is consumer-oriented. (Forest Br. at 67–68, n.48 (citing Ill. Comp. Stat. 505/10a(a)).) But that section reads, in relevant part, “Proof of a public injury, a pattern, or an effect on consumers and the public interest generally shall be required in order to state a cause of action under this Section *against a party defendant who is a new vehicle dealer or used vehicle dealer within the meaning of Chapter 5 of the Illinois Vehicle Code or who is the holder of a retail installment contract within the meaning of Section 2.12 of the Motor Vehicle Retail Installment Sales Act.*” Ill. Comp. Stat. 505/10a(a) (emphasis added). By its terms, the statute is inapplicable to the case at bar.

*43 Defendants' motion to dismiss the Illinois claim under Count Three is **DENIED**.

9. Kansas

Defendants argue that the IPP has failed to allege consumer deception in satisfaction of the elements of the Kansas Consumer Protection Act (“KCPA”). (Forest Br. at 67 n.47.) The IPP responds generally that it brings its claims pursuant to the “unconscionable” prong of the state consumer protection laws. (IPP Resp. to Gen. Defs. Br. at 17.)

The Court agrees with Defendants' interpretation of the statute. The KCPA is intended to “protect consumers from suppliers who commit deceptive and unconscionable

practices.” Kan. Stat. § 50-623; *see also id.* §§ 50-626, 50-627. As with other state laws, the enumerated offenses under the statute focus overwhelmingly on deceptive or fraudulent acts. Unlike other states, however, Kansas courts have spoken more uniformly to the issue of whether the “unconscionability” prong of the statute also requires a showing of deception: “In order to render the contract between the parties unconscionable, there must be some element of deceptive bargaining conduct present as well as unequal bargaining power.” *Cornelison v. Denison State Bank*, 315 P.3d 278 (Kan. Ct. App. 2014) (citing *Willman v. Ewen*, 230 Kan. 262, 266, 634 P.2d 1061 (1981)); *see also State ex rel. Stovall v. ConfiMed.com, L.L.C.*, 272 Kan. 1313, 1321, 38 P.3d 707, 713 (2002) (same). And, unlike courts in, for example, Illinois, courts in Kansas have not affirmatively excused a plaintiff proceeding with a claim for unconscionability from satisfying the heightened pleading requirements for claims grounded in fraud. *Compare Wheeler*, 125 F. Supp. 3d at 842, *supra*.

Because the IPP cites no cases in support of its arguments, and cites one in support of Defendants', the KCPA claim is **DISMISSED**.²⁴

24

Defendants also argue that the KCPA bars class actions (Gen. Defs. Br. at 39 n.18; Forest Br. at 68 n.53); that the statute requires plaintiffs to allege a consumer transaction or conduct that is consumer-oriented (Forest Br. at 67–68 n.48); that the statute is inapplicable to antitrust conduct (Gen. Defs. Br. at 40; Forest Br. at 68 n.49); and that the statute only allows suits by consumers who are natural persons with regard to transactions made primarily for personal or household purposes (Forest Br. at 68 n.51). However, because the Court dismisses the KCPA claim on the grounds that it is inapplicable to antitrust conduct, it does not reach these arguments.

10. Maine

Defendants argue that the Maine Unfair Trade Practices Act (“MUTPA”) provides a cause of action only for persons who purchase goods “primarily for personal, family, or household purposes.” (Forest Br. at 68 n.51.) The statute provides a remedy to, in relevant part “[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby

suffers any loss of money or property, real or personal.” *Me. Rev. Stat. tit. 5, § 213(1)*.

For the reasons discussed above, the Court finds that Sergeants Benevolent, an insurer, has not purchased or paid for Namenda “primarily for personal, family, or household purposes.” See *Restasis*, 2018 WL 5928143, at *7. It has paid for the drug because it is an insurer and has a contractual duty to reimburse its members for their purchases. Therefore, it fails to state a claim under *Rule 12(b)(6)*.

*44 Defendants' motion to dismiss is **GRANTED**.²⁵

²⁵ Defendants also argue that the MUTPA requires a showing of consumer deception. (Forest Br. at 67 n.47.) However, because the Court dismisses the MUPTA claim on the grounds that Sergeants Benevolent has failed to state a claim based on purchases made “primarily for personal, family, or household purposes,” it does not reach these arguments.

11. Massachusetts

In order to bring a claim under Massachusetts' state consumer protection law, Defendants argue that the IPP must allege primarily intrastate conduct. (Forest Br. at 68 n.50; Gen. Defs. Br. at 41 n.20.) Defendants do not cite any case law for this proposition, although they do cite Mass. Laws ch. 93A, § 1, which defines “trade” and “commerce” to include “trade or commerce directly or indirectly affecting the people of this commonwealth.” *Id.* The IPP responds that the Complaint alleges intrastate effects and that, as a matter of law, a nationwide antitrust class action satisfies “intrastate” pleading requirements. (IPP Resp. to Gen. Defs. Br. at 32.)

On its own, the “affecting people of this commonwealth” language does not persuade the Court that this claim should be dismissed, particularly as the IPP has alleged sales of Namenda IR and Namenda XR affecting consumers and third party payors across the country, including in Massachusetts.

It is true that an earlier version of the Massachusetts statute contained an exemption for defendants “of whose gross revenue at least twenty per cent is derived from transactions in interstate commerce,” as well as for defendants who met certain other criteria. See *Dodd v. Commercial Union Ins. Co.*, 365 N.E.2d 802, 808 (Mass. 1977). However, the statute no

longer carves out such defendants. Rather, the current version of that provision now states, in relevant part, “For the purpose of this section, the burden of proving exemptions from the provisions of this chapter shall be upon the person claiming the exemptions.” Mass. Laws ch. 93A, § 3.

Next, Defendants argue that G.L. c. 93A does not allow for class actions or indirect purchaser actions. *Ciardi*, 762 N.E.2d at 314, is squarely on point: it holds that both class actions and indirect purchaser actions are permitted under Massachusetts' consumer protection law. *Id.*

Finally, Defendants argue in their supplemental briefing that the IPP has not satisfied the pre-filing notice requirement under chapter 93A. (Gen. Defs. Suppl. Br. at 13 (citing *Mass. Gen. Laws ch. 93A, § 9(3)*)). Like Alabama's consumer protection statute, the pre-suit notice provisions of chapter 93A do not apply if “the prospective respondent does not maintain a place of business or does not keep assets within the commonwealth.” *Id.* Defendants do not argue, and nothing in the CAC alleges, that they maintain a place of business or keep assets in Massachusetts. (See CAC ¶¶ 16–30.) Moreover, nothing in § 9(3) suggests that a Massachusetts court would dismiss an action under Chapter 93A if a plaintiff failed to comply with this provision. Like the Alabama statute, the provision appears to operate like a Rule 68 offer of judgment, capping damages for defendants who make settlement offers in good faith.

*45 Defendants' motion to dismiss the Massachusetts law claim under Count Three is **DENIED**.

12. Michigan

Defendants first argue that the IPP is required to allege consumer deception to plead a claim under the Michigan Consumer Protection Act (“MCPA”). (Forest Br. at 67 n.47.) The IPP argues that it can base its claim on “unfair” practices. (IPP Resp. to Gen. Defs. Br. at 17.)

The IPP is correct. “The MCPA is broader than common law torts of fraud inasmuch as it prohibits ‘not only ‘deceptive’ business practices but also those which are ‘unfair’ and ‘unconscionable.’ ” *Game On Ventures, Inc. v. Gen. RV Ctr., Inc.*, 587 F. Supp. 2d 831, 839 (E.D. Mich. 2008) (citing *Mayhall v. A.H. Pond Co.*, 341 N.W.2d 268, 270 (Mich. Ct. App. 1983)). The Court finds that the IPP has adequately alleged conduct falling under § 445.903(z)—“Charging the

consumer a price that is grossly in excess of the price at which similar property or services are sold.” (*Compare* CAC ¶ 213). Therefore, Defendants’ first argument fails.

Defendant next argues that the IPP fails to plead a consumer transaction or conduct that is consumer-oriented. (Forest Br. at 67–68, n.48 (citing *Sheet Metal Workers*, 737 F. Supp. 2d at 412).) *Sheet Metal Workers*, however, dismissed the plaintiffs’ MCPA claim in a sham patent litigation case because plaintiffs had not “alleged that [defendant] had an intent to deceive consumers and because their actions [did] not fall within any of the enumerated prohibited practices listed in section 445.901 [*sic*].” *Id.* The facts of *Sheet Metal Workers* are readily distinguishable, particularly as the IPP has adequately alleged “unfair” conduct under an enumerated provision of the statute.

Third, Defendants argue that the MCPA is inapplicable to antitrust conduct because it only applies to “specific types of conduct,” such as misrepresentations. (Gen. Defs. Br. at 40 n.19 (citing *Mich. Comp. Laws* § 445.903); Forest Br. at 68 n.49.) The IPP opposes this argument on the basis that the MCPA is “modeled after the FTC Act and extend[s] to prohibit unfair methods of competition including monopolistic conduct.” (IPP Resp. to Gen. Defs. Br. at 26.)

The IPP is correct. The MCPA does contain harmonization language: it enables injured persons to bring a class action caused by “a method, act, or practice in trade or commerce declared by a circuit court of appeals or the supreme court of the United States to be an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act.” *Mich. Compiled Laws* § 445.911(3) (c). Moreover, federal courts have sustained causes of action under the MCPA for antitrust conduct. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 48 (D.D.C. 1999).

Defendants’ motion to dismiss is **DENIED**.

13. Missouri

Defendants argue that the IPP fails to adequately plead a consumer transaction or conduct that is consumer-oriented under the Missouri Merchandising Practices Act (“MMPA”). (Forest Br. at 67–68, n.48 (citing *Mo. Rev. Stat.* § 407.020(1)).)

The Court is not convinced that the provision of the MMPA cited by Defendants contains such a requirement. “The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce ... in or from the state of Missouri, is declared to be an unlawful practice.” *Mo. Rev. Stat.* § 407.020(1). “Trade or commerce,” in turn, is defined as “the advertising, offering for sale, sale, or distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated.” *Id.* § 407.010(7).

*46 Because Defendants have cited no authority commensurate with the proposition that Missouri restricts recovery under the MMPA to consumer-oriented conduct not covered by the IPP Complaint, their motion to dismiss the Missouri claim under Count Three is **DENIED**.

14. Montana

Defendants argue that the Montana Unfair Trade Practices and Consumer Protection Act (“MUTPCPA”) only “allow[s] suits by consumers who are natural persons with regards [*sic*] to transactions made primarily for personal or household purposes.” (Forest Br. at 68, n.51 (citing *Mont. Stat.* § 30-14-102).)

The MUTPCPA enables a “consumer” to bring an action for damages, *Mont. Stat.* § 30-14-133(1), and defines “consumer” as “a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes,” *id.* § 30-14-102(1).

As I have held with respect to other state laws containing this requirement, I find that Sergeants Benevolent has failed to state a claim under the MUTPCPA because it did not purchase Namenda “primarily for personal, family, or household purposes.” *See Restasis*, 2018 WL 5928143, at *7.

Defendants’ motion to dismiss is, therefore, **GRANTED**.²⁶

26 Defendants also argue that the MUTPCPA does not permit class actions. (Forest Br. at 68 n.53.) However, because the Court dismisses the

MUTPCPA claim on the grounds that Sergeants Benevolent has failed to state a claim based on purchases made “primarily for personal, family, or household purposes,” it does not reach these arguments.

15. Nebraska

Defendants argue that the IPP fails to adequately plead a consumer transaction or conduct that is consumer-oriented under the Nebraska Consumer Protection Act (“NCPA”). (Forest Br. at 67–68 n.48 (citing *Neb. Rev. Stat. § 59-1601*).) As with their claim under Missouri law, Defendants have cited no authority commensurate with the proposition that the NCPA restricts recovery to “consumer-oriented” conduct or that such conduct not covered by the IPP Complaint. Section 59-1601 of the NCPA is broad, with no indications that recovery is restricted to certain types of conduct: “person” is defined to include trusts,” *id.* § 59-1601(1), and “trade and commerce” is defined to mean, in relevant part, “any commerce directly or indirectly affecting the people of the State of Nebraska,” *id.* § 59-1601(2).

As a result, Defendants' motion to dismiss the Nebraska claim under Count Three is **DENIED**.

16. Nevada

Defendants argue that the Nevada Deceptive Trade Practices Act (“NDTPA”) requires the IPP to allege deceptive conduct. (Forest Br. at 67 n.47.) The IPP argues that it has limited its claims to the “unfair methods” and “unfair trade practices” prongs of the statute. (IPP Resp. to Gen. Defs. Br. at 17.)

The NDTPA enumerates deceptive trade practices at sections 598.015 through 598.025 of the statute. Section 598.0923 of the statute makes it a violation to “knowingly ... violate a state or federal statute or regulation relating to the sale or lease of goods or services.” *Nev. Rev. Stat. § 598.0923(3)*. This Court adopts the reasoning in *Effexor*, 2018 WL 4466050, at *20, which found that a plaintiff could state a claim under this section of the NDTPA where the claims were “predicated on allegations of anticompetitive conduct, which are considered prohibited acts under *Nev. Rev. Stat. § 598A.060*.” *Id.*

*47 Defendants next argue that the Nevada Deceptive Trade Practices Act (“NDTPA”) confers a right of action only to elderly or disabled persons. (Gen. Defs. Br. at 40 (citing

Nev. Rev. Stat. § 598.0977); *see also* Forest Br. at 68 n. 52.) Because the IPP, “a New York trust, is not an elderly or disabled person located in Nevada,” it cannot bring a claim. (Gen. Defs. Br. at 40.)

I agree with the IPP that private relief in the statute is not so limited. As the IPP persuasively argues, *Nev. Rev. Stat. § 41.600* operates to provide a right of action to “any person who is a victim of consumer fraud.” (IPP Resp. to Gen. Defs. Br. at 31 (citing *Nev. Rev. Stat. § 41.600*; *Southern Serv. Corp. v. Excel Bldg. Servs., Inc.*, 617 F. Supp. 2d 1097, 1099 (D. Nev. 2007)).) The statute defines “consumer fraud” to encompass acts that violate the NDTPA. *See Nev. Rev. Stat. § 41.600(2)(e)* (“ ‘consumer fraud’ means ... a deceptive trade practice as defined in *NRS 598.0915* to *598.0925*, inclusive”). In *Southern Serv. Corp.*, 617 F. Supp. 2d at 1100, moreover, the U.S. District Court for the District of Nevada found that “person,” as used in *Nev. Rev. Stat. § 41.600*, could include a corporate competitor, which indicates that private relief under the statute is not restricted to elderly or disabled persons. The fact that the law makes special provision for the elderly and disabled does not mean that others are not covered elsewhere in the statute.

Other federal district courts to examine this issue are in accord and have not restricted NDTPA claims to elderly or disabled plaintiffs. *DDAVP*, 903 F. Supp. 2d at 227; *Domestic Drywall*, 2016 WL 3769680, at *10.

Defendants' motion to dismiss the Nevada law claim under Count Three is **DENIED**.

17. New Hampshire

Defendants argue that the New Hampshire Consumer Protection Act (“NHCPA”) only applies when the underlying conduct is primarily intrastate. (Forest Br. at 68 n.50; Gen. Defs. Br. at 40–41 n.20). Defendants cite to the provision of the statute that deems unlawful “any unfair method of competition ... in the conduct of any trade or commerce within this state.” *N.H. Rev. Stat. § 358-A:2*. The IPP alleges it has met this requirement, both with respect to its Complaint and as a matter of nationwide class action law. (IPP Resp. to Gen. Defs. Br. at 32.)

Without more, the Court is not persuaded that the “within this state” language in the statute requires dismissal of the claim. “[C]ourts interpreting New Hampshire’s consumer protection

law disagree as to whether a nationwide scheme in which the plaintiffs pay a higher price in the state is sufficient to satisfy the statute's requirement." *In re Ductile Iron Pipe Fittings (DIPF) Indirect Purchaser Antitrust Litig.*, No. 12-cv-169, 2013 WL 5503308, at *22 (D.N.J. Oct. 2, 2013) (collecting cases). However, based on the language of the statute, this Court agrees with those cases that have held that sales of the offending goods into New Hampshire alleges sufficient intrastate conduct to satisfy the NHCPA. *DDAVP*, 903 F. Supp. 2d at 231.

Defendants' motion to dismiss the New Hampshire claim is, therefore, **DENIED**.

18. New Mexico

Defendants first argue that the New Mexico Unfair Practices Act ("NMUPA") requires plaintiffs to allege deceptive conduct. (Forest Br. at 67, n.47). The IPP says that the NMUPA also covers unfair or unconscionable conduct. (IPP Resp. to Gen. Defs. Br. at 17.)

*48 The IPP has the better reading of the NMUPA. In addition to deceptive conduct, the NMUPA also makes unlawful "unconscionable trade practices," which include those that "result[] in a gross disparity between the value received by a person and the price paid." N.M. Stat. § 57-12-2(E)(2); (compare CAC ¶ 213). Federal courts have permitted price-fixing claims, which typically do not require alleging deception, to proceed under this provision. *In re Lipitor Antitrust Litig.*, No. 12-cv-2389, 2018 WL 4006752, at *20 (D.N.J. Aug. 21, 2018); *Domestic Drywall*, 2016 WL 3769680, at *8. Although this is not a price-fixing case, the Court is persuaded by these cases that hold that a plaintiff need not allege consumer deception. In addition, and for the same reasons, the Court also rejects Defendants' argument that the NMUPA does not provide a remedy for antitrust conduct. (Forest Br. at 68, n.49; Gen. Defs. Br. at 40 n.19.)

Defendants next argue that the IPP fails to adequately plead a consumer transaction or conduct that is consumer-oriented under the NMUPA. (Forest Br. at 67–68 n.48 (citing N.M. Stat. §§ 57-12-2–3).)

As with their claim under Missouri and Nebraska law, however, Defendants have cited no authority commensurate with the proposition that the NCPA restricts recovery to "consumer-oriented" conduct or that such conduct not

covered by the IPP Complaint. Section 57-12-3 of the NMUPA states: "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." Section 57-12-2, in turn, defines "trade or commerce" very broadly, including "the advertising, offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce directly or indirectly affecting the people of this state." N.M. Stat. § 57-12-2(C).

Defendants' motion to dismiss is **DENIED**.

19. New York

Defendants move to dismiss the IPP's claim under section 349 of New York's General Business Law ("NYGBL") for failure to plead deceptive conduct. (Forest Br. at 67 n.47.) The IPP argues that it is not required to plead deceptive conduct to recover under the statute and that allegations of "unfair" conduct suffice. (IPP Resp. to Gen. Defs. Br. at 17.)

The Court agrees with Defendants. Section 349 of the NYGBL does not contain an "unfair" or "unconscionable" practices prong, and therefore a plaintiff must plead consumer fraud or deception in order to bring a claim. In addition, while antitrust conduct is actionable under section 349, plaintiffs still must allege deception to state a claim. *See Dig. Music*, 812 F. Supp. 2d at 410 (analyzing New York cases); *see also* 7 von Kalinowski, Sullivan, & McGuirl, *supra*, § 132.07. Even cases cited by the IPP hold that any plaintiff who brings a claim under section 349 must allege deceptive conduct in its Complaint. *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 907 (E.D. Pa. 2012) (dismissing claim for failure to allege deception as the basis for injury) (citing *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611–12 (N.Y. 2000)).

As a result, Defendants' motion to dismiss the New York claim is **GRANTED**.²⁷

²⁷ Defendants also argue that NYGBL § 349 requires a plaintiff to allege a consumer transaction or conduct that is consumer-oriented, (Forest Br. at 67-68 n.48), and that the statute covers only conduct that is primarily intrastate, (Forest Br. at 68 n.50; Gen. Defs. Br. at 40–41 n.20). However, because the Court dismisses the NYGBL § 349

claim for failure to plead deceptive or fraudulent conduct, it does not reach these arguments.

20. North Carolina

Defendants ask this Court to dismiss the IPP's claim under the North Carolina Unfair and Deceptive Trade Practices Act ("NCUDTPA") because it has failed to allege conduct that is primarily intrastate. (Forest Br. at 68 n.50; Gen. Defs. Br. at 41 n.20 (both citing *N.C. Gen. Stat. § 75-1.1*)). However, nothing in the section of the statute cited by Defendants indicates that a claim may be brought pursuant to the NCUDTPA only if the conduct is "primarily intrastate." See *N.C. Gen. Stat. § 75-1.1*.

*49 Second, Defendants argue that the NCUDTPA only permits actions by natural persons with regard to transactions made primarily for personal or household purposes. (Forest Br. at 68 n.51 (citing *N.C. Gen. Stat. 75.1-1*)). Again, nothing in the cited section indicates that a claim would be restricted to natural persons or to transactions made primarily for personal or household purposes. In fact, "commerce" is expressly defined to "include[] all business activities, however denominated," and exempts only "professional services rendered by a member of a learned profession." *N.C. Gen. Stat. § 75-1.1(b)*.

Defendants' motion to dismiss is **DENIED**.

21. Rhode Island

Defendants argue that the Rhode Island Deceptive Trade Practices Act ("RIDTPA") limits relief to "[a]ny person who purchases or leases goods or services primarily for personal, family, or household purposes." *R.I. Gen. Laws § 6-13.1-5.2(a)*; (see also Forest Br. at 68 n.51).

As discussed in previous sections, Sergeants Benevolent fails to state a claim under the RIDTPA because it did not purchase Namenda "primarily for personal, family, or household purposes." See *Restasis*, 2018 WL 5928143, at *7.

Defendants' motion to dismiss is, therefore, **GRANTED**.²⁸

²⁸ Defendants also argue that the RIDTPA requires a showing of consumer deception, (Forest Br. at 67 n.47), and is inapplicable to antitrust conduct, (Forest Br. at 68 n.49). However, because the Court

dismisses the RIDTPA claim on the grounds that Sergeants Benevolent has failed to state a claim based on purchases made "primarily for personal, family, or household purposes," it does not reach these arguments.

22. Tennessee

Defendants argue that the TCPA is inapplicable to antitrust conduct. (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19 (citing *Tenn. Code § 47-18-104(b)*)). There appears to be a split among Tennessee's intermediate courts with respect to this question. Some courts have held expressly that "the TCPA does not apply to anti-competitive conduct." *Bennett v. Visa U.S.A. Inc.*, 198 S.W.3d 747, 755 (Tenn. Ct. App. 2006). Others have concluded that anticompetitive conduct is an "unfair" practice covered by the TCPA. *Blake v. Abbott Labs.*, No. 03A01-9509-cv-00307, 1996 WL 134947, at *5-*7 (Tenn. Ct. App. Mar. 27, 1996).

More recent decisions in Tennessee, including *Bennett*, have reasoned that, by not incorporating the "unfair methods of competition" language from the federal FTC Act into Tennessee's "little FTC" Act, the Tennessee legislature intended to prohibit recovery for anticompetitive conduct under the TCPA. *Bennett*, 198 S.W.3d at 754-55; see also *Sherwood v. Microsoft Corp.*, No. M2000-1850-COA-R9-CV, 2003 WL 21780975, at *31-*33 (Tenn. Ct. App. July 31, 2003); *Duke v. Browning-Ferris Indus. of Tenn., Inc.*, No. W2005-146-COA-R3-CV, 2006 WL 1491547, at *8 (Tenn. Ct. App. May 31, 2006). Instead, the legislature intended that consumers injured by such conduct would have an exclusive remedy under the state antitrust statute, the Tennessee Trade Practices Act. *Sherwood*, 2003 WL 21780975, at *33. *Blake*, by comparison, did not analyze the legislative history of the TCPA or its incongruities with the federal FTC Act, instead relying on the statutory mandate that it be "liberally construed." 1996 WL 134947, at *6-*7.

Like other federal courts to review this issue, I find that the more recent opinions of the Tennessee Court of Appeals, such as *Bennett* and *Sherwood*, both persuasive in their own right, as well as indicative of how the Tennessee Supreme Court would likely rule on this question. See *Relafen*, 221 F.R.D. at 284; *In re Photochromic Lens Antitrust Litig.*, No. 10-md-2173, 2011 WL 4914997, at *4 & n.14 (Oct. 14, 2011).

*50 Therefore, Defendants' motion to dismiss the Tennessee claim under Count Three is **GRANTED**.²⁹

²⁹

Defendants also argue that the TCPA requires a showing of consumer deception (Forest Br. at 67 n.47) and that the statute does not permit class actions (Forest Br. at 68 n.53; Gen. Defs. Br. 39 n.18.) However, because the Court dismisses the TCPA claim as inapplicable to antitrust conduct, it does not reach these arguments.

23. Utah

Defendants first argue that the Utah Consumer Sales Practices Act ("UCSPA") requires the IPP to plead deceptive conduct. (Forest Br. at 67 n.47.) The IPP argues that a plaintiff may state a claim under the UCSPA for "unfair" acts or practices that are not inherently deceptive. (IPP Resp. to Gen. Defs. Br. at 17.)

The Court agrees with the IPP. The UCSPA expressly allows a plaintiff to plead "unconscionable" conduct as the basis of its claim, and that this does not require a showing of fraud or deception. *See Utah Code § 13-11-5*; *see also New Motor Vehicles*, 350 F. Supp. 2d at 205; *Gallegos v. LVNV Funding LLC*, 169 F. Supp. 3d 1235, 1245 (D. Utah 2016) (considering separately claims for deceptive and unconscionable acts).

Defendants next argue that the UCSPA is inapplicable to antitrust conduct because anticompetitive conduct is not enumerated within the statute's list of "deceptive practices." (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19 (citing *Utah Code § 13-11-4*.) The IPP responds that the UCSPA contains a harmonization provision with the FTC Act, giving it a broad reach. (IPP Resp. to Gen. Defs. Br. at 26.)

First, the list of deceptive practices in the statute is not exclusive, by its own terms. *Utah Code § 13-11-4(2)*. Second, Defendants cite to the "deceptive act or practice" provision of the UCSPA, whereas the IPP has stated that it brings all claims under Count Three pursuant to the "unfair" or "unconscionable" practices prongs of the relevant statutes. Here, the relevant provision is not *section 13-11-4* but instead *section 13-11-5*. Finally, other federal district courts have found that allegations of anticompetitive conduct, when brought pursuant to the "unconscionability" provision of the UCSPA, can survive a motion to dismiss. *New Motor*

Vehicles, 350 F. Supp. 2d at 205; *Aftermarket. Filters*, 2009 WL 3754041, at *9. Therefore, the Court declines to dismiss the UCSPA claim on this ground.

Defendants next move to dismiss the UCSPA claim because it applies only to natural persons making purchases for personal or household purposes. (Forest Br. at 68 n.51 (citing *Utah Code §§ 13-11-3(2)(a), 13-11-19*.)

The Court disagrees that the UCSPA clearly restricts recovery in this manner. *Utah Code § 13-11-5* states, "An unconscionable act or practice by a supplier *in connection with a consumer transaction* violates this act, whether it occurs before, during, or after the transaction." *Id. § 13-11-5* (emphasis added). *Utah Code § 13-11-19*, which provides a private cause of action, permits a "consumer who suffers loss as a result of a violation of this chapter" to recover actual damages. *Id. § 13-11-19(2)* (emphasis added). The statute defines "consumer transaction" in *Section 13-11-3(2)* but does not anywhere define "consumer." That subsection reads, in relevant part: "'Consumer transaction' means a sale ... or other ... transfer or disposition of goods ..., to, or *apparently to*, a person for ... primarily personal, family, or household purposes." *Utah Code § 13-11-3(2)(a)* (emphasis added). "Person," moreover, expressly includes a "corporation, ... trust, partnership, association, ... or any other legal entity." *Id. § 13-11-3(5)* (emphasis added).

*51 On its face, the definition of "consumer transaction" appears to contemplate sales of goods to—among other entities—corporations and trusts for their "personal," "family," or "household" purposes. This, of course, is possible only through an entity's members, employees or customers, which is consistent with the IPP's allegations in its Complaint.

The Court is not aware of any case law that would prohibit recovery by the IPP for failure to state a claim on the basis of these statutory provisions. The Court is aware of only one case, from the District of Utah, that purports to interpret "consumer" for purposes of subsection 13-11-19. *Icon Health & Fitness, Inc. v. ConsumerAffairs.com*, No. 16-cv-168, 2018 WL 1183372, at *5 (D. Utah Mar. 6, 2018), *motion to certify appeal denied*, 2018 WL 2122855 (D. Utah May 8, 2018). The court in that case reasoned that the plaintiff, whose products were reviewed on Defendant's website, did not have a cause of action under the UCSPA because the plaintiff did "not allege or argue that it is a consumer harmed by Defendants' conduct." *Id.* The facts of the IP Action

are clearly distinguishable, however, because Sergeants Benevolent alleges that, through its own reimbursements or payments for branded Namenda, it grossly overpaid for the product relative to its value. (CAC ¶ 213.) In addition, at least one federal court has allowed a corporation, which that a competitor engaged in false consumer advertising in the course of consumer transactions, to recover under the UCSPA. See *Derma Pen, LLC v. 4EverYoung Ltd.*, No. 13-cv-00729, 2017 WL 2258362, at *15 (D. Utah May 22, 2017), *aff'd*, 736 F. App'x 741 (10th Cir. 2018).

In addition, unlike other consumer protection statutes reviewed by this Court, the UCSPA contemplates sales made both “to” and “apparently to” a person for personal, family, or household purposes. *Utah Code § 13-11-3(2)(a)*. The Court is not aware of any Utah case that interprets this language, and the distinction is not clear from the legislative history. The “apparently to” language was inserted as part of S.B. 75, which expanded the definition of “consumer transaction” related to identity fraud. 2000 Utah Las Ch. 57 (West) (S.B. 75) (“‘Consumer transaction’ ... *includ[es] the use or misuse of personal identifying information of any person in relation to a consumer transaction to, or apparently to, a person for primarily personal, family, or household purposes.*”). Later, the identity fraud language was stripped from the definition, but the phrase “apparently to” was retained. 2004 Utah Laws Ch. 55 (H.B. 195). Construing the allegations in the Complaint in the light most favorable to the IPP, however, the Court finds that sales of Namenda were made either to or “apparently to” consumers primarily for their personal, family, or household purposes. Therefore, the Complaint states a claim.

Finally, Defendants argue that class actions are not permissible under the UCSPA. (Forest Br. at 68 n.53; Gen. Defs. Br. at 39 n.18 (citing *Utah Code § 13-11-19(2)*)). The UCSPA states, in relevant part: “A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages[.]” *Utah Code § 13-11-19(2)*.

However, another paragraph of the same section permits a consumer to bring a class action for actual damages provided certain preconditions are satisfied. *Utah Code § 13-11-19(4)(a)*; see also *Miller v. Basic Research, LLC*, 285 F.R.D. 647, 654–55 (D. Utah 2010). Specifically, class plaintiffs proceeding under the UCSPA must allege that the specific action was declared unlawful pursuant to an administrative rule, a court order, or (in limited cases) a consent judgment

before the consumer transactions on which the action was based occurred. *Id.*

*52 Courts that have examined the class action damages bar under the UCSPA have tended to defer the question of whether an action meets the statutory prerequisites until later stages of the case. See, e.g., *In re General Motors LLC Ignition Switch Litig.*, Nos. 14-md-2543, 14-mc-2543, 2018 WL 4351892, at *46 n.63 (S.D.N.Y. Sept. 12, 2018) (“The Court defers to another day whether the provision” that limits damages under the UCSPA “applies here.”); *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liability Litig.*, MDL No. 2672, 2018 WL 4777134, at *28–*29 (N.D. Cal. Oct. 3, 2018) (“The Court will not make these determinations at this stage.”).

The Court agrees that this issue is more appropriately handled following discovery, when the parties can address (i) if the statutory prerequisites have been met with respect to the conduct and particular transactions alleged and, (ii) in the alternative, whether the need to make this individualized determination in Utah would defeat predominance.

Defendants' motion to dismiss the UCSPA claim is **DENIED**.

24. Vermont

Defendants move to dismiss the Vermont Consumer Protection Act (“VCPA”) because it permits only claims brought by natural persons making purchases for personal or household purposes, (Forest Br. at 68 n.51 (citing *Vt. Stat. tit. 9 § 2461(b)*)).

This cited provision restricts recovery to a “consumer.” *Vt. Stat. tit. 9 § 2461(b)*. “Consumer,” in turn, is defined as “any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services *not for resale in the ordinary course of his or her trade or business* but for his or her use or benefit or the use or benefit of a member of his or her household, or in connection with the operation of his or her household ..., or a person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services *not for resale in the ordinary course of his or her trade or business* but for the use or benefit of his or her business or in connection with the operation of his or her business.” *Vt. Stat. tit. 9, § 2451a(a)* (emphasis added).

As discussed in preceding sections, Sergeants Benevolent cannot state a claim under this statute by alleging that it reimbursed for Namenda on behalf of its insured members. *See Restasis*, 2018 WL 5928143, at *7. The language of the statute clearly restricts the term “consumer” to end users of the product.

Therefore, Defendants' motion to dismiss the VCPA claim is **GRANTED**.

25. West Virginia

Defendants argue for the first time in their supplemental briefing that the IPP's claim under the West Virginia Consumer Credit and Protection Act (“WVCCPA”) must be dismissed because the IPP has not satisfied the statutory pre-filing notice requirement. (Gen. Defs. Suppl. Br. at 13 (citing *W. Va. Code* § 46A-6-106(c)).) That provision reads, in relevant part: “[N]o action, counterclaim, cross-claim or third-party claim may be brought pursuant to the provisions of this section until the person has informed the seller or lessor in writing and by certified mail, return receipt requested, of the alleged violation and provided the seller or lessor twenty days from receipt of the notice of violation but ten days in the case a cause of action has already been filed to make a cure offer.” *W. Va. Code* § 46A-6-106(c).

Unlike the similar pre-suit notice requirement under the Hawaii Antitrust Act, the state court remedy for noncompliance with the WVCCPA's pre-filing notice requirement appears to be dismissal of the claim. *Harrison v. Porsche Cars North Am., Inc.*, No. 15-0381, 2016 WL 1455864, at *3 (W. Va. Apr. 12, 2016) (unpublished opinion) (dismissing claim for failure to comply with pre-suit notice provisions).

*53 Because the notification requirement is an express precondition to filing suit, federal district courts sitting in diversity have also granted defendants' motions to dismiss when the plaintiffs have not complied with this provision. *Waters v. Electrolux Home Prods., Inc.*, 154 F. Supp. 3d 340, 354 (N.D. W. Va. 2015) (consumer class action); *Muffins v. Ethicon, Inc.*, No. 12-cv-2952, 2017 WL 319804, at *3 (S.D. W. Va. Jan. 20, 2017) (consumer class action); *McCoy v. Southern Energy Homes, Inc.*, No. 09-cv-1271, 2012 WL 1409533, at *13 (S.D. W. Va. Apr. 23, 2012); *Stanley v. Huntington Nat. Bank*, No. 11-cv-54, 2012 WL 254135, at *7 (N.D. W. Va. Jan. 27, 2012) (individual action). Other courts

have dismissed the claim without prejudice. *Processed Egg Prods.*, 851 F. Supp. 2d at 911.

To this Court's knowledge, no federal district court has examined the cure offer requirement in light of the Supreme Court's holding in *Shady Grove*. Certainly, the pre-suit cure offer requirement is “a state law that restricts the types of claims eligible for class treatment beyond the limits established by Rule 23,” because it requires certain prerequisites to filing suit that Rule 23 does not. *Restasis*, 2018 WL 5928143, at *6. It therefore conflicts with the federal rule.

The question is therefore whether the cure offer requirement is “so bound up with the state-created right or remedy that it define the scope of that substantive right or remedy.” *Id.* (citing *Shady Grove*, 559 U.S. at 419–20 (Stevens, J., concurring)).

This Court finds that it is. Under the statute, the cure offer, where accepted, tolls the applicable statute of limitations “for the period the effectuation of the cure offer is being performed.” *W. Va. Code* § 46A-6-106(e). Moreover, where the accepted cure offer is performed, it constitutes a complete defense to the action. *Id.* § 46A-6-106(h). And, if a defendant accepts and performs a cure offer, and a plaintiff brings suit anyway, the defendant is entitled to attorneys' fees and costs for defending the action. *Id.* In other words, the cure offer creates substantive defenses and additional remedies under state law.

For this reason, the Court **GRANTS** Defendants' motion to dismiss the West Virginia claim under Count Three.³⁰

30 Defendants also argue that the WVCCPA requires plaintiffs to allege deceptive conduct, (Forest Br. at 67 n.47); requires plaintiffs to plead a consumer transaction or conduct that is consumer-oriented, (Forest Br. at 67–68 n.48); and is inapplicable to antitrust conduct, (Forest Br. at 68 n.49; Gen. Defs. Br. at 40 n.19). However, because the Court dismisses the WVCCPA claim for failure to serve a cure offer on the Defendants prior to initiating the lawsuit, it does not reach these arguments.

E. In Conclusion, the IPP Has Stated a Claim for Violation of State Consumer Protection Laws Under Count Three Under the Laws of 14 States

In sum, the Court finds that the IPP Complaint adequately pleads facts supporting its allegations of unfair trade practices against all Defendants. The Court also finds that, as a matter of law, the IPP may pursue its Count Three claims for consumer protection law violations under the laws of all states **except** Arizona (which claim was withdrawn by the IPP), the District of Columbia, Hawaii, Kansas, Maine, Montana, New York, Rhode Island, Tennessee, Vermont, and West Virginia. Those claim are hereby **DISMISSED**.

VIII. Count Four: Unjust Enrichment Under the Laws of 44 States Against Actavis, Forest, Merz, and the Generic Defendants

*54 Finally, the IPP Complaint alleges 44 state law claims grouped under the heading “Count Four: Unjust Enrichment.” (CAC at 56.) The IPP asserts this cause of action against all Defendants: Forest, Actavis, Merz, and the Generic Defendants. (*Id.*)

This cause of action alleges that “Defendants have benefited from the overcharges” on Namenda IR and XR; that these benefits were “made possible by the unlawful and inequitable acts alleged” in the Complaint; that “Defendants’ financial benefits are traceable to Plaintiff and End-Payor Class members’ overpayments”; and that “Plaintiff and End-Payor Class members have conferred an economic benefit upon the Defendants in the nature of profits resulting from unlawful overcharges.” (CAC ¶¶ 219–21.) Together, these allegations form the factual nucleus on which the 44 state unjust enrichment claims are based.

At the outset, the IPP notes that, “[t]o the extent required, this claim is pled in the alternative to other claims in this Complaint.” (CAC ¶ 218.) The IPP maintains that “unjust enrichment is a separate cause of action” from both state antitrust and consumer protection laws, “which plaintiffs are allowed to plead in the alternative under [Federal Rule of Civil Procedure 8](#)—regardless of consistency and whether based on legal of [*sic*] equitable grounds.” (IPP Resp. to Gen. Defs. Br. at 41). The IPP also alleges that it has no adequately remedy at law. (CAC ¶ 230.)

As they have done with respect to Counts One, Two, and Three of the IPP Complaint, Defendants first make several broad-based arguments aimed at dismissing Count Four of the Complaint as a whole, including:

- The claims are “likely” time-barred under the applicable statute of limitations, (Forest Br. at 65 n.42);

- The IPP has failed to satisfy the [Fed. R. Civ. P. 8](#) pleading standard under *Twombly* and *Iqbal*, (Gen. Defs. Br. at 42);
- The IPP lacks Article III standing to bring claims in states where it has not made purchases and thereby suffered injury-in-fact, (Forest Br. at App’x 4);
- The IPP has not plausibly alleged that it conferred any benefit on the Generic Defendants, (Gen. Defs. Br. at 46);
- The IPP may not skirt the strictures of *Illinois Brick* by bringing indirect purchaser claims as equitable actions for unjust enrichment, (Gen. Defs. Br. at 34–36 nn. 12, 14; Forest Br. App’x 4); and
- Equitable claims cannot be used as a backstop where the injuries suffered by plaintiffs are not cognizable under either the antitrust or consumer protection laws (Gen. Defs. Br. at 43).

This Court has already addressed the first three of these arguments. For the same reasons discussed in preceding sections, the Court therefore denies Defendants’ motions to dismiss on those grounds.

The Court addresses the remaining three arguments—related to conferral of a benefit, *Illinois Brick*, and equitable claims—in its discussion below.

As with Count Three, Defendants also make several separate, state-specific arguments aimed at dismissing the individual state law claims under Count Four, *viz.*:

- Certain states have no independent cause of action for unjust enrichment, (Gen. Defs. Br. at 44; Forest Br. at 70 n.55);
- Some states require the plaintiff to allege that the defendant received a direct benefit from it, (Gen. Defs. Br. at 44–45; Forest Br. at 77 n.57); and
- *55 • A subset of states require the plaintiff to allege privity with the defendant, (Gen. Defs. Br. at 47–48), or “something approaching privity,” (Forest Br. at 70).

Defendants raise one or several of these arguments as a defense to each state law claim under Count Four. The table in Appendix 4 of Actavis, Forest, and Merz’s original brief

provides a mostly accurate overview of which arguments correspond to which claims. (See Forest Br. App'x 4.)

Again, as this Court has done with the other Counts of the IPP Complaint, it first addresses Defendants' arguments of general applicability and then proceeds through each state claim, determining whether the relevant arguments raised warrant dismissal.

A. Count Four Does Not State a Claim With Respect to the Generic Defendants Under the Laws of Any State

Federal district courts generally recognize that “[t]he elements of unjust enrichment are similar in every state.” *Lazarek v. Ambit Energy Holdings, LLC*, No. 15-cv-6361, 2017 WL 4344557, at *6 (W.D.N.Y. Sept. 29, 2017) (citing *Credit Default Swaps*, 2014 WL 4379112, at *18). Both *Lazarek* and *Credit Default Swaps* base their reasoning in large part on a law review article, which compared the elements of unjust enrichment in each state and, finding them to be similar, proposed that these state laws could be applied to antitrust claims. Daniel R. Karon, *Undoing the Otherwise Perfect Crime—Applying Unjust Enrichment to Consumer Price-Fixing Claims*, 108 W. Va. L. Rev. 395, 409–10 & n.79 (2005).

That article summarized the elements of unjust enrichment as follows: “(1) [plaintiff] conferred a benefit upon the defendant, who had knowledge of the benefit; (2) [t]he defendant accepted and retained the conferred benefit; and (3) [u]nder the circumstances, it would be inequitable for the defendant to retain the benefit without paying for it.” *Id.* at 409.

Notably, the IPP adopts this same formulation in its brief. (IPP Resp. to Gen. Defs. Br. at 38.)

The Generic Defendants move to dismiss all of Count Four with respect to themselves — but not with respect to Actavis, Forest, and Merz—because “Plaintiff’s Complaint does not plausibly allege that Plaintiff conferred even an indirect economic benefit ... on the Generic Defendants.” (Gen. Defs. Br. at 46; Gen. Defs. Suppl. Br. at 17–18.) The IPP responds that the Generic Defendants received a benefit “in the nature of profits resulting from unlawful overcharges.” (IPP Resp. to Gen. Defs. Br. at 39.)

Even by the IPP’s own logic, however, the unlawful overcharges did not unjustly enrich the Generic Defendants, if

the benefit alleged is indeed “profits resulting from unlawful overcharges”—profits which could have come only from sales of branded Namenda IR and Namenda XR—then the CAC alleges no facts consistent with the claim that any benefit flowed from the IPP or the Class to the Generic Defendants.

In other words, nowhere has the IPP alleged that it or other members of the Class paid increased prices for *generic* versions of Namenda IR. Rather, the gravamen of the IPP Complaint is that it and other Class members paid increased prices for *branded* Namenda IR while generic Namenda IR was kept off of the market. All of these overcharge benefits flowed to Forest.³¹

³¹ Again, most likely due to their decision to retain the same counsel and to submit a brief jointly with Forest, Actavis and Merz have not challenged the unjust enrichment claims under Count Four on the basis that no benefit from the overcharges on Namenda flowed to them, so the Court will not raise and address this argument *sua sponte*.

^{*56} Indeed, according to the CAC, the only benefits conferred upon the Generic Defendants came from Forest and Merz—not from the IPP or class members—and came in the form of: (i) cash payments for avoided litigation costs; (ii) early entry licenses; and (iii) an acceleration clause that guaranteed entry no later than other generic manufacturers. The IPP has wholly failed to allege a connection between these benefits, which again are the only benefits to Generic Defendants mentioned in the CAC, and the loss suffered by the IPP and other Class members. (See CAC ¶ 221 (“Plaintiff and [IPP] Class members have conferred an economic benefit upon the Defendants in the nature of profits resulting from unlawful overcharges, to the economic detriment of Plaintiff and the End-Payor Class members.”).)³²

³² The *Restatement (Third) of Restitution and Unjust Enrichment* states, “While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula ‘at the expense of another’ can also mean ‘in violation of the other’s legally protected rights,’ without the need to show that the claimant has suffered a loss.” *Restatement (Third) of Restitution and Unjust Enrichment* § 1 (2011). The IPP presumably could have chosen to rely upon this theory to prosecute its claims of unjust enrichment.

However, the IPP has also stated expressly in its Complaint and in briefing that it conferred a benefit on Generic Defendants in the form of overcharges, so the Court does not reach this question.

The Court therefore **DISMISSES** all 44 state law claims under Count Four with respect to the Generic Defendants.

B. The Unjust Enrichment Claims Under the Laws of Ten States Are Barred By *Illinois Brick* (Alaska, Colorado, Connecticut, Delaware, Montana, New Jersey, Oklahoma, South Carolina, Virginia, and Washington)

The remaining Defendants next move to dismiss the claims for unjust enrichment under the laws of 20 states because allowing the IPP to pursue such claims would constitute an impermissible “end run” around the *Illinois Brick* prohibition on indirect purchaser actions. (Gen. Defs. Br. at 34–36 nn.12, 14; Forest Br. App'x 4.)³³

³³ Because Actavis, Forest, and Merz adopt the Generic Defendants' briefing in whole, this Court continues to refer to Generic Defendants' briefs, even though these defendants were dismissed from Count Four.

As an initial matter, these 20 states include Puerto Rico and Utah. As this Court has already determined when addressing the arguments brought against Count One, Puerto Rico and Utah allow indirect purchaser claims. Accordingly, the Court **DENIES** Defendants' motion to dismiss the Puerto Rico and Utah unjust enrichment claims.

Whether the remaining 18 state claims can be dismissed based on *Illinois Brick* depends on whether the claims stand on their own or simply reflect an alternative election of equitable remedies by the IPP. Courts in this circuit have observed that “unjust enrichment takes at least two forms:” autonomous and parasitic. *In re Dig. Music Antitrust Litig.*, 812 F. Supp. 2d 390, 411 (S.D.N.Y. 2011). “Parasitic claims are where the unjust enrichment is based upon a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation.” *Id.* (internal quotation omitted). “Conversely, unjust enrichment may provide an independent ground for restitution, and this is known as autonomous restitution.” *Id.* (internal quotation omitted).

Logically, “Autonomous claims in an area regulated by an independent body of law are more problematic than

parasitic claims because the premise for such a claim must be that, even if the defendants' conduct is blameless under the substantive requirements of federal and state antitrust statutes and state consumer protection statutes, the plaintiffs nevertheless can still obtain restitution.” *Id.* at 411–12. This becomes even trickier when the state legislature has expressed a policy preference restricting certain groups of plaintiffs from recovering.

*57 The majority of courts in this circuit have followed the rule that indirect purchasers may not allege autonomous unjust enrichment claims if that state follows *Illinois Brick*. “It is beyond peradventure that indirect purchasers may not employ unjust enrichment to skirt the limitation on recovery imposed by *Illinois Brick*.” *Dig. Music*, 812 F. Supp. 2d at 412; accord *DDAVP*, 903 F. Supp. 2d at 232; *Yong Ki Hong v. KBS Am., Inc.*, 951 F. Supp. 2d 402, 425 (E.D.N.Y. 2013) (“Certainly, if such plaintiffs were permitted to repackage their antitrust claims as unjust enrichment actions, the entire thrust and purpose of the antitrust standing doctrine would disintegrate.”).

This Court agrees with the logic of those decisions, which is respectful of states' own policy determinations about who may recover for anticompetitive conduct. It therefore **DISMISSES** the following ten autonomous unjust enrichment claims brought in states that follow the rule of *Illinois Brick*: Alaska, Colorado, Connecticut, Delaware, Montana, New Jersey, Oklahoma, South Carolina, Virginia, and Washington.

Defendants seek dismissal of claims in an additional eight states that follow *Illinois Brick* but for which the Complaint pleads a viable antitrust or consumer protection claim: Alabama, Idaho, Massachusetts, Minnesota, Missouri, New York, Rhode Island, and South Dakota. (Gen. Defs. Br. at 34–36.) By definition, these are parasitic claims rather than autonomous claims.

“As to parasitic claims premised on a violation of state law, these claims boil down to an election of remedies.” *Dig. Music*, 812 F. Supp. 2d at 413. This turns on a case-by-case examination of whether each state's antitrust or consumer protection statute has “override[n]” or “limit[ed] ... the scope of restitutionary relief” that would normally be available to a plaintiff at equity. *Id.*

No party has briefed the extent to which each of these eight states' antitrust and consumer protection laws limits a

plaintiff's ability to recover in equity. Absent such argument or briefing, this Court will not undertake an independent assessment of whether and to what extent these each of these statutes restricts equitable recovery.

Therefore, Defendants' motion to dismiss these eight parasitic unjust enrichment claims is **DENIED**, without prejudice to consideration of the issue at a later date on proper briefing.

C. Autonomous Unjust Enrichment Claims in States That Do Not Follow *Illinois Brick* Survive (Arkansas and Wyoming)

Defendants also argue that, in an antitrust case, claims for unjust enrichment cannot lie where the injuries suffered by plaintiffs are not cognizable under either the antitrust or consumer protection laws. (Gen Defs. Br. at 43.) This is true regardless of whether those states follow *Illinois Brick*. On these grounds, they move to dismiss any autonomous unjust enrichment claims remaining, which would be those under the laws of Arkansas and Wyoming.

The IPP responds that recovery under a theory of autonomous enrichment is not contingent on statutory claims. (IPP Resp. to Gen. Defs. Br. at 39–40.)

The Court is aware of some cases that support Defendants' argument. For example, in *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, plc*, 737 F. Supp. 2d 380, 426 (E.D. Pa. 2010), the court applied the respect-for-state-policies rationale undergirding *Digital Music* and held that it would dismiss all autonomous unjust enrichment claims “unless plaintiffs have presented convincing caselaw establishing that a state recognizes unjust enrichment as an autonomous cause of action.” *Id.* at 426; accord *Niaspan*, 42 F. Supp. 3d at 763.

***58** This Court finds, however, that such a determination inappropriately shifts the burden at the motion to dismiss stage to the nonmoving party—particularly in light of the fact that unjust enrichment claims can morph from parasitic to autonomous once a court determines that the predicate statutory claims do not survive. Rather than asking the plaintiff to shoulder the burden of these contingencies, the Court finds it is more appropriate at this stage that the parties moving to dismiss bear the burden of arguing that the state does not recognize an autonomous cause of action for unjust enrichment, as Defendants do here with respect to California, Illinois, and Mississippi, (*See* Forest Br. App'x 4.)

In the alternative, the party moving to dismiss may argue that the policy reasons barring recovery under the predicate statutes are strong enough to require dismissing any autonomous unjust enrichment claim in that state. For example, at least one district court has held that it would “decline to allow autonomous restitution where recovery under state antitrust and consumer protection statutes is specifically prohibited.” *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 542 n.13 (E.D. Pa. 2010). The Court agrees that such an approach accords respect to states' own substantive policy determinations.

Here, however, the Court has not had occasion to determine whether recovery is “strictly prohibited” under the antitrust and consumer protection laws of Arkansas and Wyoming. This is because (i) the IPP did not allege antitrust or consumer protection claims in those states, and (ii) Defendants did not independently raise reasons why the IPP would be prohibited from recovering under the antitrust laws of Arkansas and Wyoming, beyond the fact that the IPP simply did not allege those claims in the first place. *Cf. In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1191 (N.D. Cal. 2009) (defendants briefed policy reasons why plaintiffs could not recover under the antitrust laws and, therefore, by extension, the unjust enrichment laws, of Arkansas, Virginia, Montana, and Puerto Rico).

In sum, this Court agrees with the reasoning of *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 669 (E.D. Mich. 2000). That case reasoned that a federal policy requiring dismissal of all autonomous unjust enrichment claims in an antitrust case would both “fail[] to read Plaintiffs' complaint in the light most favorable to Plaintiffs and confuse[] Plaintiffs' right to recover an equitable remedy under a common law claim based upon principles of unjust enrichment with its right to recover a remedy at law for an alleged violation of a state's antitrust laws.”

Therefore, the Court **DENIES** Defendants' motion to dismiss the claims under Arkansas and Wyoming law, without prejudice to consideration of the issue at a later date on proper briefing.

D. The IPP States a Claim for Unjust Enrichment Under the Laws of Some States But Not Others

The Court now turns to Defendants' state-specific arguments for dismissing the IPP's unjust enrichment claims under Count Four. (Gen. Defs. Br. at 44–50.)

1. Alabama

Defendants argue that the IPP cannot allege a claim for unjust enrichment in Alabama because to do so it must allege that it conferred a direct benefit on the Defendants. (Forest Br. at 70 n.57 (citing *Danny Lynn Elec. & Plumbing, LLC v. Veolia ES Solid Waste Se., Inc.*, No. 09-cv-192, 2011 WL 2893629, at *6 (M.D. Ala. July 19, 2011)); Gen. Defs. Br. at 45 n.24 (same).)

The IPP responds that unjust enrichment does not require a direct benefit because it does not require privity. (IPP Resp. to Gen. Defs. Br. at 43.) The IPP also cites several federal district court cases that denied motions to dismiss based on the “direct benefit” requirement, none of which discuss that requirement in the context of Alabama law. (*Id.*)

*59 “The essence of the theories of unjust enrichment or money had and received is that a plaintiff can prove facts showing that defendant *holds* money which, in equity and good conscience, belongs to plaintiff or *holds* money which was improperly paid to defendant because of mistake or fraud.” *Hancock-Hazlett Gen. Const. Co. v. Trane Co.*, 499 So. 2d 1385, 1387 (Ala. 1986) (emphasis in original). The IPP Complaint plainly alleges that Defendants “hold” money, in the form of overcharges on Namenda IR and Namenda XR that “belongs to” the IPP or to other members of the Class. It is a foundational principle of antitrust law that overcharges are passed along the distribution chain to consumers.

The case cited by Defendants is distinguishable. In *Danny Lynn Electric & Plumbing*, 2011 WL 2893629, at *6, plaintiffs’ payments of inflated fees to a company did not directly benefit individual employees of the company, whose annual bonuses were tied to that company’s profits. *Id.* It could not be said, in other words, that the individuals “held” money, through their bonuses, that belonged to the fee payers. *Id.*

Defendants’ motion to dismiss this claim is **DENIED**.

2. Arizona

Defendants argue that the claim for unjust enrichment under Arizona law should be dismissed because the IPP does not allege that it “directly” benefitted the Defendants. (Gen. Defs. Br. at 45 n.24 (citing *In re Refrigerant Compressors Antitrust*

Litig., No. 09-MD-02042, 2013 WL 1431756, at *26 (E.D. Mich. Apr. 9, 2013)).)

Arizona law, however, does not appear to require that the plaintiff confer any benefit directly on the defendant. See *Murdoch-Bryant Const., Inc. v. Pearson*, 703 P.2d 1197, 1202–03 (Ariz. 1985). In that case, the court found that the excavation and site preparation subcontractor had conferred a benefit on a joint venture partner, even though that partner had signed the TV agreement with the prime contractor after the excavation and site preparation subcontractor’s work had already been performed. *Id.*

Other federal district courts have also rejected the so-called “direct benefit” argument to hold that indirect purchasers may state a claim for unjust enrichment under Arizona law. See *In re Lidoderm Antitrust Litig.*, 103 F. Supp. 3d 1155, 1175–76 (N.D. Cal. 2015). Those courts reasoned, in part, that unjust enrichment in Arizona is a “flexible, equitable remedy,” and “[a] benefit may be any type of advantage, including that which saves the recipient from any loss or expense.” *Id.* The *Lidoderm* court found, accordingly, that indirect purchasers still stated a claim even though they had dealt directly with intermediaries in the chain of distribution, rather than defendants. *Id.*; see also *Flonase*, 692 F. Supp. 2d at 543.

Defendants’ motion to dismiss this claim is **DENIED**.

3. California

Defendants argue that California has no independent cause of action for unjust enrichment. (Gen. Defs. Br. at 44.)

While some California courts have held that there is no independent recovery in unjust enrichment, others have simply restyled a claim for unjust enrichment as a claim sounding in quasi-contract, and still other courts have treated these claims in the ordinary course, enumerating its elements. 55 Cal. Jur. 3d *Restitution* § 2 (noting inconsistent treatment of unjust enrichment claims and collecting cases). For example, the Ninth Circuit recently held, in the same opinion, that “in California, there is not a standalone cause of action for ‘unjust enrichment,’ which is synonymous with ‘restitution,’ ” but later held that “[w]hen a plaintiff alleges unjust enrichment, a court may construe the cause of action as a quasi-contract claim seeking restitution.” *Astiana v. Hain Celestial Grp.*, 783 F.3d 753, 762 (9th Cir. 2015).

201WL 8 91592©©

*60 Because this Court apparently may construe the claim as one for quasi-contract, the Court **DENIES** Defendants' motion to dismiss.

4. District of Columbia

Defendants argue that the claim for unjust enrichment under the District of Columbia's law should be dismissed for the IPP's failure to allege that it conferred a direct benefit on the Defendants. (Gen. Defs. Br. at 45 n.24 (citing *Refrigerant Compressors*, 2013 WL 1431756, at *26).)

The Court disagrees. *Refrigerant Compressors* relied on cases that did not analyze D.C. law. See also *Lidoderm*, 103 F. Supp. 3d at 1176 (finding Defendants' citation to *Refrigerant Compressors* "not helpful"). Defendants have cited no other case law requiring D.C. law to be so construed, and the Court is aware of none. See *id.* ("I find that in absence of cases arising under District of Columbia law that support defendants' proposed narrow definition of direct benefit, the claims under District of Columbia law can proceed.").

Defendants' motion to dismiss this claim is **DENIED**.

5. Florida

Defendants also that the claim for unjust enrichment under Florida law should be dismissed because the IPP must allege that it conferred a direct benefit on the Defendants. (Gen. Defs. Br. at 45, n.24 (citing *Century Senior Servs. v. Consumer Health Ben. Ass'n, Inc.*, 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011)).)

The Court agrees with the district court's thoughtful analysis in *In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 928–29 (E.D. Pa. 2012), which upheld a claim for unjust enrichment under Florida law against the same challenge. That case surveyed several Florida cases and determined that while some Florida courts had not allowed plaintiffs to rely on the doctrine of unjust enrichment absent a direct benefit, other courts had allowed these claims to proceed. *Id.* For example, on a motion to dismiss, an appellate court overturned a trial court's dismissal of a medical services provider's unjust enrichment claim, which was based on uncompensated treatment of defendant HMO's members. *Merkle v. Health Options, Inc.*, 940 So. 2d 1190, 1199 (Fla.

Dist. Ct. App. 2006). Florida courts have also confirmed that recovery under quasi-contract is available "even where the parties had no dealings at all with each other." *Commerce P'ship 8098 L.P. v. Equity Contracting Co., Inc.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997).

Therefore, at this stage, the Court **DENIES** Defendants' motion to dismiss.

6. Idaho

Defendants move to dismiss the claim for unjust enrichment under Idaho law because the IPP fails to allege privity (or "something approaching privity") and that the IPP conferred a direct benefit on Defendants. (Forest Br. at 70 nn.56–57; Gen. Defs. Br. at 45 n.24.) Defendants cite *Beco Const. Co., Inc. v. Bannock Paving Co., Inc.*, 797 P.2d 863, 867 (Ida. 1990).

The Court agrees and dismisses this claim as to all Defendants. First, the *Beco Construction* court rejected the plaintiff's contention that "the equitable principle of unjust enrichment does not require the plaintiff and the defendant to have any other relationship beyond the nexus that one party may not unjustly enrich itself at the expense of the other." *Id.*

*61 Second, other Idaho courts have similarly restricted recovery in the absence of a direct relationship. See, e.g., *Stevenson v. Windermere Real Estate/Capital Grp., Inc.*, 275 P.3d 839, 842–44 (Ida. 2012) ("The Stevensons' argument, reduced to its essence, is that because they conferred a benefit upon Jefferson, and Jefferson conferred a benefit upon Windermere, they can cut out the middleman and directly recover from Windermere for unjust enrichment.... We are unwilling to expand the doctrine of unjust enrichment to the extent advocated by the Stevensons."); *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 336 P.3d 802, 806 (Ida. 2014) (summarizing cases).

Defendants' motion is **GRANTED**.

7. Illinois

Defendants argue that Illinois has no independent cause of action for unjust enrichment and that, in the alternative, the IPP has failed to allege privity with Defendants or conferral of a direct benefit on Defendants. (Gen. Defs. Br. at 44, 45 nn.22, 24.) Defendants also argue that the IPP has failed to allege a

201WL 8 91592@@

duty owed to it by Defendants, which is required under Illinois law for recovery in unjust enrichment. (Gen. Defs. Br. at 48 n.26.)

First, Illinois appears to recognize an independent cause of action for unjust enrichment. “To state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff’s detriment, and that defendant’s retention of the benefit violates the fundamental principles of justice, equity, and good conscience.” *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989). However, it is also true that, recently, intermediate appellate courts have called this into question. See *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011) (noting apparent disagreement in Illinois law). This Court follows the controlling view of the Illinois Supreme Court and declines to dismiss the IPP’s unjust enrichment claim under Illinois law.

A plaintiff in Illinois is likewise not required to allege privity or allege a direct benefit. See *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005) (listing *HPI Health Care* as a case that “concluded that the benefit received by a defendant need not be direct to establish an unjust enrichment claim”).

Defendants cite *Cleary*, 656 F.3d at 517, to support their contention that defendants must receive a benefit from plaintiff in a “direct way.” (Gen. Defs. Br. at 45.) However, *Cleary* was decided on the basis that the plaintiffs had not alleged *any* detriment that would make the defendants’ retention of profits from cigarette sales unjust, since plaintiffs had not proven that they would have refrained from purchasing defendants’ cigarettes even defendants had disclosed their true nature and risk. 656 F.3d at 519. Because the IPP has alleged a detriment here, in the form of overcharges, *Cleary* is inapposite.

Finally, Defendants cite *Martis v. Grinnell Mut. Reins. Co.*, 905 N.E.2d 920, 928 (Ill. App. Ct. 2009), for the proposition that the IPP must allege a duty owed to it by Defendants in order to state a claim for unjust enrichment. (Gen. Defs. Br. at 48 n.26.) Contrary to Defendants’ argument, however, *Martis* dismissed plaintiff’s claim because plaintiff’s claim under the Illinois Consumer Fraud Act (“ICFA”) had been dismissed; therefore, there was no underlying fraud count upon which the plaintiff could establish a duty in unjust enrichment. 905 N.E.2d at 928. Here, by contrast, the Court has found that the IPP has stated a claim under the ICFA.

*62 Therefore, Defendants’ motion to dismiss the IPP’s claim for unjust enrichment under Illinois law is **DENIED**.

8. Kansas

Defendants argue that the IPP fails to state a claim for unjust enrichment under Kansas law because it does not allege either (i) that the IPP and the Defendants are in privity or (ii) that the IPP conferred a direct benefit on Defendants. (Gen. Defs. Br. at 44, 45 nn.22, 24.)

Kansas does not require privity. “Our past cases establish that recovery under quasi-contract or unjust enrichment is not prohibited simply because the subcontractor and the owner of the property are not in privity. This conclusion is consistent with the theory of quasi-contract and unjust enrichment, which does not depend on privity.” *Haz-Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 910 P.2d 839, 847 (Kan. 1996).

Other district courts have been similarly unable to find any authority for the proposition that plaintiffs in Kansas are required to allege a “direct benefit.” See *Processed Egg Prods.*, 851 F. Supp. 2d at 930 (E.D. Pa. 2012); *Packaged Seafood Prods.*, 242 F. Supp. 3d 1033, 1090 (S.D. Cal. 2017); *Lidoderm*, 103 F. Supp. 3d at 1177–78; *Auto. Parts Antitrust Litig. (Instrument Panel Clusters)*, 2014 WL 2993753, at *30. In particular, this Court adopts the thoughtful analysis in *Processed Egg Prods.*, 851 F. Supp. 2d at 929–30, which summarized several Kansas cases that permitted plaintiffs to maintain unjust enrichment claims absent “direct” benefits.

Accordingly, Defendants’ motion to dismiss this claim is **DENIED**.

9. Maine

Defendants argue that to plead a claim for unjust enrichment under Maine law, the IPP must allege that it conferred a benefit directly on the Defendants. (Gen. Defs. Br. at 45 n.24.)

The Defendants again cite *Refrigerant Compressors*, 2013 WL 1431756, at *25, which dismissed a similar claim for unjust enrichment, albeit without any analysis of Maine’s laws.

201WL 8 91592©©

Beyond *Refrigerant Compressors*, the Court is aware of one trial-level case from Maine purporting to condition recovery on a direct benefit. *Rivers v. Amato*, No. CIV. A. CV-00-131, 2001 WL 1736498, at *4 (Me. Super. Ct. June 22, 2001). In that case, however, a prospective buyer claimed unjust enrichment against the owner of a piece of property, on the theory that the buyer's negotiations with a third-party developer had led to the owner's repudiating their original contract and entering into a higher-priced land sale contract with that developer. *Id.* The court there found that the prospective buyer had failed to allege that *any* cognizable benefit was conferred. *Id.*

At present, and in the absence of any additional briefing by Defendants on this issue, neither *Refrigerant Compressors* nor *Rivers* convinces the Court that Maine's unjust enrichment law requires a plaintiff to allege a direct benefit in order for its claim to survive a motion to dismiss. *See also TFT-LCD (Flat Panel)*, 2011 WL 4501223, at *11 (denying motion to dismiss claim under Maine's unjust enrichment law for failure to allege direct benefit).

Defendants' motion is **DENIED**.

10. Massachusetts

Defendants argue that Massachusetts law similarly requires that the IPP confer a direct benefit on Defendants in order to state a claim for unjust enrichment. (Gen. Defs. Br. at 45 n.24.) Defendants again cite *Refrigerant Compressors*, which does not contain any analysis of Massachusetts law and does not cite to any cases containing analysis of Massachusetts law. 2013 WL 1431756, at *25.

*63 Moreover, Massachusetts law does not appear to include such a requirement. *See, e.g., Meshna v. Scrivanos*, No. CIV.A. 2011 01849 BLS 1, 2012 WL 414476, at *4 (Mass. Super. Ct. Dec. 21, 2011) (plaintiff employees successfully pleaded unjust enrichment claim against restaurant owner on the basis that owner was unjustly enriched by tips that customers left for employees). *See also Packaged Seafood Prods.*, 242 F. Supp. 3d 1033, 1091 (S.D. Cal. 2017) (noting absence of direct benefit rule in Massachusetts cases).

Defendants' motion to dismiss is **DENIED**.

11. Michigan

Defendants argue that Michigan law also requires the IPP to allege that it conferred a direct benefit on Defendants, again citing *Refrigerant Compressors*. (Gen. Defs. Br. at 45 n.24 (citing 2013 WL 1431756, at *25).) The IPP responds that other courts have sustained claims for unjust enrichment under Michigan law by indirect purchaser classes. (IPP Resp. to Gen. Defs. Br. at 43 (citing *In re Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665, 706 (E.D. Pa. 2014)).)

This Court is persuaded that, under Michigan law—which strictly grounds a claim for unjust enrichment in quasi-contract—the relationship between the IPP and the Defendants is too attenuated to support a claim of unjust enrichment. *See A & M Supply Co. v. Microsoft Corp.* (“*A & M I*”), No. 274164, 2008 WL 540883, at *2 (Mich. Ct. App. Feb. 28, 2008) (requiring direct benefit). In *A & M I*, the Court of Appeals vacated and remanded the trial court's certification of a class of “individuals who purchased, leased, or licensed a copy of Windows 95 or Windows 98 from an entity other than Microsoft.” *A & M Supply Co. v. Microsoft Corp.* (“*A & M F*”), 654 N.W.2d 572, 575 (Mich. Ct. App. 2002). In a later proceeding, *A & M II*, the Court of Appeals dismissed the unjust enrichment claims by indirect purchasers against Microsoft because there was no “direct contact” between the parties, nor any showing that “Microsoft received any direct payment or other benefit from those purchasers.” 2008 WL 540883, at *2.

Although there may be limited exceptions to the “direct benefit” requirement where the plaintiff and defendant are directly in contact, *see Rammer Asphalt Paving Co. v. E. China Twp. Sch.*, 504 N.W.2d 635, 641 (Mich. 1993), the IPP has not alleged that either it or any Class members had direct contact with Actavis, Forest, or Merz. *See also Hollowell v. Career Decisions, Inc.*, 298 N.W.2d 915, 920 (Mich. Ct. App. 1980) (“The process of imposing a ‘contract-in-law’ to prevent unjust enrichment is an activity which courts should approach with some caution.”).

Therefore, Defendant's motion to dismiss this claim is **GRANTED**.

12. Mississippi

Defendants cite *Cole v. Chevron USA, Inc.*, 554 F. Supp. 2d 655, 671 (S.D. Miss. 2007), for the proposition that unjust enrichment is not a separate cause of action in Mississippi.

After reading *Cole* and the case on which it relies, *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 813 (S.D. Miss. 2002), the Court is not convinced that Mississippi courts have barred unjust enrichment as a separate cause of action. Although Mississippi courts discuss unjust enrichment as a “theory of recovery,” this is not incompatible with its being considered a cause of action. See *Estate of Johnson v. Adkins*, 513 So. 2d 922, 926 (Miss. 1987) (“The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another[.]”) (citing *Hans v. Hans*, 482 So.2d 1117, 1122 (Miss. 1986)).

*64 Other federal courts have agreed. “Contrary to *Coleman* and its federal progeny ... there is a substantial body of Mississippi case law that treats unjust enrichment as a separate cause of action.” *In re Light Cigarettes Mktg. Sales Practices Litig.*, 751 F. Supp. 2d 183, 193 (D. Me. 2010).

Defendants' motion to dismiss this claim is **DENIED**.

13. New York

Defendants argue that New York requires both privity and conferral of a direct benefit in order to allege a claim for unjust enrichment. (Gen. Defs. Br. at 45 n.24; *id.* at 48; Forest Br. at 70 nn.56–57.) The privity argument is a non-starter. “[A] plaintiff need not be in privity with the defendant to state a claim for unjust enrichment[.]” *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 215, 863 N.E.2d 1012, 1018 (2007).

The New York Court of Appeals has announced a rule that the relationship between the parties may not be “too attenuated” in a claim for unjust enrichment. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 216, 863 N.E.2d 1012, 1018 (2007). In *Sperry*, for example, the Court of Appeals dismissed a claim by end purchasers of rubber products against manufacturers of processing chemicals that had allegedly been sold to the rubber product manufacturers at a markup. *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 209, 863 N.E.2d 1012, 1013–14 (2007).

Later, the New York Court of Appeals dismissed on the same grounds a claim for unjust enrichment brought by a real estate broker, which had conducted due diligence on certain properties, against a rival brokerage firm, which had purchased those due diligence reports from the developer and eventually won the commission to sell the properties in the original broker’s stead. *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 519, 973 N.E.2d 743, 748 (2012). Over a dissent, the Court of Appeals held that “regardless of whether [the defendant rival firm] was a good-faith purchaser of the due diligence materials, the complaint fails to present a sufficient connection between [plaintiff and defendant] to form the basis of an unjust enrichment claim.” *Id.*

However, wrongdoing can create the requisite relationship between benefactor and beneficiary. The First Department has synthesized the rule as follows: “a plaintiff must plead some relationship between the parties that could have caused reliance or inducement and ... the relationship cannot be too attenuated.” *Philips Int’l Invs., LLC v. Pektor*, 117 A.D.3d 1, 4, 982 N.Y.S.2d 98, 100–01 (2014); see also *Mandarin Trading Ltd. v. Wildenstein*, 944 N.E.2d 1104, 1111 (N.Y. 2011).

In *Philips International Investments*, for example, the First Department denied a motion to dismiss an unjust enrichment claim against a group of limited partnerships that had swooped in to purchase viable properties in a real estate transaction—cutting plaintiff, who had done much of the development work, out of the deal—because they “knew of the alleged wrong being done to plaintiff and of their essential role in the allegedly wrongful scheme.” *Philips Int’l Investments, LLC v. Pektor*, 117 A.D.3d 1, 8, 982 N.Y.S.2d 98, 103 (2014).

At this time, the Court cannot hold that the relationship between the IPP and the Defendants is too attenuated as matter of law, since the IPP has plausibly pled that Defendants derived an economic benefit from charging monopolistic and artificially inflated prices for Namenda, a direct and proximate result of Defendants' unlawful practices. Cf. *Duran v. Bautista*, 2015 N.Y. Slip Op. 50507(U), 19, 2015 WL 1567020, at *18 (N.Y. Sup. 2015) (“It is against equity and good conscience to permit [the defendant] to retain the proceeds ... if the Class is able to prove the alleged fraudulent scheme.”)

*65 Other district courts examining this requirement with respect to indirect purchaser class actions are in accord. See

Processed Egg Prods., 851 F. Supp. 2d at 930; *DDAVP*, 903 F.Supp.2d at 234; *Suboxone*, 64 F. Supp. 3d at 709–10.

The Court therefore **DENIES** Defendants' motion to dismiss the claim for unjust enrichment under New York law, without prejudice to renewal at a later date.

14. North Carolina

Defendants cite *Effler v. Pyles*, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989), for the proposition that a plaintiff must allege that it conferred a direct benefit on a defendant. (Forest Br. at 70 n.57; Gen. Defs. Br. at 45 n.24.) The *Effler* court affirmed the trial court's entry of summary judgment in favor of defendant because the record did "not satisfy plaintiffs burden of showing that she conferred a benefit *directly* on defendant." *Effler*, 380 S.E.2d at 152 (emphasis added).

The North Carolina Supreme Court has defined the elements of the claim more broadly, without reference to a "direct" benefit: "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. The benefit must not be gratuitous and it must be measurable." *Booe v. Shadrick*, 369 S.E.2d 554, 556 (N.C. 1988).

Moreover, "cases decided after *Effler* have held that an indirect benefit can support an unjust enrichment claim." *Lau v. Constable*, No. 16 CVS 4393, 2017 WL 536361, at *5 (N.C. Super. Feb. 7, 2017) (collecting cases); see also *Bandy v. Gibson*, No. 16 CVS 456, 2017 WL 3207068, at *5 (N.C. Super. July 26, 2017) (same).

Generally, federal district courts that have recognized this split in North Carolina authority have not dismissed unjust enrichment claims on pre-answer motions. *Lidoderm*, 103 F. Supp. 3d at 1178 (citing other federal cases). In particular, the court in *Processed Egg Prods.*, 851 F. Supp. 2d at 931–32, found that the more expansive language of *Booe*, from the North Carolina Supreme Court, was more persuasive than the language of *Effler*, from the intermediate appellate court. *Id.* This Court agrees that, given both the divide in authority and the clear language of *Booe*, a case from the North Carolina Supreme Court, it cannot dismiss the claim on these grounds.

Therefore, the Court **DENIES** Defendants' motion to dismiss the North Carolina claim for unjust enrichment.

15. North Dakota

Defendants argue that unjust enrichment under North Dakota law requires the plaintiff to have conferred a direct benefit on the defendant, citing *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 680 N.W.2d 634, 642 (N.D. 2004) and *Relafen*, 225 F.R.D. at 28. (Forest Br. at 70 n.57; Gen. Defs. Br. at 45 n.24.)

In *Ritter*, defendant and plaintiffs worked on the same construction project; the defendant argued that the plaintiffs, which had not chosen to contract with it directly at the outset of the project, could not later sue it for unjust enrichment. 680 N.W.2d at 642 (citing *Apache Corp. v. MDU Res. Grp, Inc.*, 603 N.W.2d 891 (N.D. 1999)).

*66 *Apache*, however, does not stand for the proposition that, in North Dakota, unjust enrichment claims universally require a direct benefit. Rather, that case holds that, when parties involved in a single project do not all contract with one another, "[t]he separate contracts convey clearly the limited kinds of liability and exposure each party has in mind. Respect for that contract arrangement requires the courts to refuse restitution between the parties who did not contract with each other." *Apache*, 603 N.W.2d at 895 (citing Dan B. Dobbs, *Law of Remedies*, § 4.1(2), p. 372 (2d ed. 1993)). Accord *In re Auto. Parts (Fuel Senders) Antitrust Litig.*, 29 F. Supp. 3d 982, 1025 (E.D. Mich. 2014) (declining to dismiss indirect purchasers' unjust enrichment claim under North Dakota law on the basis of *Apache*); *In re Auto. Parts (Bearings) Antitrust Litig.*, 50 F. Supp. 3d 836, 864–65 (E.D. Mich. 2014).

Moreover, North Dakota courts have upheld unjust enrichment claims even where no direct benefit was alleged. See, e.g., *Opp v. Matzke*, 559 N.W.2d 837, 840 (N.D. 1997) (well driller had stated claim for unjust enrichment against landowner even though she had not asked him to drill the well and did not reside on the property; since defendant "provide[d] her family a place to live on the property," she benefitted from the well).

Defendants' motion to dismiss the North Dakota claim is **DENIED**.

16. Rhode Island

Defendants argue that Rhode Island law requires the IPP to allege that it conferred a direct benefit on Defendants. (Gen. Defs. Br. at 45 n.24.) Defendants again cite *Refrigerant Compressors*, which dismissed the Rhode Island unjust enrichment claim without any analysis of Rhode Island law. 2013 WL 1431756, at *25.

In Rhode Island, there are three elements of unjust enrichment. *R & B Elec. Co. v. Amco Const. Co.*, 471 A.2d 1351, 1355 (R.I. 1984). “First, a benefit must be conferred upon the defendant by the plaintiff. Second, there must be an appreciation by the defendant of such benefit. Finally, there must be an acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without paying the value thereof.” *Id.* at 1356. None of these elements requires conferral of a direct benefit.

Moreover, “[t]he most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust,” *Id.* Because the Rhode Island courts have not stated clearly that an action for unjust enrichment requires that the plaintiff have conferred a benefit on the defendant directly, and because Defendants have cited no case that so holds, the Court denies Defendants' motion to dismiss this claim on such grounds.

However, because the conduct underlying this claim is based on antitrust violations, and because Rhode Island did not recognize a cause of action for indirect purchasers under its antitrust statute until July 15, 2013, the Court **DISMISSES IN PART** this claim to the extent the IPP seeks to recover for injuries incurred before that date.

17. Tennessee

Defendants argue that a plaintiff in Tennessee must demonstrate either (i) that it “has exhausted all remedies against the person with whom the plaintiff enjoyed privity of contract” or (ii) that any attempt to exhaust these remedies would be futile, before it may recover in unjust enrichment. *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525–26 (Tenn. 2005); (see also Gen. Defs. Br. at 46–47). Defendants further contend that the IPP’s assertions at paragraphs 222–23 of its Complaint demonstrate that that the IPP intends to rely on a futility theory, but that,

under Tennessee law, “a bare allegation of futility is not enough.” (Gen. Defs. Br. at 46–47).

*67 *Freeman Indus.*, 172 S.W.3d at 526, held that, at the summary judgment stage, an affidavit from plaintiff’s counsel averring that he was “unaware of any viable claims” against the party with which the plaintiff had been in privity, without any further factual basis, was insufficient to show that he was entitled to recover in unjust enrichment. *Id.*

The IP Action, however, is at the motion to dismiss stage, where plaintiff has adequately alleged that any claim against the pharmacies or distributors would be futile. (CAC ¶¶ 222–23.) It is thus easily distinguishable from *Freeman Industries*, and the IPP must be given the opportunity to prove up its futility argument after discovery is complete.

Defendants' motion to dismiss the Tennessee claim is **DENIED**.

18. Utah

Defendants argue that, under Utah law, a plaintiff must allege that it conferred a benefit directly on a defendant. (Gen. Defs. Br. at 45 n.24 (citing *Concrete Prods. Co. v. Salt Lake Cty.*, 734 P.2d 910, 911–12 (Utah 1987)).)

In *Concrete Prods.*, 734 P.2d at 911, a concrete supplier delivered materials to a subcontractor hired for a public works project. *Id.* The supplier, which was never paid, unsuccessfully sued the subcontractor, and then turned around and attempted to sue the county government on the theory that the county had not required the general contractor to post a bond. *Id.* The court found that the subcontractor could not recover in unjust enrichment against the county because there was no benefit to the county whatsoever—“[i]nstead, [the county] will incur the expenses of cleaning and maintaining curbs and gutters with no resale value or intrinsic economic worth.” *Id.* at 912. Although the *Concrete Products* court distinguished an earlier case, *Breitling Bros. Const. v. Utah Golden Spikers, Inc.*, 597 P.2d 869 (Utah 1979), by stating that “[n]o direct benefit, such as that demonstrated by the plaintiff in *Breitling*, is present here,” *Concrete Prods.*, 734 P.2d at 911–12 (emphasis added), the use of the word “direct” in that case’s dicta does not convince the Court that a plaintiff must allege a direct benefit as part of its *prima facie* case.

Other district courts have also found that Utah law does not require a direct benefit. *Processed Egg Prods.*, 851 F. Supp. 2d at 932–34; *Auto. Parts (Bearings)*, 50 F. Supp. 3d at 864–65; *Packaged Seafood Prods.*, 242 F. Supp. 3d at 1092–93.

Defendants' motion to dismiss the Utah unjust enrichment claim is, therefore, **DENIED**.

19. Washington

Defendants claim that Washington unjust enrichment law requires plaintiffs to allege a direct benefit. (Gen Defs. Br. at 45 n.24 (citing *Keil v. Scholten*, No. 48051-1-I, 2002 WL 988562, at *5 (Wash. Ct. App. Feb. 4, 2002)) (unpublished opinion).)

In *Keil*, a group that had formed a joint venture to purchase a commercial real estate property sued a real estate broker for unjust enrichment, seeking recovery of two hundred thousand dollars he had earned as a commission from the sale proceeds. *Id.* at *4. But for the broker's fraud and misrepresentations concerning the sale, the group argued, it never would have paid the four hundred thousand dollars cash at closing from which the broker earned his fee. *Id.* at *5. The court found that the group could not recover the broker's commission on a theory of unjust enrichment because, pursuant to the sale documents, it was the property owner's obligation to pay the brokerage fee, not the group's. *Id.*

*68 Similarly, in *State v. Am. Tobacco Co.*, No. 96-2-15056-SEA, 1996 WL 931316, at *8–9 (Superior Ct. Wash. Apr. 9, 1999), the court found that the State of Washington had not stated a claim for unjust enrichment against tobacco producers, because the benefit that the state alleged to have conferred, in the form of medical payments, was too attenuated. *Id.*

However, in *Chem. Bank v. Wash Pub. Power Supply Sys.*, 691 P.2d 254, 544 (Wash. 1984), the Supreme Court of Washington held that a group of bondholders, which had funded a nuclear power plant construction project that later went bankrupt, had provided a “benefit” to the projects' participants—municipal entities that had bargained for a share of the plants' power output—such that restitution was appropriate. *Id.* at 558. The court reasoned that “the Restatement's definition of benefit is quite broad;” that the bond revenues—although flowing through a third party—had been raised on the request of the participants; and that,

“[f]inally, it was for the participants' benefit that the plants were being built in the first place.” *Id.*

This Court is not aware of any federal district court cases discussing the “direct benefit” requirement under Washington unjust enrichment law in the antitrust context. However, this Court concludes that it must follow the reasoning of the Washington Supreme Court in *Chemical Bank*. The IPP has alleged that unlawful overcharges for branded Namenda IR and Namenda XR flowed ultimately to Defendants, even though there were intermediaries in the chain of distribution. This is analogous to the bondholder financing that flowed to the participants in *Chemical Bank*. Moreover, it was on Defendants' account that higher prices for Namenda were passed through to the consumer.

Therefore, the Court **DENIES** Defendants' motion to dismiss.

20. West Virginia and Wisconsin

Defendants argue that a plaintiff must allege conferral of a direct benefit on a defendant in order to bring a claim for unjust enrichment in West Virginia and Wisconsin. (Gen. Defs. Br. at 45 n.24 (citing *Refrigerant Compressors*, 2013 WL 1431756, at 25–26)). *Refrigerant Compressors*, however, neither analyzes the law under either of these jurisdictions nor cites any case that does.

As a result, and in the absence of any additional briefing, Defendants' motion to dismiss these claims is **DENIED**.

21. Wyoming

Lastly, Defendants argue that the IPP has failed to allege that it conferred a direct benefit on Defendants, as required under Wyoming law. (Forest Br. at 70 n.57 (citing *Boyce v. Freeman*, 39 P.3d 1062, 1065–66 (Wyo. 2002)).) In *Boyce*, 39 P.3d at 1063, the plaintiff gave a pickup truck to an employee of the defendant because the employee told the plaintiff that the defendant would pay for the truck. *Id.* Plaintiff was never paid for the truck and brought an unjust enrichment claim against the defendant, alleging that the employee had used the truck on the job and, therefore, that the defendant-employer was unjustly enriched. *Id.* The Supreme Court of Wyoming found that because nothing in the record showed that the employer knew it was expected to pay for the truck, or that the employer induced the plaintiff to give the truck to its

employee, “[w]e see no evidence leading us to conclude that ... good conscience requires [the defendant] to pay[.]” *Id.* at 1066. The opinion concluded, in part, that the employer had “received no *direct* benefit from this action.” *Id.*

*69 In *Boyce*, the Supreme Court of Wyoming also described the elements of unjust enrichment as follows: “(1) Valuable services were rendered, or materials furnished, (2) *to the party to be charged*, (3) which services or materials were accepted, used and enjoyed by the party, and, (4) under such circumstances which reasonably notified the party to be charged that the plaintiff, in rendering such services or furnishing such materials, expected to be paid by the party to be charged. Without such payment, the party would be unjustly enriched.” *Id.* at 1065 (citing *Coones v. F.D.I.C.*, 894 P.2d 613, 617 (Wyo. 1995) (emphasis added).)

The Court finds that the *Boyce* opinion as a whole establishes that a plaintiff seeking to recover under a theory of unjust enrichment under Wyoming law must allege a direct benefit.

Other federal district courts sitting in diversity are in accord. *See, e.g., Aftermarket. Filters*, 2010 WL 1416259, at *2–3.

Therefore, Defendants' motion to dismiss the Wyoming claim is **GRANTED**.

E. In Conclusion, the IPP Has Stated a Claim for Unjust Enrichment Under Count Four With Respect to Actavis, Forest, and Merz Under the Laws of 31 States

In sum, the Court finds that the IPP Complaint has adequately pled facts supporting a claim for unjust enrichment against Actavis, Forest, and Merz only. The Court thus dismisses all claims under Count Four with respect to the Generic Defendants.

The Court also finds that, as a matter of law, the IPP may pursue its Count Four claims for unjust enrichment under the laws of all states **except** Alaska, Colorado, Connecticut, Delaware, Idaho, Michigan, Montana, New Jersey, Oklahoma, South Carolina, Virginia, Washington, and Wyoming. Those claim are hereby **DISMISSED**.

The Court also **DISMISSES IN PART** the IPP's claim under Rhode Island law, to the extent the IPP seeks recovery for injuries occurring prior to July 15, 2013.

IX. Conclusion

In conclusion, the Court holds as follows:

With respect to Count One for monopolization, the claims under the laws of Florida, Kansas, Massachusetts, and Utah are **DISMISSED** in their entirety. The claim under the law of Rhode Island is **DISMISSED IN PART**, to the extent that the IPP seeks to recover on the basis of injuries occurring before July 15, 2013.

With respect to Count Two for conspiracy to monopolize, the claims under the laws of Illinois, Massachusetts, and Utah are **DISMISSED** in their entirety. The claim under the law of Rhode Island is **DISMISSED IN PART**, to the extent that the IPP seeks to recover on the basis of injuries occurring before July 15, 2013.

With respect to Count Three for consumer protection and unfair and deceptive trade practices, the claims under the laws of Arizona, the District of Columbia, Hawaii, Kansas, Maine, Montana, New York, Rhode Island, Tennessee, Vermont, and West Virginia are **DISMISSED** in their entirety.

With respect to Count Four, unjust enrichment, all claims are **DISMISSED ONLY WITH RESPECT TO** the Generic Defendants. For the remaining Defendants, Actavis, Forest, and Merz, the claims under the laws of Alaska, Colorado, Connecticut, Delaware, Idaho, Michigan, Montana, New Jersey, Oklahoma, South Carolina, Virginia, Washington, and Wyoming are **DISMISSED** in their entirety. The claim under the law of Rhode Island is **DISMISSED IN PART**, to the extent that the IPP seeks to recover on the basis of injuries occurring before July 15, 2013.

The Clerk of Court is respectfully requested to remove Docket Number 133 from the Court's list of pending motions.

*70 Pursuant to this Court's memorandum endorsement at Docket Number 165, the Clerk of Court is also respectfully requested to remove Docket Number 150 from the Court's list of pending motions.

All Citations

Not Reported in Fed. Supp., 2018 WL 7197233

201WL 8 91592©©

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 48

2016 WL 4157309

Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

Daniel SMALL, et al., Plaintiffs,

v.

UNIVERSITY MEDICAL CENTER OF
SOUTHERN NEVADA, et al., Defendants.

Case No. 2:13-cv-00298-APG-PAL

Signed 08/03/2016

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(ECF No. 259)

ANDREW P. GORDON, UNITED STATES DISTRICT
JUDGE

*1 Plaintiffs were hourly employees of University Medical Center of Southern Nevada ("UMC"). They allege that UMC implemented policies to limit their hourly pay below the federal minimum wage and to prevent them from receiving any overtime pay for hours worked in excess of 40 hours a week. Plaintiffs bring a collective and class action against UMC and John Espinoza, UMC's Chief Human Resources Officer, under state and federal law. Defendants move to dismiss for failure to state a claim upon which relief can be granted. Because plaintiffs' allegations regarding overtime pay are threadbare recitals of the elements of a cause of action, I dismiss this claim with leave to amend. I also dismiss plaintiffs' minimum-wage claim with leave to amend because plaintiffs assert an equitable theory of recovery that is not available to them because they have an adequate remedy at law.

I. BACKGROUND

Plaintiffs Daniel Small, Carolyn Small, William Curtin, David Cohen, Leanne Lawrence, and Louise Collard worked at UMC as respiratory therapists, registered nurses, admitting representatives, and electrocardiogram ("EKG") technicians. ECF No. 256 at ¶¶ 5–16. They allege that they were paid on an hourly basis, but UMC and Espinoza implemented policies to limit their hourly compensation. *See id.* at ¶¶ 20–30. UMC

and Espinoza allegedly deducted 30 minutes of pay each day for meal breaks whether or not breaks were taken, failed to pay overtime when employees worked in excess of 40 hours a week, and failed to keep records documenting the hours the employees worked. *Id.*

Plaintiffs bring a collective action under section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), for UMC and Espinoza's alleged failure to pay overtime. *See id.* at ¶¶ 33, 54. They also bring a class action for unjust enrichment for UMC and Espinoza's alleged policy of automatically deducting 30 minutes of pay for meal breaks. *See id.* at ¶¶ 49, 65. UMC and Espinoza move to dismiss on several grounds.

II. ANALYSIS

A properly pleaded complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a complaint must "contain [] enough facts to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation omitted). I accept as true all well-pleaded facts and construe them in the light most favorable to the nonmoving party. *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013) (citations omitted).

A. Plaintiffs' FLSA Allegations Regarding Overtime Pay are Dismissed Without Prejudice.

*2 Defendants contend that plaintiffs' FLSA allegations are inadequately pleaded under *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014), cert. denied, 135 S. Ct. 1845 (2015). Plaintiffs respond that dismissal is inappropriate because the parties have conducted extensive discovery, defendants have been on notice of plaintiffs' claims for three and a half years, *Landers* is inapplicable because it was decided after plaintiffs' original complaint was filed, and *Landers* is distinguishable because, unlike *Landers*, one of plaintiffs' prior complaints survived a motion to dismiss.¹

1 Plaintiffs also contend that the defendants' motion to dismiss is barred by Rule 12(g), which prohibits a defendant from raising a defense that was available but omitted from an earlier motion to dismiss. Because the operative complaint contains a newly named defendant who was not previously a party to this action, I decline to deem the defenses that are now asserted waived. *See Aetna Life Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1475 n.2 (9th Cir. 1988) (stating “courts have discretion to hear a second motion under Rule 12(b)(6) if the motion is not interposed for delay and the final disposition of the case will thereby be expedited.”).

The FLSA sets a national minimum wage and requires overtime pay of one and a half times an employee's hourly wage for every hour worked over 40 hours per week. *Landers*, 771 F.3d at 640; *see also* 29 U.S.C. § 206(a) (minimum wage); 29 U.S.C. § 207(a)(1) (overtime). In determining whether a plaintiff has stated a plausible claim under the FLSA, plaintiffs in the Ninth Circuit must do more than recite this statutory language. *Id.* at 644. At a minimum, a plaintiff must allege facts showing that he or she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty hours during that week. *See id.* at 645–46.

Plaintiffs' allegations fall short of this standard. The complaint merely alleges that the defendants instituted “uniform policies and practices” that disregarded “the requirements of federal and state wage and hour laws” by “fail[ing] to pay overtime hours” when plaintiffs worked “more than forty (40) hours per week.” ECF No. 256 at ¶¶ 32, 35, 36. This threadbare recitation does not allege, as *Landers* requires, that any particular plaintiff worked more than forty hours in a particular workweek without being compensated for their additional work.

Plaintiffs' assertion that *Landers* is distinguishable on the facts is incorrect. *Landers* establishes the level of specificity that is required for a plaintiff to state a plausible FLSA claim. This standard applies to every complaint and, under *Landers'* standard, it is irrelevant whether plaintiffs' pre-*Landers* complaint survived a different motion to dismiss. For the same reason, I am also unpersuaded that dismissal is inappropriate because plaintiffs have engaged in discovery and survived a prior motion to dismiss. When considering a motion to dismiss, my review is generally limited to the pleadings. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). Conducting discovery does

not render a complaint plausible and surviving one motion to dismiss does not render plaintiffs immune from a subsequent motion.

Nor is it relevant that defendants have been on notice of plaintiffs' claims for three and a half years. *Twombly* and *Iqbal* require me to consider whether plaintiffs' complaint states a plausible claim, not whether plaintiffs' complaint put defendants on notice. I therefore dismiss plaintiffs' FLSA claims without prejudice.

B. Plaintiffs' Unjust–Enrichment Claim is Dismissed Without Prejudice.

*3 Defendants also seek dismissal of plaintiffs' unjust enrichment claim, asserting that it is an equitable claim that is not available because plaintiffs have a remedy at law. Plaintiffs respond that defendants incorrectly rely on *Landers* for this assertion and that an unjust enrichment claim is appropriate under Rule 23.

“[U]njust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another.” *Mainor v. Nault*, 101 P.3d 308, 317 (Nev. 2004) (en banc), as corrected on denial of reh'g (Apr. 13, 2005). To state a claim for unjust enrichment, a plaintiff must show she conferred a benefit on the defendant, and the defendant appreciated, accepted, and retained the benefit under circumstances such that it would be inequitable for him to retain the benefit without paying for it. *Leasepartners Corp. v. Robert L. Brooks Trust Dated November 12, 1975*, 942 P.2d 182, 187 (Nev. 1997). Nevada recognizes the general rule that an equitable claim, like unjust enrichment, is not available where the plaintiff has a full and adequate remedy at law. *In re Wal-Mart Wage & Hour Emp't Prac. Litig.*, 490 F. Supp. 2d 1091, 1125 (D. Nev. 2007) (citing *State v. Second Judicial Dist. Court in & for Washoe Cty.*, 241 P. 317, 322 (Nev. 1925)).

Plaintiffs' minimum-wage claim asserts that defendants instituted a policy of automatically deducting 30 minutes of pay for meal breaks, regardless of whether a break was actually taken. ECF No. 256 at ¶¶ 49, 65. Because federal law provides plaintiffs with a legal remedy for this claim (*see*, 29 U.S.C. §§ 206(a), 216(b), 216(e)(2)), their unjust-enrichment theory is improperly pleaded. Plaintiffs' contention that an unjust enrichment claim may be asserted under Rule 23 is irrelevant. Rule 23 is not a source of substantive rights and does not provide plaintiffs with a claim for relief. I therefore dismiss plaintiffs' unjust-enrichment claim without

209WL 3 59©Th0o

prejudice and grant them leave to plead an appropriate theory of recovery if they can.

C. Defendants' Remaining Arguments

Because I grant the defendants' motion to dismiss plaintiffs' two-count complaint, I decline to address defendants' remaining arguments in detail. I simply note that I cannot, as defendants request, dismiss plaintiffs' alter-ego or recordkeeping claims because none exists. The complaints' references to alter ego and recordkeeping failures are allegations, which may be stricken under Rule 12(f) but are not subject to dismissal under Rule 12(b)(6) as defendants contend.

I also find that defendants' concerns regarding standing and the scope of plaintiffs' proposed classes and subclasses are premature. Because plaintiffs have not plausibly alleged an

injury or any theory of recovery, I cannot determine whether the named plaintiffs are appropriate representatives. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 961 (9th Cir. 2004) (discussing standing in the class-action context).

III. CONCLUSION

IT IS THEREFORE ORDERED that defendants' motion to dismiss (**ECF No. 259**) is **GRANTED** and plaintiffs' FLSA and minimum-wage claims are dismissed without prejudice.

IT IS FURTHER ORDERED that plaintiffs may file an amended complaint within **21 days** of entry of this order.

All Citations

Not Reported in Fed. Supp., 2016 WL 4157309

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 49

2011 WL 2119100

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Sandy SMITH and Kathleen Maxson,
on behalf of themselves and all
others similarly situated, Plaintiffs,
v.

MERIAL LIMITED, Defendant.

Civ. No. 10-439.

|
May 26, 2011.

Attorneys and Law Firms

Paul Diamond, Diamond Law Office, LLC, Fort Lee, NJ,
Gary S. Graifman, Kantrowitz, Goldhamer & Graifman,
Esqs., Montvale, NJ, Jeffrey W. Herrmann, Cohn, Lifland,
Pearlman, Herrmann & Knopf, LLC, Saddlebrook, NJ,
Michael Scott Green, Green & Pagano, LLP, East Brunswick,
NJ, for Plaintiffs.

OPINION

WILLIAM J. MARTINI, District Judge.

*1 This matter comes before the Court on Defendant Merial Limited's ("Merial") motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). There was no oral argument. [Fed.R.Civ.P. 78](#). For the reasons stated below, Defendant's motion to dismiss is **GRANTED** in part and **DENIED** in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' Amended Complaint ("Complaint") brings a putative class action on behalf of themselves and other purchasers and users of "spot on" flea and tick treatments manufactured by Defendant. Defendant Merial manufactures Frontline and Frontline Plus (together, "Frontline"), which are flea and tick control pesticide products containing the active ingredients finopril and methoprene. (Compl.¶ 4.) Frontline is considered a "spot on" flea and tick treatment because the pesticide is applied directly to one or more localized areas on the body of the pet. (See Compl., Ex. D.)

On April 21, 2009, the Environmental Protection Agency ("EPA"), which regulates the safety of pesticides, issued a

press release, reporting a "recent sharp increase in the number of incidents being reported from the use of spot-on pesticide products for flea and tick control for pets." (Compl., Ex. D.) In response, Merial issued a statement on April 22, 2009, addressing the EPA's concern and concluding, "[p]et owners can continue to trust FRONTLINE products for long-lasting and effective flea and tick control." (Compl., Ex. E.) Merial also issued a similar letter to veterinarians. (See Compl., Ex. F.)

Plaintiffs allege that Frontline is unsafe because it caused skin irritation and neurological problems for their pets. (Compl.¶ 7.) Plaintiff Sandy Smith, a resident of Tennessee, alleges that on or about 2007 she used Frontline on her two dogs and noticed that after each application, the dogs exhibited "seizure-like symptoms." (Compl.¶¶ 32-33.) Plaintiff Kathleen Maxson, a resident of New Jersey, alleges that on November 28, 2009, she purchased and treated her cat once with Frontline, after which the cat "began to convulse and died." (Compl.¶¶ 34-36.)

Plaintiffs, on behalf of themselves and other purchasers of Defendant's products, bring the following causes of action: (1) breach of express warranty (Count One); (2) breach of implied warranty of merchantability (Count Two); (3) unjust enrichment (Count Three); and (4) violation of the New Jersey Consumer Fraud Act ("NJCFRA") (Count Four). Specifically, Plaintiffs seek economic damages based upon the difference between the amount they paid for the product and the diminished (or nonexistent) value of the product as a result of it being unsafe to apply to their pets.¹

¹ In addition to this action, multiple putative class actions have been filed against various other "spot on" flea and tick treatment manufacturers in this Court. The Court has issued parallel opinions on the pending motions to dismiss in the following flea and tick treatment cases: *McDonough v. Bayer Healthcare*, Civ. No. 10-442; *Arlandson v. Hartz Mountain Corp.*, Civ. No. 10-1050; *Snyder v. Farnam Companies*, Civ. No. 10-1391; and *Johansson v. Central Garden and Pet Company*, Civ. No. 10-6372.

II. DISCUSSION

A. Motion to Dismiss Standard

[Federal Rule of Civil Procedure 12\(b\)\(6\)](#) provides for the dismissal of a complaint, in whole or in part, if the plaintiff

fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated, *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir.2005), and dismissal is appropriate only if, accepting all of the facts alleged in the complaint as true,² the plaintiff has failed to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); see also *Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 64 (3d Cir.2008). Although a complaint need not contain detailed factual allegations, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Thus, the factual allegations must be sufficient to raise a plaintiff’s right to relief above a speculative level, see *id.* at 570, such that the court may “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (2009) (citing *Twombly*, 550 U.S. at 556). While “[t]he plausibility standard is not akin to a ‘probability requirement’ ... it asks for more than a sheer possibility ...” *Iqbal*, 129 S.Ct. at 1949 (2009).

² This assumption of truth is inapplicable, however, to legal conclusions couched as factual allegations or to “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Ashcroft v. Iqbal*, — U.S. —, —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

*2 In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. *Sands v. McCormick*, 502 F.3d 263 (3d Cir.2007). The court may also consider “undisputedly authentic documents] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the [attached] documents.” *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.1993). Moreover, “documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered.” *Pryor v. Nat’l Coll. Athletic Ass’n*, 288 F.3d 548, 560 (3d Cir.2002).

B. Choice of Law Principles

Since Plaintiffs’ claims are all based on state law, at the outset the Court must determine which law to apply to Plaintiffs’ claims. New Jersey’s choice of law rules apply, as a federal court sitting in diversity must apply the forum state’s choice of

law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 383 U.S. 487, 496 (1941). New Jersey has adopted the “most significant relationship” test of the Restatement of Conflict of Laws. *P.V. v. Camp Jaycee*, 197 N.J. 132, 142–43, 962 A.2d 453 (2008).³ This analysis, which must be performed on an issue-by-issue basis, is a two-step process. *Id.* at 143, 962 A.2d 453. The first step is to determine whether an actual conflict of law exists, for if no conflict exists, the law of the forum state applies. *Id.* Second, if a conflict does exist, the Court must determine which state has the “most significant relationship” to the claim, by “weighing] the factors set forth in the Restatement section corresponding to the plaintiff’s cause of action.” *Nikolin v. Samsung Elecs. Am., Inc.*, Civ. No. 10–1456, 2010 U.S. Dist. LEXIS 110942, at *9, 2010 WL 4116997 (D.N.J. Oct.18, 2010).

³ Until the New Jersey Supreme Court’s decision in *Camp Jaycee*, New Jersey used the “governmental interest” analysis. The “most significant relationship” test now used “embodies all of the elements of the governmental interest test plus a series of other factors deemed worthy of consideration.” *Camp Jaycee*, 197 N.J. at 142 n. 4, 962 A.2d 453.

Plaintiffs argue that it is premature to conduct a proper choice of law analysis, as the Court does not yet have a full factual record. Due to the factual inquiry that may be necessary to properly weigh the Restatement factors, “it can be inappropriate or impossible for a court to conduct that analysis at the motion to dismiss stage when little or no discovery has taken place.” *In re Samsung DLP Television Class Action Litigation*, Civ. No. 07–2141, 2009 WL 3584352, at *3 (D.N.J. Oct. 27, 2009). However, “[s]ome choice of law issues may not require a full factual record and may be amenable to resolution on a motion to dismiss.” *Harper v. LG Elecs. United States, Inc.*, 595 F.Supp.2d 486, 491 (D.N.J.2009). As such, courts in this Circuit have sometimes determined that the choice of law analysis in a putative class action can be done at the motion to dismiss stage. See, e.g., *Cooper v. Samsung Elecs. Am., Inc.*, 374 Fed. Appx. 250, 255 n. 5 (3d Cir.2010); *Warma Witter Kreisler, Inc. v. Samsung Electronics America, Inc.*, Civ. No. 08–5380, 2010 U.S. Dist. LEXIS 34584, at *2, 2010 WL 1424014 (D.N.J. Apr. 8, 2010); *Knox v. Samsung Electronics America, Inc.*, Civ. No. 08–4308, 2009 U.S. Dist. LEXIS 53685, at *2, 2009 WL 1810728 (D.N.J. June 25, 2009). Other times, however, Courts in this District have deferred the choice of law analysis until the class certification stage. See *Harper*,

595 F.Supp.2d at 490–91; *In re Samsung*, 2009 WL 3584352, at *3; *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 55 (D.N.J.2009); *In re K-Dur Antitrust Litig.*, 338 F.Supp.2d 517, 541 (D.N.J.2004); *In re Hypodermic Products Antitrust Litig.*, Civ. No. 05–1602, 2007 U.S. Dist. LEXIS 47438, at *16, 2007 WL 1959225 (D.N.J. June 29, 2007).

*3 In order to decide whether choice of law analysis is appropriate at the motion to dismiss stage in this particular case, the Court will follow the guidance provided in *Harper*, and determine whether the choice of law issues “require a full factual record” or not. 595 F.Supp.2d at 491. Since choice of law analysis must be undertaken on an issue-by-issue basis, the Court will also determine whether or not to defer its choice of law decision on an issue-by-issue basis. The factual record available at this time may be full enough for certain choice of law determinations but not for others. Therefore, New Jersey's choice of law analysis will be addressed for each issue, and should the choice of law determination for that issue require a fuller factual record, the Court will defer its decision until such factual record is available.

C. Counts Two, Three and Four—Breach of Implied Warranty, Unjust Enrichment and Violation of the NJCFA

Defendant argues that Plaintiffs' theories of breach of implied warranty, unjust enrichment, and consumer fraud are not independently actionable, as under New Jersey law, claims arising from harm caused by products can only be asserted under the NJPLA. Furthermore, Defendant contends that even if Tennessee law applies to Plaintiff Sandy Smith's claims, these claims would still be subsumed under the Tennessee Product Liability Act (“TPLA”).

1. Choice of Law

The choice of law analysis here is straight forward. First, under the applicable Restatement provision, the state where the injury occurs is presumed to govern, unless some other state can be shown to have a more significant relationship. *Restatement (Second) of Conflict of Laws*, § 147. Second, Plaintiffs themselves state in their opposition brief that “if Plaintiffs were actually asserting product liability claims, the NJPLA would apply only to the claims of New Jersey plaintiffs,” as “the law of the state where the plaintiff was injured generally governs product liability claims.” (Pls.' Opp. Br. at 9 n. 3.) While Plaintiffs may challenge whether the applicable product liability acts subsume their claims, they have not challenged the applicability of the law of the state

where the plaintiff was injured to product liability issues. Since Plaintiffs and Defendant are in agreement, there is no real choice of law issue present here, and the Court will apply the law of each Plaintiff's home state.⁴

4 Since the class has yet to be certified, only the law of each of the named Plaintiffs' home states will be addressed. *See Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 659 (3d Cir.1998) (stating that “[u]ntil the putative class is certified, the action is one between the [named plaintiffs] and the defendants. Accordingly, the First Amended Complaint must be evaluated as to these particular plaintiffs.”)

2. Subsumption of Counts Two, Three and Four Under the NJPLA and the TPLA

Since the product liability law of each Plaintiff's home state governs, the NJPLA applies to Plaintiff Kathy Maxson's claims. The NJPLA governs any “product liability action,” which is defined as “any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty.” N.J. Stat. Ann. § 2A:58C–1(b)(3). “Harm” is defined in the statute as, “(a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.” N.J. Stat. Ann. § 2A:58C–1(b)(2). Thus, the Third Circuit has determined that the NJPLA “effectively creates an exclusive statutory cause of action for claims falling within its purview.” *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir.1991). If any of Plaintiff Kathy Maxson's claims constitute a “product liability claim,” they will be subsumed under the NJPLA.

*4 Plaintiffs attempt to classify their claims as non-product liability claims by alleging only economic damages related to the price of the product as opposed to damages related to the harm caused by the product. However, “[limiting a claim to economic injury and the remedy sought to economic loss cannot be used to obviate the PLA.” *Vercelleno v. Gerber Prods. Co.*, Civ. No. 09–2350, 2010 U.S. Dist. LEXIS 9477, at *20, 2010 WL 455388 (D.N.J. Feb. 3, 2010). The New Jersey Supreme Court has expressly held that “[t]he language of the PLA represents a clear legislative intent that ... the PLA is paramount when the underlying claim is one for harm caused

by a product.” *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, 66, 948 A.2d 587 (N.J.2008). As such, regardless of how a claim is pleaded, where the *core issue* is the harmfulness of the product's chemicals, the claim must be pleaded as an NJPLA claim. *Crouch v. Johnson & Johnson*, Civ. No. 09–2905, 2010 WL 1530152, at *7 (D.N.J. Apr. 15, 2010).

Though Plaintiffs assert contract, quasi-contract, and consumer fraud claims, the core issue underlying Plaintiffs' claims is that the chemicals in Frontline products are dangerous and caused physical damage to Plaintiffs' property, in the form of harm to their pets' health. See *Harabes v. The Barkery, Inc.*, 348 N.J.Super. 366, 791 A.2d 1142, 1144 (N.J.Super. Ct. Law Div.2001) (classifying pets as personal property). This fits squarely within the NJPLA's definition of “harm” as “physical damage to property.” N.J. Stat. Ann. § 2A:58C–1(b)(2)(a).

While Plaintiffs point to the New Jersey Appellate Division case *Wendling v. Pfizer, Inc.*, No. L–348–04, 2008 WL 833549 (N.J.App.Div. Mar. 31, 2008), to support their position, the facts of *Wendling* are distinguishable. In *Wendling*, the plaintiffs brought a claim under the NJCFA that a product claiming to control tapeworms in horses failed to do so, causing harm to the plaintiffs' horses from tapeworms that were insufficiently treated. The Appellate Division found that the plaintiffs' claim was not subsumed by the NJPLA because in *Wendling*, “it was not the product itself that caused the harm, but allegedly its misleading promotion.” *Wendling*, 2008 WL 833549, at *8. Here, Plaintiffs are not alleging that Defendant's products failed to kill fleas and ticks, causing harm to Plaintiffs' pets because the fleas and ticks went untreated. Instead, Plaintiffs are alleging that the product is unusable as it harmed their pets in the process of successfully killing the fleas and ticks as promised. Simply “articulating a claim in terms of pure economic harm where the core issue is the potential injury arising as a consequence of the products' allegedly harmful chemicals” does not obviate the NJPLA's reach. *Vercelleno*, 2010 U.S. Dist. LEXIS 9477, at *20, 2010 WL 455388.⁵ Therefore, Plaintiff Kathy Maxson's breach of implied warranty, unjust enrichment and consumer fraud claims are subsumed under the NJPLA, as “irrespective of the theory underlying the claim,” the core issue in Plaintiffs' claims is “harm caused by a product.” N.J. Stat. Ann. § 2A:58C–1(b)(3).

⁵ Plaintiffs attempt to distinguish *Vercelleno*, as well as various other cases finding subsumption by the NJPLA, based on reasoning provided in dicta in

another decision that the NJPLA does not subsume claims where a breach of express warranty has been alleged and an NJPLA claim has not. See *In re Ford Motor Co. E–350 Van Products*, Civ. No. 03–4558, 2008 U.S. Dist. LEXIS 73690, *48 n. 9, 2008 WL 4126264 (D.N.J. Sept. 3, 2008). This Court disagrees with this reasoning, as no such proposition stems from the NJPLA or from the New Jersey Supreme Court's instructive decision in *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, 948 A.2d 587 (N.J.2008). While the NJPLA does expressly exempt breach of express warranty claims, the presence or absence of either a breach of express warranty claim or an NJPLA claim does not affect the analysis of Plaintiffs' other claims.

*5 Plaintiff Sandy Smith's breach of implied warranty, unjust enrichment and consumer fraud claims are similarly subsumed under the TPLA. The TPLA “includes all actions brought for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product.” *Tenn.Code Ann. § 29–28–102(6)*. The TPLA specifically includes in its purview claims for “breach of or failure to discharge a duty to warn or instruct,” “breach of warranty, express or implied,” and “any other substantive legal theory in tort or contract whatsoever.” *Id.* The language of the TPLA is at least as broad, if not broader, than the NJPLA. Therefore, both Plaintiffs fail to state a claim in Counts Two, Three and Four, for these claims must instead be brought as products liability claims as mandated by the NJPLA and the TPLA. While these claims fail as pleaded, the Court is making no determination at this juncture as to whether Plaintiffs can successfully state a claim under the requisite product liability statutes. As such, the Court will dismiss these claims, but will allow Plaintiffs the opportunity to amend the Complaint to plead them as product liability causes of action instead.

D. Count One—Breach of Express Warranty

Since claims for breach of express warranty are expressly preserved by the NJPLA, Count One is not subsumed.⁶ Defendant contends that Count One still fails to state a claim, however, because Plaintiffs have failed to allege any express warranty that was breached. Even if the statements cited by Plaintiffs constitute express warranties that were breached, Defendant further argues that the Count still fails to claim that they were part of the “basis of the bargain” for the product.

New Hope Pipe Liners, LLC v. Composites One, LCC, Civ. No. 09–3222, 2009 U.S. Dist. LEXIS 111217, at *15, 2009 WL 4282644 (D.N.J. Nov. 25, 2009).

⁶ Defendant does not address the application of the TPLA to Plaintiff Sandy Smith's breach of express warranty claim, therefore the Court will presume for the time being that Count One is not subsumed as to either named Plaintiff.

1. Choice of Law

Under New Jersey's "most significant relationship" test, the first step is to determine whether or not there is a true conflict between the laws. If there is no conflict, the law of the forum state applies. Since there is no evident conflict between New Jersey and Tennessee breach of express warranty law, Defendant does not contest Plaintiff's contention that the law of the forum state, New Jersey, applies.⁷ (Def.'s Reply Br. at 9 n. 6.)

⁷ The parties do not address the potential applicability of the law of Georgia, Defendant's principal place of business. Therefore, Georgia law will not be included in the choice of law analysis at this time. However, Defendant has expressly reserved its right to argue in future proceedings that another state's law applies. (Def.'s Reply Br. at 9 n. 6.)

2. Breach of Express Warranty

Under New Jersey law, in order to state a claim for breach of express warranty, Plaintiffs must properly allege: (1) that Defendant made an affirmation, promise or description about the product; (2) that this affirmation, promise or description became part of the basis of the bargain for the product; and (3) that the product ultimately did not conform to the affirmation, promise or description. *New Hope Pipe Liners*, 2009 U.S. Dist. LEXIS 111217, at *15; 2009 WL 4282644 N.J. Stat. Ann. § 12A:2–313. However, "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." N.J. Stat. Ann. § 12A:2–313(2). Additionally, statements that are nothing more than mere puffery are not considered specific enough to create an express warranty. *In re Toshiba Am. HD DVD Mktg. & Sales Practices Litig.*, Civ. No. 08–939, 2009 U.S. Dist. LEXIS 82833, at *48–49, 2009 WL 2940081 (D.N.J. Sept. 10, 2009) (dismissing a breach of warranty claim based on Defendant's statement that

HD DVD Players were for "Today, Tomorrow, and Beyond," since the statement is just "puffery"). Finally, courts have noted that "whether a given statement constitutes an express warranty is normally a question of fact for the jury." *In re Ford Motor Co. E–350 Van Prods. Liab. Litig.*, Civ. No. 03–4558, 2008 U.S. Dist. LEXIS 73690, at *13, 2008 WL 4126264 (D.N.J. Sept. 3, 2008); see also *Union Ink Co., Inc. v. AT & T Corp.*, 352 N.J. Super. 617, 645, 801 A.2d 361 (App.Div.2002) ("Whether the advertisements contained material misstatements of fact, or were merely puffing, as alleged by defendants, presents a question to be determined by the trier of fact.").

*6 Plaintiffs allege that Defendant made the following affirmations and promises:

(1) A statement on Merial's website that "Merial is committed to developing pharmaceuticals ... with the highest level of quality and safety." (Compl. ¶ 4; Ex. A.)

(2) A statement in a Frontline product insert under the heading, "PRECAUTIONARY STATEMENTS" and "HAZARDS TO DOMESTIC ANIMALS," which states, "[p]ets may experience some temporary irritation at the site of product application. If signs persist, or become more severe within a few days of application, consult a veterinarian immediately. If your pet has an unusual reaction to the initial application, consult a veterinarian before repeating treatment." (Compl. ¶ 8; Ex. B.)

(3) A press release by Merial stating that, "[although the EPA has stated that it has noted a 'sharp increase' in the number of reported adverse events associated with the use of spot-on flea and tick control products, our records do not indicate that this is the case for FRONTLINE." (Compl. ¶ 28; Ex. E.)

(4) A letter sent to veterinarians by Merial in the wake of the EPA's statements, stating that Frontline continues to offer the same "trusted, reliable protection." (Compl. ¶ 28; Ex. F.)⁸

⁸ Plaintiffs also rely on a statement that appears on "PetDrugs.com," a website hosted by a third-party vendor located in Canada. Since Plaintiffs do not allege that Merial was responsible for this statement, Merial cannot be held liable for the statement since it is by a third-party. Therefore, the PetDrugs.com statement will not be considered at this time.

Defendant alleges that these statements do not constitute express warranties under New Jersey law. The Court finds that, especially as to the statements made by Defendant in response to the EPA's April 21, 2009 press release, Plaintiffs' allegations identify specific affirmations or promises by Defendant that Frontline is safe to use on pets, and therefore survive a motion to dismiss. *See, e.g., Knipe v. Smithkline Beecham*, 583 F.Supp.2d 602, 625–626 (E.D.Pa.2008) (holding that Plaintiffs' showing that Defendant asserted in “various articles, conferences and journals presented to the medical community” that Paxil is safe and effective for children to use was sufficient for Plaintiffs' breach of express warranty claim to survive a motion for summary judgment). At the motion to dismiss stage, it is enough that Plaintiffs provide more than “bald assertions,” and identify specific affirmations by Defendant that could be found to constitute an express warranty. *Compare In re Ford Motor Co. E-350 Van*, 2008 U.S. Dist. LEXIS 73690, at *14–15, 2008 WL 4126264 (finding that an allegation that Ford described a van as a “15-passenger” van survived a motion to dismiss, as such a statement could constitute an “objective representation warranting the van's design and safety”), and *Taylor v. JVC Ams. Corp.*, Civ. No. 07–4059, 2008 U.S. Dist. LEXIS 43215, at *15–16, 2008 WL 2242451 (D.N.J. May 29, 2008) (allegation that television was sold as a “1080p” television but did not accept a 1080p signal found sufficient to survive motion to dismiss), with *Simmons v. Stryker Corp.*, Civ. No. 08–3451, 2008 U.S. Dist. LEXIS 93306, at *5, 2008 WL 4936982 (D.N.J. Nov. 17, 2008) (dismissing a claim that was “devoid of any ‘factual matter’ to support the existence of an express warranty”), and *Parker v. Howmedica Osteonics Corp.*, Civ. No. 07–2400, 2008 U.S. Dist. LEXIS 2570, at *21, 2008 WL 141628 (D.N.J. Jan. 14, 2008) (general references to “press releases” and “assurances of safety,” as opposed to specific statements, cannot survive a motion to dismiss), and *Heisner v. Genzyme Corp.*, No. 08–C–593, 2008 U.S. Dist. LEXIS 60569, at *24–25, 2008 WL 2940811 (N.D.Ill., July 25, 2008) (claim dismissed where plaintiff failed to specify any particular affirmation or promise by defendant).

*7 Defendant further contends that even if Plaintiffs have properly pleaded express warranties, they have failed to plead the “basis of the bargain” element of a breach of express warranty. However, “[t]o establish a breach of an express warranty under N.J. Stat. § 12A:2–101, the plaintiff need not prove privity or traditional reliance.” *Knipe*, 583 F.Supp.2d at 625. While some states require such elements, New Jersey's “basis of the bargain” requirement is much broader. Plaintiffs

must only show that the alleged express warranties “were of a kind which naturally would induce the purchase.” *Elias v. Ungar's Food Prods., Inc.*, 252 F.R.D. 233, 239 (D.N.J.2008).

Defendant claims that the Third Circuit further requires that a plaintiff prove he or she has “read, seen, or heard the advertisements at issue” to satisfy the “basis of the bargain” requirement. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 569 (3d Cir.1990). However, the *Cipollone* decision is narrower than Defendant's interpretation. First, the Court in *Cipollone* pointed out that this additional burden on the plaintiff would not apply where a “written warranty delivered to the purchaser in connection with a sale” was at issue. *Cipollone*, 893 F.2d at 567 n. 29. Here, one of the alleged warranties was included with the sale of the product, so that “there is no question that the plaintiff has knowledge that the alleged warranty exists.” *Id.* Furthermore, the requirement established in *Cipollone* was in regard to what must be included in jury instructions at trial, not what must be pleaded to survive a motion to dismiss. *Id.* at 563–64. At this stage, it is sufficient that Plaintiff has pleaded alleged warranties that plausibly could have been the basis of the bargain. *See In re Ford Motor Co. E-350 Van*, 2008 U.S. Dist. LEXIS 73690, 2008 WL 4126264 (holding that whether an alleged warranty was the basis of the bargain cannot be resolved on a motion to dismiss).

E. Preemption by FIFRA

Finally, Defendant contends that Plaintiffs' claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (“FIFRA”), as Plaintiffs' claims for relief seek to alter Frontline's EPA-approved label and package insert. FIFRA provides a comprehensive scheme for regulating labels used on pesticides such as Frontline. When a pesticide manufacturer applies to the EPA for registration of a pesticide product, the manufacturer “must submit a proposed label to [the] EPA as well as certain supporting data.” *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 438, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) (citing 7 U.S.C. § 136a). The EPA then determines what warnings or precautions must appear on the product's label, and notifies the manufacturer of its labeling decision. 7 U.S.C. § 136a(c). Under FIFRA, the EPA is essentially given full control to regulate labels used on pesticides. While state governments can regulate pesticide labeling in conjunction with the federal government, they are expressly prohibited from “imposing] or continuing] in effect any requirements for labeling or packaging in addition to or different from” those established by the federal government. 7 U.S.C. § 136v(b).

This includes “judge-made rules” in addition to statutes and regulations. *Bates*, 544 U.S. at 443. However, this preemption is limited in scope to judge-made requirements for “labeling or packaging,” where said requirements are more than is required under FIFRA. *Id.* at 444.

*8 The Supreme Court's decision in *Bates* instructs courts as to what types of claims are preempted by FIFRA. In *Bates*, the Supreme Court held that, “rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirement for labeling or packaging.” 544 U.S. at 444 (finding that the petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not pre-empted). The Supreme Court further explained that “the proper inquiry calls for an examination of the elements of the common-law duty at issue,” not an examination of the potential effects of imposing those common law requirements. *Id.* at 445. The Third Circuit, in examining Congress's purpose in passing FIFRA, additionally explains that Congress meant only to provide uniformity in labeling, and did not intend “to regulate sales literature generally and the legal obligations that can arise therefrom.” *Indian Brand Farms, Inc. v. Novartis Crop Prot., Inc.*, 617 F.3d 207, 217 (3d Cir.2010).

Plaintiffs' breach of express warranty claim is not preempted by FIFRA. As explained above, “rules that require manufacturers to ... honor their express warranties” are not preempted by FIFRA. *Bates*, 544 U.S. at 444. Furthermore, the Third Circuit has specifically held that FIFRA does not preempt claims based on breach of express warranty. *See Mortellite v. Novartis Crop Protection, Inc.*, 460 F.3d 483, 490 (3d Cir.2006) (holding that “FIFRA does not preempt claims based on theories of strict liability, negligent testing, and breach of express warranty”). Simply because success on a breach of express warranty claim may lead to a label change by Defendant does not mean the claim imposes a “requirement” within the meaning of FIFRA's preemption provision. *Id.* As such, Plaintiffs' breach of express warranty claim remains.

III. CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is **GRANTED** as to Counts Two, Three and Four, and Counts Two, Three and Four are **DISMISSED** as subsumed under the NJPLA and TPLA. Defendant's motion to dismiss as to Count One is **DENIED**. An Order follows this Opinion.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2119100

TAB 50

2005 WL 2037419



KeyCite Yellow Flag - Negative Treatment

Disagreed With by [C-Innovation, LLC v. Norddeutsche Seekabelewerke GMBH](#), E.D.La., March 13, 2013

2005 WL 2037419

Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.

Daimon STRODERD and Joseph
Richard, Jr. on Behalf of Themselves
and all Others Similarly Situated
v.

YAMAHA MOTOR CORPORATION, U.S.A.

No. Civ.A. 04-3040.

|
Aug. 4, 2005.

Attorneys and Law Firms

[Richard Collins Dalton](#), Dalton Law Firm, LLC, Lafayette,
LA, for Daimon Stroderd and Joseph Richard, Jr.

[Eugene R. Groves](#), [Edward D. Hughes](#), Taylor, Porter, Brooks
& Phillips, LLP, Baton Rouge, LA, [David P. Murray](#), [Jamie
R. Abrams](#), Willkie Farr & Gallagher LLP, Washington, DC,
Carrol L. Spell, Jr., Attorney at Law, Milton, LA, for Yamaha
Motor Corporation, U.S.A.

ORDER AND REASONS[FALLON, J.](#)

*1 Before the Court is the motion of Defendant Yamaha Motor Corporation, U.S.A. to dismiss with prejudice claims filed against it by Plaintiffs Daimon Stroderd and Joseph Richard, Jr. For the following reasons, Defendant's motion is GRANTED in part and DENIED in part.

I. BACKGROUND

In October and November 2002, Plaintiffs Daimon Stroderd and Joseph Richard, Jr. ("Plaintiffs") each purchased Yamaha Road Star Warrior motorcycles for approximately \$10,000. On January 9, 2004, Defendant Yamaha Motor Corporation U.S.A. ("Defendant") issued a "Safety Recall Notice" to all owners of 2002 and 2003 Yamaha Road Star Warrior

motorcycles. Defendant intended to use the recall to repair potential transmission failure in the motorcycles due to excessive wear.

The recall instructed Yamaha Road Star Warrior owners to stop using their motorcycles and to bring them in to an authorized dealer for repair at Yamaha's expense. The recall notice advised that the motorcycles would be kept in the repair shop for at least two days. Plaintiffs allege that the repairs took four to six months.

Plaintiffs filed suit in Louisiana state court on April 23, 2004 and sought class certification. Plaintiffs seek actual, consequential, and incidental damages relating to the cost of alternative transportation, loss of use, inconvenience, and diminution of value due to the defect and delay in repair. Plaintiffs base their complaint on four legal theories: redhibition, breach of contract, negligent repair, and the Louisiana Products Liability Act (hereinafter "LPLA" or "the Act"). On November 8, 2004, Defendant removed the case to this Court based upon diversity of citizenship.

**II. MOTION OF THE DEFENDANT
TO DISMISS PLAINTIFFS' CLAIMS**

On April 15, 2005, Defendant filed a motion to dismiss all of the Plaintiffs' claims pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#). Defendant moves to dismiss Plaintiffs' negligent repair and the breach of contract claims based on the exclusivity provisions of the LPLA. Defendant moves to dismiss Plaintiffs' redhibition claim, arguing that Louisiana redhibition law requires a defect to have manifested itself. Defendant also alleges that Plaintiffs' redhibition claim is too speculative to survive a [Rule 12\(b\)\(6\)](#) motion. Defendant moves to dismiss Plaintiffs' products liability claim, alleging that Plaintiffs have failed to satisfy either prong of the two-prong test required under Louisiana law. Finally, Defendant contends that the National Traffic and Motor Vehicle Safety Act ("Safety Act"), [49 U.S.C. § 30101 et seq.](#), bars Plaintiffs from asserting causes of action arising from a motor vehicle recall.

III. LAW & ANALYSIS**A. Legal Standard for Motion to Dismiss**

The Federal Rules of Civil Procedure permit a defendant to seek dismissal of a complaint based on the "failure to state a

2005 WL 2037419

claim upon which relief can be granted.” Fed.R.Civ.P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), a district court should construe the complaint liberally in favor of the plaintiff, assuming all factual allegations to be true. See *Leleux v. United States*, 178 F.3d 750, 754 (5th Cir.1999). Rule 12(b)(6) motions are viewed with disfavor and are rarely granted. See *id.* A complaint may not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* (quoting *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir.1997)).

B. Plaintiffs' Negligent Repair and Breach of Contract Claims

*2 Defendant moves to dismiss Plaintiffs' negligent repair and breach of contract claims. The core of Defendant's argument is that the LPLA subsumes all possible causes of action, with the exception of redhibition, against a manufacturer for damage caused by the manufacturer's products. The Court agrees with Defendant.

The LPLA “establishes the exclusive theories of liability for manufacturers for damage caused by their products.” La.Rev.Stat. Ann. § 9:2800.52. “Damage” is defined as “damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that [a redhibition cause of action] does not allow recovery for such damage or economic loss.” La.Rev.Stat. Ann. § 9:2800.53(5). A “manufacturer” is defined as a “person or entity who is in the business of manufacturing a product for placement into trade or commerce.” La.Rev.Stat. Ann. § 9:2800.53(1).

The drafters of the LPLA sought to strictly delimit possible bases of liability for manufacturers. Consideration and passage of the Act came on the heels of the Louisiana Supreme Court's 1986 decision in *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110 (La.1986), which expanded manufacturer liability to include strict liability for injuries caused by an “unreasonably dangerous per se” product. See John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 La.L.Rev. 565, 587 (1989) (hereinafter “Kennedy”).¹ The LPLA therefore set out four distinct and exclusive theories of liability.² The sole exception to the exclusivity provisions under the LPLA is redhibition, which the Act expressly preserved. See Kennedy at 580.

1 John Kennedy and Professor H. Alston Johnson III were the drafters of the LPLA. Kennedy at 565 n.a1.

2 Under the LPLA, a manufacturer is liable for damages caused by an unreasonably dangerous product. The four kinds of unreasonably dangerous product are: (1) in construction or composition; (2) in design; (3) because an adequate warning about the product has not been provided; and (4) because it does not conform to an express warranty of the manufacturer about the product. La.Rev.Stat. Ann. §§ 9:2800.55-58.

The plain language and legislative history of the LPLA demonstrate the legislature's intent to make the Act and Louisiana redhibition law the sole vehicles for a suit against a manufacturer for damages arising from a defective product. In *In re Air Bag Products Liability Litigation*, 7 F.Supp.2d 792 (E.D.La.1998), Judge Feldman held that plaintiffs, who brought “redhibition, breach of implied warranty of fitness for use, negligence per se ... and ‘other contract-related’ theories” against automobile manufacturers, were barred by the LPLA's exclusivity provisions from asserting all but their redhibition claims. *Id.* at 800. In *Jefferson v. Lead Industries Ass'n, Inc.*, 930 F.Supp. 241 (E.D.La.1996), Judge Vance held that plaintiffs, who alleged “negligence, fraud by misrepresentation, market share liability, breach of implied warranty of fitness and civil conspiracy” against lead paint manufacturers, had failed to state a claim because of the LPLA's exclusivity provisions. *Id.* at 244. The court expansively read the LPLA's exclusivity provisions to hold that “[a] plaintiff may not recover from a manufacturer for damage caused by a product on the basis of any theory of liability not set forth in the LPLA.” *Id.* at 244-45 citing *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 526 (5th Cir.1995). The Court finds the reasoning of these cases persuasive.

*3 Plaintiffs' claim of breach of contract of fitness for ordinary use fails for an independent reason as well: it is subsumed by Louisiana redhibition law. Plaintiffs contend that La. Civ.Code art. 2524 provides that a breach of contract of fitness for ordinary use claim is distinct from a redhibition claim. Article 2524 provides that a buyer has a cause of action against a seller if an item sold is not fit for the buyer's intended use. Article 2524's Revision Comments discuss the relationship of the breach of contract claims with Louisiana redhibition law. Comment (b) reads as follows:

that a buyer would still have bought it
but for a lesser price.

Under this Article when the thing sold is not fit for its ordinary use, even though it is free from redhibitory defects, the buyer may seek dissolution of the sale and damages, or just damages, under the general rules of conventional obligations. The buyer's action in such a case is one for breach of contract and not the action arising from the warranty against redhibitory defects.

In the present case, it is undisputed that the motorcycles at issue were not free from defects. Comment (b) implies that a breach of contract of fitness for ordinary use claim is only an independent cause of action when an item is free from redhibitory defects. This proposition has consistently been endorsed by the courts. *See, e.g., PPG Industries, Inc. v. Industrial Laminates Corp.*, 664 F.2d 1332, 1335 (5th Cir.1982) (“[C]ourts in Louisiana have held unequivocally that actions based on a breach of warranty against defects are to be brought in redhibition instead of as a breach of contract.”). The Court therefore concludes that Plaintiffs' breach of contract of fitness for ordinary use action under La. Civ.Code art. 2524 is further precluded by their redhibition claim.

C. Plaintiffs' Redhibition Claims

Defendant moves to dismiss Plaintiffs' redhibition claims as well. Defendant bases its motion on two arguments. First, Defendant alleges that a defect must have manifested itself for a redhibition claim to succeed. Second, Defendant alleges that the Plaintiffs' claim that the defect diminished the value of the motorcycles is too speculative to support the redhibition claim. The Court disagrees with the Defendant on both points.

Louisiana redhibition law provides two definitions of a redhibitory defect. The less stringent of the two definitions provides in pertinent part:

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed

La. Civ.Code art. 2520.

Defendant argues that courts have interpreted this clause to require a defect to have manifested itself. Defendant cites to a string of cases to support its contention that a manifested defect is a *prima facie* element of a redhibition claim. When read in context, each of these cases supports the opposite contention: that a plaintiff bears a minimal pleading burden in a redhibition claim. *See, e.g., Mid City Finance Co. v. Coleman*, 232 So.2d 918, 920 (La.App.1970) (characterizing the plaintiff's burden of proof as a showing of “unsatisfactory performance”); *Robinett v. Sears, Roebuck and Co.*, 485 So.2d 953, 954 (La.App.1986) (holding that a redhibitory defect exists if a product is not fit for its intended use). Plaintiffs cite to *In re Ford Motor Company Bronco II Products Liability Litigation*, 1995 WL 491155 (E.D.La.1995), in which plaintiffs sued on a sports-utility vehicle's propensity to roll over. The court held that although none of the plaintiffs had alleged that the vehicles had in fact rolled over, the mere propensity to do so was a sufficient allegation of a redhibitory defect.

*4 Defendant also overstates the Plaintiffs' burden of alleging harm. Defendant argues that “diminished value” is too speculative to support a redhibition claim, and that Plaintiffs are instead required to point to concrete harms that they have suffered. The broad language of La. Civ.Code art. 2520 undermines Defendant's argument. For a defect to be redhibitory, Plaintiffs need only allege that they would have purchased the motorcycles but for a lesser price. *See In re Ford Motor Company Bronco II*, 1995 WL 491155 at 9.

D. Plaintiffs' LPLA Claims

Defendant moves to dismiss Plaintiffs' products liability claims under the LPLA. Defendant argues that Plaintiffs' claim fails to satisfy either of the necessary elements required by the LPLA. First, Defendant asserts that Plaintiffs' have failed to demonstrate that their damages were proximately caused by an unreasonably dangerous characteristic of the motorcycles. Second, Defendant asserts that Plaintiffs' damages did not arise from reasonably anticipated use of the motorcycles. The Court agrees with the Defendant on both points.

2005 WL 2037419

A plaintiff bears a two-tiered burden in pleading a LPLA claim. The plaintiff must show that: “(1) his damages were proximately caused by a characteristic of the product that renders it unreasonably dangerous, and (2) his damages arose from a reasonably anticipated use of the product.” *Kampen v. American Isuzu Motors, Inc.*, 157 F.3d 306, 309 (5th Cir.1998) citing *La.Rev.Stat. Ann. § 9:2800.54(D)*. A product can be “unreasonably dangerous” in four ways: “(1) in construction or composition; (2) in design; (3) because of an inadequate warning; or, (4) because of nonconformity to an express warranty.” *Kampen*, 157 F.3d at 309 citing *La.Rev.Stat. Ann. § 9:2800.54(B)*.

In the present case, Plaintiffs can allege that their harms were caused either: (1) by the motorcycle's defect; or (2) by the tardiness of the recall. Both approaches are flawed. Under the first approach, Plaintiffs' damages (loss of use, *et cetera*) were neither proximately caused by a characteristic of the product nor arose from a reasonably anticipated use of the product. The defect may have been a cause in fact of the Plaintiffs damages, but the damages themselves were proximately caused by the alleged delay in the return of the motorcycles to their owners. The damages also did not arise from reasonably anticipated use of the product; rather, the damages arose from *non*-use of the product. The second approach fails even more fundamentally: nothing about the recall's defect was unreasonably dangerous.³

³ As discussed in the following section, an allegation that a recall was conducted improperly is likely preempted by the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*

The legislative history of the LPLA and the jurisprudence of Louisiana courts with regard to products liability against manufacturers further undermine Plaintiffs' LPLA claim. As outlined in the section above, the legislative history of the LPLA demonstrates a legislative intent to clearly outline the elements of a products liability cause of action against a manufacturer. *See generally* Kennedy. Moreover, courts have demonstrated that actions involving a latent defect sound in redhibition rather than in products liability. *Compare In re Ford Motor Company Bronco II Products Liability Litigation*, 1995 WL 491155 (E.D.La.1995) (Sear, J.) (holding that plaintiffs, owners of sports-utility vehicle with propensity to roll over, had stated a claim in redhibition even though none of their vehicles had actually rolled over) with *Willett v. Baxter Intern., Inc.*, 929 F.2d 1094 (5th Cir.1991) (Wisdom, J.) (granting summary judgment to defendants in LPLA suit by

plaintiffs, recipients of heart valve transplants with a potential but unrealized defect).

E. Safety Act's Preclusive Effect

*5 Defendant moves to dismiss all of Plaintiffs' claims based on the preemptive effect of the Safety Act. Defendant argues that any state suit concerning the administration of a motor vehicle recall conflicts with the Safety Act and is precluded. The Court agrees that the Safety Act has some preemptive and preclusive effect, but holds that the preclusive effect does not apply to Plaintiffs' state redhibition claims.

The purpose of the Safety Act is to prescribe uniform motor vehicle safety standards. 49 U.S.C. § 30101. The Safety Act provides a detailed method of commencing, administering, and overseeing recalls if a motor vehicle fails to satisfy enumerated safety requirements. 49 U.S.C. §§ 30118-30120. The Safety Act provides remedies for owners of vehicles subject to recall and provides for an administrative procedure for interested parties to criticize or comment on the recall process. *Id.* The Safety Act expressly preempts conflicting state regulations, but preserves a manufacturer's common law liability. 49 U.S.C. § 30103.

The Safety Act's express savings clause undermines Defendant's argument that Plaintiffs' common law redhibition claim is precluded. Defendant relies on cases such as *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000), and *Lilly v. Ford Motor Co.*, 2002 WL 84603 (N.D.Ill.2002) in which courts held that a state action conflicted with the Safety Act. *Geier* and *Lilly*, however, were cases concerning state actions in direct conflict with the Safety Act. *Geier*, 529 U.S. at 874 (“[A] common law “no airbag” action like the one before us actually conflicts with ... FMVSS 208 [which] sets a minimum airbag standard.”); *Lilly*, 2002 WL 84603 at 5 (“A nationwide court-ordered recall would conflict directly with and frustrate the Safety Act.”). Instead, the Safety Act's express savings clause contemplates that manufacturers remain liable at common law as long as there is no direct conflict. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 123 S.Ct. 518, 154 L.Ed.2d 466 (2002) (quoting *Geier*, 529 U.S. at 868 (“[The] saving clause assumes that there are some significant number of common-law liability cases to save and the language of the preemption provision permits a narrow reading that excludes common-law actions.”)). *See also Martin v. Ford Motor Co.*, 914 F.Supp. 1449, 1454 (S.D.Tex.1996) citing *Perry v. Mercedes Benz of North America*, 957 F.2d 1257 (5th Cir.1995) (“[S]tate causes of action not falling afoul of [direct conflict] may

2005 WL 2037419

be brought against automobile manufacturers despite the enactment of the Safety Act and federal safety regulations.”).

Plaintiffs' redhibition claim does not directly conflict with the principles underlying the Safety Act. The purpose of the Safety Act is to establish uniform guidelines for motor vehicle safety and to ensure that recalls are properly ordered and administered. A redhibition claim does not conflict or undermine either of those purposes. Instead, Plaintiffs' redhibition claim falls squarely within the savings clause anticipated by Congress in [49 U.S.C. § 30103\(e\)](#).

IV. CONCLUSION

*6 For the foregoing reasons, Defendant's motion to dismiss Plaintiffs' negligent repair, breach of contract, and LPLA claims are GRANTED. Defendant's motion to dismiss Plaintiffs' redhibition claim is DENIED.

All Citations

Not Reported in F.Supp.2d, 2005 WL 2037419

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 51

2020 WL 1237394

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas, Dallas Division.

Raymon J. SWEEZEY, IV

v.

C.R. BARD INCORPORATED et al.

CIVIL ACTION NO. 3:19-CV-2172-S

|

Signed 03/12/2020

Attorneys and Law Firms

Charla G. Aldous, Aldous Walker LLP, Kristi Elizabeth Wood, Ben C. Martin, Laura Jean Baughman, Martin Baughman PLLC, Thomas W. Arbon, Law Offices of Ben C. Martin, Dallas, TX, Julie L. Rhoades, Houston, TX, for Raymon J. Sweezy, IV.

Richard B. North, Jr., Pro Hac Vice, Brandee J. Kowalzyk, Pro Hac Vice, Elizabeth C. Helm, Matthew B. Lerner, Pro Hac Vice, Taylor Tapley Daly, Pro Hac Vice, Nelson Mullins Riley & Scarborough LLP, Atlanta, GA, James F. Rogers, Pro Hac Vice, Nelson Mullins Riley and Scarborough LLP, Columbia, SC, Jordan E. Jarreau, Melissa Dorman Matthews, Hartline Barger LLP, Dallas, TX, Matthew E. Brown, Pro Hac Vice, Nelson Mullins Riley & Scarborough LLP, Boston, MA, Philip M. Busman, Pro Hac Vice, Nelson Mullins Riley and Scarborough LLP, Washington, DC, for C.R. Bard Incorporated, Bard Peripheral Vascular Incorporated.

MEMORANDUM OPINION AND ORDERKAREN GREN SCHOLER, UNITED STATES DISTRICT
JUDGE

*1 This Order addresses Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.'s (collectively, "Defendants") Motion for Summary Judgment [ECF No. 95]. For the following reasons, the Court grants in part and denies in part the Motion.

I. BACKGROUND

Plaintiff Raymon Sweezy ("Plaintiff") was treated with Defendants' Recovery Inferior Vena Cava Filter ("Filter") on June 28, 2008. Mot. 4. Sometime thereafter, Plaintiff's filter allegedly migrated and perforated his Inferior Vena Cava ("IVC"). *See id.*; *see also* Resp. in Opp. to Mot. for Summ. J. ("Resp.") 6. Plaintiff brings claims for Strict Products Liability – Information Defect (Failure to Warn) (Count II); Strict Products Liability – Design Defect (Count III); Negligence – Design (Count IV); Negligence – Failure to Warn (Count VII); Negligent Misrepresentation (Count VIII); Negligence Per Se (Count IX); Breach of Express Warranty (Count X); Fraudulent Misrepresentation (Count XII); and Fraudulent Concealment (Count XIII).¹ *See* ECF No. 1. Plaintiff also seeks punitive damages. *Id.* at 3.

¹ Plaintiff withdrew his claims for Strict Products Liability – Manufacturing Defect (Count 1) and Negligence – Manufacture (Count V). This Order, therefore, does not address those claims.

Defendants filed the pending Motion on February 17, 2020, seeking summary judgment on all of Plaintiff's claims (including his claim for punitive damages). Mot. 1. For the following reasons, the Court grants the Motion with respect to Plaintiff's Negligence Per Se (Count IX) and Fraudulent Concealment (Count XIII) claims and denies the Motion as to the remaining claims.

II. ANALYSIS***A. Negligence Per Se (Count IX)***

"Negligence per se is a tort theory whereby courts use statutes or regulations to define the standard of reasonably prudent conduct." *Monk v. Wyeth Pharm., Inc.*, Civ. A. No. SA-16-CV-1273-XR, 2017 WL 2063008, at *8 (W.D. Tex. May 11, 2017) (quoting *Hackett v. G.D. Searle & Co.*, 246 F. Supp. 2d 591, 594 (W.D. Tex. 2002)). " 'Texas courts ... refuse to recognize a cause of action for negligence per se based on violations of the [FDCA] and FDA regulations.' " *Id.* (quoting *Holland v. Hoffman-La Roche, Inc.*, No. 3-06-CV-1298-BD, 2007 WL 4042757, at *3 (N.D. Tex. Nov. 15, 2007)); *see also Jackson v. Tae Jin Kim*, No. 2:02-CV-200, 2004 WL 6040969, at *4 (E.D. Tex. Sept. 27, 2004) (citing *Baker v. Smith & Nephew Richards, Inc.*, No. 95-58737, 1999 WL 811334, at *8 (Tex. Dist. June 7, 1999), *aff'd on other grounds sub. nom.*, *McMahon v. Smith & Nephew Richards, Inc.*, No. 14-99-00616-CV, 2000 WL 991697 (Tex. App.—Houston

[14th Dist.] July 20, 2000, no pet.)). Plaintiff does not dispute that his negligence per se claim is based on Defendants' alleged violations of the FDCA and FDA regulations. See Resp. 50. Accordingly, the Court grants summary judgment as to Plaintiff's negligence per se claim.

B. Fraudulent Concealment (Count XIII)

Under Texas law, "fraudulent concealment is not an independent cause of action, but is rather a tolling provision to prevent the defendant from relying upon a statute of limitations period as an affirmative defense." *Seismic Wells, LLC v. Matthews*, Civ. A. No. 5:15-CV-148-C, 2015 WL 11027778, at *4 (N.D. Tex. Sept. 11, 2015) (citing *Thompson v. Barnard*, 142 S.W.2d 238, 241 (Tex. Civ. App.—Waco 1940), *aff'd*, 158 S.W.2d 486 (Tex. 1942)). The Court, therefore, grants summary judgment as to Plaintiff's fraudulent concealment claim. Plaintiff has, however, preserved his right to assert fraudulent concealment as a defense to limitations at trial. See *Smith v. Palafox*, Civil No. EP-15-CV-00201-DB-RFC, 2016 WL 10515973, at *7 (W.D. Tex. Sept. 28, 2016) (citing *Nichols v. Smith*, 507 S.W.2d 518, 520 (Tex. 1974)).

C. Remaining Claims

*2 With respect to the remaining claims, the Court finds that Plaintiff has established that there is a genuine issue of material fact so that a reasonable jury might return a verdict in his favor. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Therefore, the Court denies the Motion as to those claims.

III. CONCLUSION

For the reasons discussed above, the Court grants the Motion as to Counts IX and XIII and denies the Motion as to all other Counts.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 1237394

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 52

2002 WL 31667901

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware.

TOTAL CARE PHYSICIANS, P.A., and Total
Care Physicians, Glasgow, P .A., Plaintiffs,

v.

Kevin W. O'HARA, M.D., et al., Defendants.

No. Civ.A.99C-11-201-JRS.

|

Submitted July 12, 2002.

|

Decided Oct. 29, 2002.

Attorneys and Law Firms

Jeffrey S. Welch, and Garvan McDaniel, Welch & Associates,
P.A., Wilmington, DE, for Plaintiffs.Charles M. Oberly, III, and Karen V. Sullivan, Oberly,
Jennings & Rhodunda, P.A., Wilmington, DE, for
Defendants.

MEMORANDUM OPINION

*DECISION AFTER NON-JURY TRIAL AND POST-
TRIAL MEMORANDA. VERDICT FOR PLAINTIFF
ON COUNT VI. JUDGMENT FOR DEFENDANTS
AS A MATTER OF LAW AS TO COUNTS I AND VII.*

SLIGHTS, J.

I. INTRODUCTION

*1 Plaintiff, Total Care Physicians, P.A. ("TCP"), initiated this litigation against defendants, Kevin W. O'Hara, M.D. ("O'Hara") and Millcreek Medical Associates P.A. ("Millcreek"), after O'Hara terminated his employment with TCP to form Millcreek with another physician. TCP has alleged that O'Hara wrongfully solicited TCP patients to join him at his new medical practice. The Court previously addressed this case on cross-motions for summary judgment and, at the conclusion of that process, substantially pared

down the issues remaining for trial.¹ Three counts of the plaintiff's amended complaint survived summary judgment: Count I-unjust enrichment; Count VI-misappropriation of trade secrets; and Count VII-breach of fiduciary duty.² The Court ordered bifurcation of the issues of liability and damages.³

¹ *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043 (Del.Super.2001).

² *Id.*

³ Prior to trial, the parties requested the Court to clarify this order, specifically with respect to causation, in the hopes that clarification might assist the parties in their efforts to settle the case. Specifically, the parties inquired whether the Court was expecting to receive evidence in the first phase of the trial on the issue of whether any misappropriation of trade secrets that may have occurred proximately caused damages to TCP. As the issue was refined, the question evolved into whether TCP would have to prove that each patient who left TCP to join O'Hara at Millcreek did so as a proximate result of the alleged misappropriation. While the Court did provide the parties with some advisory guidance with respect to this issue as requested, ultimately the Court told the parties that the causation issue would be addressed in the second phase of the trial to the extent a second phase was necessary.

The matter was tried to the Court over three days in June, 2002. At the conclusion of the trial, the Court requested the parties to submit post-trial memoranda focusing on the distinction between, on the one hand, a physician properly *notifying* his patients of his departure from one medical practice to join another practice in keeping with his ethical responsibilities and, on the other hand, a physician improperly *soliciting* patients of a medical practice to join him in a new practice. The Court advised the parties that the notification-versus-solicitation distinction likely would be at the heart of the Court's decision on at least one of TCP's three claims for relief.

As can be discerned below, the Court has determined that O'Hara improperly solicited TCP patients to transfer their care to Millcreek. The Court also has determined that O'Hara identified the targets of his solicitation by utilizing TCP's

confidential and proprietary information. Consequently, the Court has concluded that O'Hara misappropriated TCP's trade secrets. Accordingly, the Court's verdict is in favor of TCP on Count VI of the complaint. As to Counts I and VII, the Court will enter judgment as a matter of law in favor of the defendants for the reasons stated below.

II. FINDINGS OF FACT

A. O'Hara's Practice At TCP

O'Hara joined TCP in June of 1992. The letter agreement memorializing O'Hara's relationship with TCP, dated June 2, 1994 (the "letter agreement"), provided that O'Hara would "provide medical services for [TCP] as an independent contractor."⁴ In the years that followed, O'Hara developed a large following of patients whom O'Hara considered to be his own. He would also, on occasion, treat individuals he considered to be patients of TCP or other individual TCP physicians.

⁴ (Pl.'s Ex. 1 at ¶ 1)

The letter agreement required TCP to offer O'Hara a "financial interest" in TCP no later than December 30, 1995. When O'Hara became convinced that no such offer would be forthcoming from TCP, he began to explore other opportunities in the Wilmington medical community. These explorations led O'Hara to Stuart Felzer, M.D. ("Felzer") who was looking for a physician to join his practice for the purpose of sharing an existing (and ever-growing) patient load. Felzer did not plan to add new patients to his practice. Nevertheless, O'Hara acknowledges that Felzer did not discourage him from bringing patients with him from TCP, and O'Hara's conduct after he struck a deal with Felzer suggests that he did not wish to leave patients behind when he left TCP.

B. O'Hara Leaves TCP

*2 O'Hara notified TCP of his intent to leave the practice by letter dated December 29, 1995. Near the end of March or beginning of April, 1996, O'Hara met briefly with Dr. Constantine Michell ("C.Michell"), a principal of TCP, to discuss O'Hara's impending departure from the practice. Both parties agree that during this brief encounter O'Hara and C. Michell discussed the need to notify O'Hara's patients that he was leaving TCP and to advise them where he was going.

That a discussion occurred and that it addressed generally the topic of patient notification are the only aspects of this key piece of the factual puzzle on which the parties agree. O'Hara recalls that C. Michell authorized him to notify his patients but did not specify the means or the content of such notification. According to O'Hara, this "blanket authorization" later was echoed by TCP's other principal, Dr. Theodore Michell ("T.Michell"). C. Michell testified that he gave O'Hara very specific instructions that the notification was to be provided orally when patients came to see O'Hara, and that the notification should be limited to: (i) the fact that O'Hara was leaving TCP; (ii) where he was going; and (iii) advising the patients that they may chose to follow O'Hara or remain at TCP. C. Michell believes that he specifically admonished O'Hara not to send a mass-mailed letter to patients.

The preponderance of the evidence supports O'Hara's recollection of this discussion. C. Michell readily acknowledged that O'Hara had a professional and ethical responsibility to notify his patients that he was leaving TCP and to advise them where he was going. This duty did not extend only to those patients who happened to see O'Hara in the office between April and June, 1996.⁵ The duty to notify patients extended to all of O'Hara's patients, whether they were seen in the office or not. The limitations imposed upon O'Hara in C. Michell's rendition of his conversation with O'Hara would allow no means by which patients not seen by O'Hara in the office would be notified. This result would be contrary to the stated goal of both TCP and O'Hara that all of O'Hara's patients receive notification of O'Hara's move. The Court finds, as a matter of fact, that TCP authorized O'Hara to notify patients and did not restrict him with respect to the means by which the notification would occur.

⁵ Both parties agreed that O'Hara was authorized to begin notifying patients of his departure in April, 1996. He left TCP at the end of June, 1996.

Having concluded that O'Hara was authorized by TCP to notify his patients of his departure from the practice, and that he was not restricted in the means by which he could effect this notification, the Court next must consider whether O'Hara was authorized to utilize TCP's records to obtain the information needed to contact the patients he did not see in the office. O'Hara acknowledges that he did not discuss this issue with anyone from TCP. Instead, he assumed that implicit in the authorization to notify patients was the authority to obtain patient identity and address information from TCP's

records. O'Hara utilized TCP's super bills,⁶ insurance lists and medical records to compile a list of his patients and their addresses so that he could send a mass-mailed letter purportedly to advise patients of his departure from TCP and his new association with Felzer. O'Hara estimates that the letter went to as many as 900 patients.

⁶ A "super bill" is a written compilation of patient data, including the patient's identity, diagnosis, treatments, insurance and address information used by the practice internally to process requests for reimbursement for medical services from insurance carriers and government programs.

*3 TCP's general endorsement of O'Hara's authority to notify patients of his departure compels the conclusion that O'Hara was authorized to use TCP information to compile a list of patients (with addresses) to effect the notification. TCP acknowledges that it assumed no responsibility whatsoever for notifying O'Hara's patients; O'Hara was to perform whatever notification was to occur on his own. Under these circumstances, when TCP authorized O'Hara to notify patients, it implicitly authorized him to utilize the TCP information that was available to him to compile a list of his patients and their addresses. To conclude otherwise would be to conclude that TCP authorized O'Hara to notify all of his patients but forbade him from determining the identity and addresses of those patients. Nothing in the record suggests that TCP had resorted to this kind of gamesmanship in its dealings with O'Hara or with patients.

C. O'Hara's Mass-Mailed Letter to Patients

On June 17, 1996, O'Hara mailed the following letter to more than 900 of his TCP patients:⁷

⁷ The letter was dated June 1, 1996 but mailed on June 17. At trial, the parties disputed whether all 900 patients who received this letter were, in fact, O'Hara's patients. TCP contends that some of the 900 patients had never been treated by O'Hara and others had been treated by O'Hara on a limited basis on behalf of other physicians at TCP. TCP did not prove this contention by a preponderance of the evidence. The record was, at best, opaque with respect to this issue. The Court has determined that all of the patients who received O'Hara's letter had an interest in knowing that he was leaving TCP.

I am pleased to inform you that on July 1, 1996 I will be leaving Total Care Physicians to join Stuart Felzer in our new office listed above [the letterhead provided Felzer's office address]. Dr. Felzer is an excellent physician whom I have known since 1982.

You can feel confident that we will provide top quality healthcare for you and your family in our new location. We are board certified physicians who offer comprehensive and preventative care for patients starting from the age of six. Our office is conveniently located at the center of many health services, including on-site laboratory, radiology, physical therapy, and many additional medical services close by.

You are receiving this letter because either we have an established relationship and/or you have selected me as your primary care physician (PCP) with your insurance plan. In order for me to continue as your PCP at my new location, the insurers require that *you* notify them directly. You *will not automatically* be transferred with me.

Therefore, if you wish to retain me as your PCP, please contact your member services number listed below and inform them of your intentions *as soon as possible*. Please make sure to include all applicable family members. Failure to do so may result in problems with insurance coverage for office visits.

Also, Total Care Physicians will require a signed request in order to forward your records to my new office. Therefore, I have included a records request form for that purpose. Simply list all family members requesting transfer, sign the form, and mail it to the office where your records are filed.

I appreciate your taking the time to do these tasks now as this will make the transition much smoother for all of us.

Sincerely,

Kevin W. O'Hara, M.D.⁸

⁸ (Pl.'s Ex. 5)(emphasis in original).

O'Hara constructed this letter on his own; he did not seek input from Felzer or from legal counsel. And he did not clear the letter with TCP before sending it. According to TCP, between June 17 (the date the letter was mailed) and July 3, TCP received upwards of 500 requests for records

from patients who had received O'Hara's letter. On average, TCP fielded 15-20 calls per day from O'Hara's patients in the weeks following his departure. Needless to say, the transition, from TCP's perspective, was anything but smooth. O'Hara estimates that approximately 640 patients ultimately left TCP to join him in his new practice.

*4 The Court already has determined that TCP authorized O'Hara to *notify* his patients of his departure from the practice and of his new location. Thus, to the extent the letter simply notified patients as authorized by TCP, there can be no actionable claim based on the letter, even if its sending caused disruption at TCP. The question, then, prompted by the evidence is: did O'Hara's letter constitute an authorized *notification* of patients or an unauthorized *solicitation* of patients? The answer to this question is significant because if O'Hara utilized (appropriated) TCP's trade secret information to solicit TCP's patients without TCP's permission, then O'Hara may be liable for, among other claims, misappropriation of trade secrets. The resolution of this issue, and the implications flowing therefrom, implicate mixed questions of law and fact. The Court will address them below.

III. CONCLUSIONS OF LAW

A. Misappropriation of Trade Secrets

In Delaware, the claim of misappropriation of trade secrets is a creature of statute.⁹ The elements of the claim are well-settled: (1) a trade secret; (2) communicated by the plaintiff to the defendant; (3) pursuant to an express or implied understanding that the secrecy of the matter would be respected; and (4) which the defendant improperly has used to the injury of the plaintiff.¹⁰ The Court will address the proof with respect to these elements *seriatim*.

⁹ See DEL.CODE ANN. tit. 6, §§ 2001-2009 (1999).

¹⁰ *Total Care Physicians, P.A.*, 798 A.2d at 1053 (citation omitted).

1. The Existence and Communication of Trade Secrets
The Court already has determined that TCP's super bills constituted trade secrets and were entitled to the statutory protection from misappropriation codified in Delaware's Uniform Trade Secrets Act.¹¹ And the parties do not dispute that TCP "communicated" the trade secrets-the super bills-to

O'Hara by giving him unfettered access to them.¹² Nothing in the trial record suggests to the Court that its conclusions in this regard should be revisited.

¹¹ *Id.* at 1053-54.

¹² *Id.* at 1054.

2. Did O'Hara Understand That the Super Bills Were to Remain Secret?

O'Hara was not a rookie when he joined TCP. He had associated with at least one other medical practice prior to associating with TCP and had left that practice in a context which required him to adhere to restrictive covenants. He also was a savvy businessman, as recognized by the Court in its prior decision.¹³ The manner in which he secured, copied, and later used the super bills reflects an understanding on his part that the information contained in those documents was valuable to TCP (and its physicians) and that it was not for public consumption. Finally, even though he did not sign the document, the record reflects that O'Hara was made aware of a revised contract TCP was asking its physicians to sign which expressly provided that all TCP documents were to be kept confidential.¹⁴

¹³ *Id.* at 1052 (noting that O'Hara negotiated a favorable contract with conditional restrictive covenants which were triggered only if TCP offered him an equity stake in the practice, and that he carefully conducted his activities in accordance with the contract to avoid its restrictive covenants).

¹⁴ (Pl.'s Ex. 4 at ¶ 18).

Based on the foregoing, the Court is satisfied that TCP proved by a preponderance of the evidence that O'Hara used the super bills with an implied (if not express) understanding that the information was to be kept secret and was to be utilized only in accordance with TCP's authorization.

3. Did O'Hara Improperly Use The Trade Secret Information?

*5 " 'Misappropriation' shall mean ... [d]isclosure or use of a trade secret of another without express or implied consent by a person who, ... [a]t the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade [sic] was ... [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limits its use." ¹⁵ The success

2002 1 WL8995008

of TCP's claim of misappropriation turns on whether O'Hara's use of the trade secret information was with or without TCP's "express or implied consent."

¹⁵ DEL.CODE ANN. tit. 6, § 2001(2)(b)(2)(B) (1999).

To reiterate, the Court has concluded, as a matter of fact, that TCP implicitly authorized O'Hara to utilize its trade secret information (super bills and other patient identifiers) for the purpose of notifying appropriate TCP patients that he was departing the practice and advising them of his new location. Even if TCP had not authorized O'Hara to notify patients (expressly or implicitly), the Court, for reasons discussed below, would conclude that applicable standards of professional ethics and Delaware public policy compelled O'Hara to notify his patients that he was leaving TCP and joining Millcreek. Accordingly, to the extent the June 1 letter simply notified patients, O'Hara's use of TCP's trade secrets to construct and/or mail the letter would not constitute a misappropriation of trade secrets. Such use either was expressly authorized by TCP, implicitly authorized by TCP, or mandated by governing rules of professional responsibility and Delaware public policy.¹⁶

¹⁶ By no means should this conclusion be read as an endorsement of a patient's right of action against a physician for failure of the physician to notify the patient of his departure from a medical practice. This question is not before the Court. Nor has the Court concluded as a matter of law that all employees leaving an employer may utilize the employer's trade secret information to notify customers of their departure. The Court's holding in this case is limited to the factual scenario presented here: a physician with an existing patient base who departs one medical practice to join another.

The Court also has concluded, as a matter of fact, that TCP did not authorize O'Hara to solicit patients from TCP to his new practice at Millcreek. Thus, to the extent O'Hara used TCP's super bills to launch an unauthorized solicitation of TCP patients, the Court would be obliged to conclude that O'Hara misappropriated TCP's trade secrets.¹⁷

¹⁷ DEL.CODE ANN. tit. 6, § 2001(2)(b)(2)(B) (1999).

To determine whether O'Hara's June 1, 1996 letter was a notification or solicitation, and to confirm that this distinction

is relevant in the context of a physician's responsibilities and proscriptions when departing a medical practice, the Court has sought direction from ethical standards of the American Medical Association ("AMA"), Delaware's public policy as embodied in its statutes, and analogous case law.¹⁸

¹⁸ At the outset, the Court notes that O'Hara has never argued that he was authorized by TCP, or otherwise permitted, to solicit TCP patients to join him at Millcreek. Instead, he has argued that he was authorized by TCP to *notify* patients and that his letter to patients did nothing more than that. And, although he cites to AMA ethical standards and Delaware statutes in support of his argument that patient notification was mandated, O'Hara has not utilized this authority to justify the actual text of his June 1, 1996 letter to patients.

a. The AMA Code of Medical Ethics

The AMA begins its analysis of the physician's duty to patients when he departs one medical practice to join another with the fundamental (practically Hippocratic) recognition that "[t]he interest of the patient is paramount in the practice of medicine, and everything that can reasonably and lawfully be done to serve that interest must be done by all physicians who have served or are serving the patient."¹⁹ In this regard, the AMA has determined that the best interests of the patient mandate that when a physician leaves a group practice, the physician's patients "must be notified that the physician is leaving the group."²⁰ "Patients of the physician must also be notified of the physician's new address and offered the opportunity to have their medical records forwarded to the departing physician at his or her new practice."²¹ Finally, the AMA admonishes that "[i]f the responsibility for notifying patients falls to the departing physician rather than to the group, the group should not interfere with the discharge of these duties by withholding patient lists or other necessary information."²²

¹⁹ AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS § 7.01 (1994).

²⁰ *Id.* at § 7.03.

²¹ *Id.*

²² *Id.*

*6 The AMA's Code of Medical Ethics provides meaningful guidance on at least two fronts. First, it confirms that the departing physician's ethical duty is to "notify", not solicit, patients when he leaves a medical practice.²³ Second, it confirms that the practice from which the physician is departing has responsibilities along with the departing physician-the practice either notifies the appropriate patients of the departure of one of its physicians or it stands out of the way of the departing physician as he discharges his duty to notify.²⁴ Either way, it is understood that all patients of the departing physician will be notified and that it may be necessary to utilize patient lists or other confidential information to identify these patients and to facilitate the notification.

²³ Notification, from the AMA's perspective, involves: (1) telling the patient the physician is leaving; (2) telling the patient where the physician is going; and (3) telling the patient that he may follow the physician if he so chooses. *Id.*

²⁴ Here, the evidence clearly demonstrated that TCP did nothing to notify its patients of O'Hara's departure. The responsibility for doing so, therefore, fell to O'Hara.

At trial, both TCP and O'Hara recognized the mandate of patient notification as codified by the AMA. For its part, TCP contended that the AMA did not require TCP to permit O'Hara to notify his patients of his departure by a mass-mailed letter. The Court already has concluded that TCP's proffered alternative method of notification was, at best, unreasonable and, more likely, chimerical. The AMA supports the notion that all patients must be notified of the physician's departure, not just those patients who happen to see the physician in the office before he leaves the practice. For his part, O'Hara claims that he was motivated, at least partially, to prepare his June 1 letter by the mandate of the AMA's ethical standards. Yet, when pressed, he admitted that he had not referred to them when he actually constructed the letter. Thus, it appears that he was unaware that while the AMA required him to notify his patients of his departure, to advise them of his new location, and to provide a means by which they could transfer their records to the new practice if they wished to do so, it did not give him license to solicit their business.

b. Delaware's Public Policy

Although at times expressed by our courts, Delaware's public policy most frequently is expressed in the voice

of our General Assembly. And, when it comes to a patient's right of access to healthcare, Delaware's General Assembly has spoken loud and clear. Delaware provides a right to healthcare to eligible citizens who are unable to pay for care,²⁵ rights to fair treatment from healthcare insurers,²⁶ and a highly regulated framework within which physicians are licensed, are required to obtain continuing medical education, and are subject to discipline.²⁷ The General Assembly also has recognized the importance of maintaining the continuity of care by protecting the physician-patient relationship. Not only has the physician-patient relationship been recognized to create a protected privilege,²⁸ it also is the source of Delaware's statute prohibiting restrictive covenants in physician "employment, partnership or corporate agreements."²⁹ Indeed, the synopsis to Senate Bill 294 recognizes that "[b]ecause patients establish relationships with their physicians and/or enter into courses of treatment with particular physicians, the patients should not be deprived of the services of the physician of their choice because of an economic contract entered into between two physicians."³⁰ It is not surprising, then, that one year after disallowing contracts that restrict a physician's right to provide medical services to his patients within the State, the General Assembly enacted a law which required physicians to notify their patients when they discontinue their practice within the State for any reason.³¹

²⁵ DEL.CODE ANN. tit. 31, § 505 (1997).

²⁶ DEL.CODE ANN. tit. 18, §§ 3301-3343, 3501-3566, 3401-3409, 4401-4420, 6301-6309, 6401-6408, and 7101-7109 (1999).

²⁷ DEL.CODE ANN. tit. 24, § 1701 (1997).

²⁸ See Del. R. Evid. 503 (codifying the physician-patient privilege).

²⁹ DEL.CODE ANN. tit. 6, § 2707 (1999).

³⁰ S.B. 294, 132nd Gen. Assem., Reg. Sess. (synopsis)(Del.1983)(enacted as DEL.CODE ANN. tit. 6, § 2707).

³¹ DEL.CODE ANN. tit. 24, § 1761(a)(1997) (enacting H.B. 870, 132nd Gen. Assem., Reg. Sess. (Del.1984)).

*7 It is against this statutory framework, in which the sanctity of the physician-patient relationship is embroidered in the fabric of Delaware's public policy, that the Court takes comfort in recognizing a physician's right to notify his patients when he departs one medical practice and joins another. Thus, as stated above, even if TCP had not expressly or implicitly authorized O'Hara to notify his patients of his departure, the Court would have sanctioned his notifications in any event as an act compelled by the spirit (if not the letter) of Delaware's statutory treatment of the physician-patient relationship. But nothing in Delaware's statutes or public policy encourages or authorizes a physician to solicit patients from one medical practice to another, particularly when he uses the protected trade secrets of the target medical practice to accomplish the inducement.

The Court is satisfied that the distinction it seeks to fashion between a proper notification of patients and an improper solicitation of patients is well-grounded in Delaware's public policy. Aside from confirming that the distinction is valid, however, Delaware statutory law offers nothing by way of interpretive guidance in determining whether O'Hara's letter notified patients or solicited them.

c. The Distinction Between Notification and Solicitation
As Recognized in the Case Law

The parties have suggested that the propriety of a physician's conduct when communicating with patients regarding his departure from a medical practice raises questions of first impression in Delaware. This may be so, but at least one Delaware court has offered meaningful guidance. In *Dickinson Medical Group, P.A. v. Foote*,³² Chancellor Brown addressed a medical practice's claim that a departing physician had misappropriated trade secrets by surreptitiously removing confidential patient records for use in starting a new practice. Like O'Hara, the departing physician (Foote) argued that she had a "professional responsibility" to notify patients that she was leaving the medical practice (Dickinson) to start her own practice. And, like O'Hara, Foote argued that she should be permitted to utilize Dickinson's patient lists to make contact with patients for whom she had provided care. The Court disagreed. Concluding that the patient lists were trade secrets,³³ the court enjoined Foote from utilizing the lists to make direct contact with Dickinson's patients.³⁴

³² 1984 Del. Ch. LEXIS 429, 1984 WL 8208 (Del. Ch.).

³³ *Id.* at *6-7.

³⁴ *Id.* at *7.

Chancellor Brown's holding reveals that he was concerned that Foote would solicit Dickinson's patients improperly and that Dickinson would be harmed irreparably as a result.³⁵ But the court also recognized that Dickinson's patients should be notified that Foote no longer was practicing with Dickinson and that they should be offered a choice of where to seek medical care. Accordingly, the court directed Dickinson to notify patients of Foote's departure and of her "professional whereabouts" and also to advise patients that they may continue to treat with Dickinson, follow Foote to her new practice, or seek a new physician of their choice.³⁶ While perhaps not directly addressed by Chancellor Brown in *Dickinson*, the distinction between notifying and soliciting patients was at least implicitly recognized by him as he "fashioned [the court's] remedy to fit the occasion."³⁷

³⁵ *Id.* at *2-3 ("Dickinson seeks an order temporarily enjoining Dr. Foote from using the patient for purposes of [a] competing business solicitation....").

³⁶ *Id.* at *8.

³⁷ *Id.*

*8 Courts elsewhere have addressed the distinction more directly. For instance, when interpreting California's Uniform Trade Secrets Act, the United States Court of Appeals for the Ninth Circuit has held:

The UTSA definition of "misappropriation" has been clarified by case law which establishes that the right to announce a new affiliation, even to trade secret clients of a former employer, is basic to an individual's right to engage in fair competition, and that the common law right to compete fairly and the right to announce a new business affiliation have survived the enactment of the UTSA. (citation omitted) However, misappropriation occurs if information from a customer data base is used to solicit customers.

2002 1 WL8995@08

(citation omitted) Merely informing a former employer's customers of a change of employment, without more, is not solicitation. (citation omitted)³⁸

³⁸ *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir.1993).

Several other courts have drawn this distinction as well.³⁹

³⁹ See e.g., *Rao v. Verde*, 222 A.D.2d 569, 635 N.Y.S.2d 660, 661 (N.Y.Sup.1995)(deciding that physician may notify patients of departure but may not solicit); *Core v. Martin*, 543 So.2d 619, 622 (La.App.1989)(stating that veterinarian may announce his departure but may not solicit); *Maryland Metals, Inc. v. Metzner*, 282 Md. 31, 382 A.2d 564, 568 (Md.App.1978)(asserting that employee may notify customers of departure but may not solicit); *Crane Co. v. Dahle*, 576 P.2d 870, 872 (Utah 1978)(same); *Alder, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1184-86 (Pa.1978)(same).

The Supreme Court of California has referred to Black's Law Dictionary to define "solicit":

"Solicit" is defined as: 'To ask for the earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite.' (Black's Law Dictionary, 3d ed., p. 1639) 'It implies personal petition and importunity addressed to a particular individual to do some particular thing ...' (citation omitted) It means: "To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; to entreat, implore, or importune; to make petition to; to plead for; to try to obtain."⁴⁰

⁴⁰ *Aetna Building Maintenance Co., Inc. v. West*, 39 Cal.2d 198, 246 P.2d 11, 15 (Cal.1952).

In a later decision of the California Court of Appeals, the court referred to *Aetna's* definition of "solicit" when considering the propriety of the following letter written by an insurance agent to customers of his former firm as he was departing the business:

After almost fifteen years as both an agent and policyholder, I have left [ACI] and am very pleased to announce the formation of an independent insurance agency. I shall continue to specialize in Credit Insurance but will now primarily be representing Fidelity and Deposit Company of Maryland, who [sic] is offering companies a very interesting alternative to the types of policies being written by both [ACI] and Continental. If you would like to learn more about the [F & D] policy, I will be happy to discuss it in detail with you when you are ready to review your ongoing credit insurance needs at renewal time. In the meantime, ACI will assign a new agent to your policy. If I can be of assistance to you during the transition period or answer any questions for you at any time, please do not hesitate to call me. I have really enjoyed our past association and hope we don't lose touch!⁴¹

⁴¹ *American Credit Indemnity Co. v. Sacks*, 213 Cal.App.3d 622, 625, 262 Cal.Rptr. 92 (Cal.App.1989).

After recognizing the agent's right to announce her departure from the firm to customers with whom she had conducted business, the court held that her letter to customers "went beyond an appropriate professional announcement and constituted a solicitation of the ACI customer list."⁴² The court went on to explain how the "announcement letter" was transformed into an improper solicitation:

⁴² *Id.* at 633, 262 Cal.Rptr. 92.

*9 Although the letter begins as an announcement of her departure from ACI and affiliation with F & D, it soon assumes a different tone. Sacks (the agent) informs ACI's customers of the interesting competitive alternative F &

D offers as compared to ACI's policies. She invites their inquiry about the F & D policy and indicates she would be happy to discuss it in detail when they are ready to renew. She personally petitions, importunes and entreats ACI's customers to call her at any time for information about the better policies F & D can provide and for assistance during the agent transition period. Phrased in the terms used in the *Aetna* definition, Sacks is endeavoring to obtain their business. Sacks, in a word, solicited. Therefore, as a matter of law, Sack's letter ... constituted a solicitation.⁴³

⁴³ *Id.* at 636, 262 Cal.Rptr. 92.

In contrast, a mass-mailed letter to customers of an accounting firm by a departing accountant which simply announced his departure and provided the name, address and telephone number of his new firm was deemed not to be an improper solicitation.⁴⁴ "Merely informing customers ... of a change of employment, without more, is not solicitation."⁴⁵ And, when approached by customers, the former employee may discuss transferring the customer's business to the new firm.⁴⁶

⁴⁴ *See Moss, Adams & Co. v. Shilling*, 179 Cal.App.3d 124, 127, 224 Cal.Rptr. 456 (Cal.App.1986).

⁴⁵ *Aetna*, 246 P.2d at 15.

⁴⁶ *See Hilb, Rogal & Hamilton Ins. Sevs. Of Orange County v. Robb*, 33 Cal.App. 4th 1812 (Cal.App.1995)(deciding that former employee did not misappropriate customer list and other client information by informing agency's clients of his change of employment and then complying with their instructions to move their accounts).

d. O'Hara's Letter Solicited TCP Patients

The Court has discerned the following guidance from the AMA standards, Delaware public policy and the case law: (1) a proper notification will supply the patient with information which will allow him to continue to receive care from the physician after he leaves a medical practice; (2) this information should include the fact that the physician is leaving a practice, the location of the new practice, and the means by which the patient can transfer his medical records from the old practice to the new practice if he so chooses; and (3) the notification should not include statements which will either encourage the patient to leave the physician's former practice or transfer care to the new practice-stated differently,

the physician should not "endeavor to obtain [the patient's] business."⁴⁷

⁴⁷ *Sacks*, 213 Cal.App.3d at 636, 262 Cal.Rptr. 92.

O'Hara's June 1 letter "endeavors to obtain [the] business" of TCP patients. Like the insurance agent in *Sacks*, O'Hara begins his letter with a proper announcement of his departure from TCP and relocation to Millcreek. This was authorized by TCP and mandated by governing rules of professional responsibility and Delaware public policy. Later in the letter, O'Hara advises patients how to transfer their records to Millcreek if they so choose. Again, this information is proper in that it does not encourage the transfer of care; it simply provides the means by which a transfer would occur if the patient elects to follow O'Hara to Millcreek.⁴⁸ But, like the agent in *Sacks*, O'Hara did not stop there. He goes on to tout the quality of care that will be offered at the new practice and the quality of the facilities in which the care will be rendered. This is solicitation.⁴⁹ Since TCP did not authorize O'Hara to utilize its trade secrets to solicit TCP patients, and the Court can see no other basis to sanction the solicitation, the Court must conclude that O'Hara misappropriated TCP's trade secrets.

⁴⁸ *See AMERICAN MEDICAL ASSOCIATION*, *supra* note 19.

⁴⁹ O'Hara has offered no justification for this portion of the letter and the Court can think of none other than to entice patients to leave TCP and join O'Hara at Millcreek.

e. TCP May Proceed To The Second Phase Of The Trial To Prove Its Damages

***10** The Court ordered bifurcation of the issues of liability and damages. Having concluded that misappropriation has occurred, the Court must look ahead to the next phase of these proceedings. Certainly, TCP may now endeavor to prove its damages. Yet the Court must confess that its vision of how the damages phase of the trial will unfold, or at least the framework in which it will proceed, is less than clear. The Court has determined that some portions of the June 1 letter were proper, others were not. Arguably, TCP would be required to prove that patients left TCP as a result of the solicitous portions of the letter, as opposed to those portions of the letter which properly announced O'Hara's departure from

the practice.⁵⁰ The Court will expect the parties to address this issue in advance of the next phase of the trial.

⁵⁰ See *Marsico v. Cole*, 1995 Del. Ch. LEXIS 78, at *25, 1995 WL 408877 (Del. Ch.) (“No reliable or credible evidence was presented as to the extent to which [the departing physician] has been enriched, if at all, by virtue of the misappropriation of trade secrets.”); *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (S.C.App.2000)(noting that there was no evidence presented that clients' decision to transfer their business to defendant's new employer was the result of the solicitation on the part of the employee); *Western Electro-Plating Co. v. Henness*, 196 Cal.App.2d 564, 571-72, 16 Cal.Rptr. 691 (Cal.App.1961)(asserting that trial court should receive evidence that transfer of business to employee's new business was not the result of solicitation); *Dunsmore & Assoc., Ltd. v. D'Alessio*, 2000 Conn.Super. LEXIS 114, at *33, 2000 WL 124995 (“Actual loss in this context [a misappropriation claim] means the amount of money that the plaintiff lost from the defendant's misappropriation; it is measured by how much better off the plaintiff would have been but for the defendant's misappropriation.”).

B. Unjust Enrichment

“The elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy at law.”⁵¹ In light of the Court's decision on TCP's misappropriation of trade secrets claim, the unjust enrichment claim may be disposed of as a matter of law. TCP has an adequate remedy at law: its claim for damages resulting from the misappropriation of its trade secrets. It need not invoke this Court's sense “of justice or equity and good conscience” to secure relief.⁵² When a plaintiff may avail itself of an adequate remedy at law, this Court will not hear a claim sounding in unjust enrichment.⁵³ The Court will enter judgment for the defendants on TCP's unjust enrichment claim is dismissed as a matter of law.⁵⁴

⁵¹ *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del.Ch.1999) (citations omitted).

⁵² See *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1062 (Del.1988)(“Unjust enrichment is defined as ‘the unjust retention of a benefit to the loss of another ... against fundamental principles of justice or equity or good conscience.’”).

⁵³ See e.g., *R.M. Williams Co., Inc. v. Frabizzio*, 1993 Del.Super. LEXIS 55, at *42-44, 1993 WL 54423 (Del.Super.) (dismissing unjust enrichment claim when remedy at law was available to the plaintiff).

⁵⁴ At the conclusion of the trial, the Court suggested that the unjust enrichment claim would be displaced by the misappropriation of trade secrets claim. Cf. *Leucadia, Inc. v. Applied Extrusion Techs.*, 755 F.Supp. 635, 637 (D.Del.1991)(stating that the Uniform Trade Secrets Act “was intended to preserve a single tort cause of action under state law for misappropriation ... and ... to eliminate other tort causes of action founded on allegations of trade secret misappropriation”)(citing DEL.CODE ANN. tit. 6, § 2007(a)(1999)). On reflection, the Court has determined that it is more accurate to say that the misappropriation of trade secrets claim affords TCP an adequate remedy at law which, in turn, disables its unjust enrichment claim. The unjust enrichment claim is not a tort-based claim and is not, therefore, subject to the statutory preemption addressed in *Leucadia*.

C. Breach of Fiduciary Duty

In its decision on the cross motions for summary judgment, the Court determined that O'Hara owed a fiduciary duty to TCP to protect TCP's trade secrets.⁵⁵ This determination was made after reviewing an undisputed record with respect to the nature of the relationship between TCP and O'Hara as recounted in TCP's amended complaint. The Court also relied upon then Vice Chancellor Chandler's decision in *Marsico v. Cole* in which he concluded that an independent contractor physician owed “a duty of loyalty” to the medical practice in which he worked to “protect[] trade secrets or confidential, proprietary information.”⁵⁶

⁵⁵ *Total Care Physicians, P.A.*, 798 A.2d at 1058.

⁵⁶ *Id.* at 1059 (citing *Marsico*, 1995 Del. Ch. LEXIS 78, at *5-7), 1995 WL 408877.

Unfortunately, at no time during the pendency of the cross motions for summary judgment did either of the parties advise the Court that the Court of Chancery had already addressed the breach of fiduciary claim when the case was pending there. Specifically, in connection with a motion to dismiss filed on behalf of all defendants, the Court of Chancery concluded that it lacked jurisdiction over the controversy because TCP had failed to plead a claim for breach of fiduciary duty.⁵⁷ By its order dismissing the case for lack of equitable jurisdiction, the Court of Chancery, in effect, dismissed the breach of fiduciary duty claim. This is the law of the case. Absent a finding by this Court that the Vice Chancellor's ruling was "clearly erroneous," the issue should not be re-litigated here.⁵⁸

⁵⁷ See *Total Care Physicians, P.A. v. O'Hara*, C.A. No. 16313-NC (Del. Ch. Nov. 8, 1999)(Tr. at 29)("I don't think that the allegation suffices to plead to the facts creating a special relationship between Dr. O'Hara and Total Care. In fact, I'd be quite troubled to recognize such a fiduciary obligation.").

⁵⁸ See *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del.2000).

*11 Although it is not clear whether the Court of Chancery considered *Marsico* in reaching its conclusion that a fiduciary duty could not exist under the circumstances presented here,

the Court is not "left with the definite and firm conviction that a mistake has been committed."⁵⁹ Reasonable minds could differ with respect to the nature and character of the parties' relationship. Accordingly, the Court will respect the law of the case. Judgment will be entered in favor of the defendants on Count VII as a matter of law.

⁵⁹ *Berglund v. Horgan*, 1997 Del. Ch. LEXIS 153, at *12, 1997 WL 695568 (Del. Ch.) (defining "clearly erroneous").

IV. CONCLUSION

The Court has concluded that O'Hara misappropriated TCP's trade secrets by using them to conduct an unauthorized solicitation of TCP's patients. TCP may now attempt to prove its damages with respect to this claim. The Court also has determined that judgment should be entered as a matter of law in favor of the defendants as to Counts I and VII. The Prothonotary will enter these judgments on the docket forthwith.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2002 WL 31667901

TAB 53

2006 WL 2807342

Only the Westlaw citation is currently available.
 United States District Court,
 N.D. Oklahoma.

UNITED GOLF, LLC, an Oklahoma corporation;
 and Northeastern Irrigation & Landscape,
 Inc., an Oklahoma corporation, Plaintiffs,

v.

WESTLAKE CHEMICAL CORPORATION, a
 Delaware corporation; and North American Pipe
 Corporation, a Delaware corporation, Defendants.

No. 05-CV-0495-CVE-PJC.

|
 Aug. 15, 2006.

Attorneys and Law Firms

James Michael Love, Titus Hillis Reynolds Love Dickman &
 McCalmon, Tulsa, OK, for Plaintiffs.

Cason Paul Carter, David Edward Keglovits, Erin K. Dailey,
 Gable & Gotwals, Tulsa, OK, for Defendants.

OPINION AND ORDER

CLAIRE V. EAGAN, Chief Judge.

*1 Now before the Court is Defendants' Motion to Dismiss and Brief in Support (Dkt.# 20). Defendants motion to dismiss is a partial motion to dismiss alleging that: (1) plaintiffs have no basis to assert a subrogation right under their contract with the City of Tulsa ("the City"); and (2) plaintiffs' sole remedy for alleged deficiencies with the pipes plaintiffs purchased is provided by the Uniform Commercial Code ("UCC").

I.

Plaintiffs United Golf, LLC ("United Golf") and Northeastern Irrigation & Landscape, Inc. ("Northeastern") allege that they were awarded a contract by the City to install a new sprinkler system at the Page Belcher Golf Course in Tulsa, Oklahoma. United Golf was the general contractor and Northeastern was retained as a subcontractor to perform the installation. Plaintiffs purchased polyvinyl chloride ("PVC") pipes from a distributor, and plaintiffs allege that

the pipes were designed and manufactured by Westlake Chemical Corporation ("Westlake") and North American Pipe Corporation ("North American"). Sometime after the pipes were installed, many of the pipes began to leak. The leaks caused the sprinkler system to fail, resulting in too much water in some places on the golf course and not enough water in other places. Plaintiffs had to remove the pipes and replace them with pipes from a different manufacturer.

When plaintiffs removed the pipes, they had to tear up significant sections of sod to dig below the surface to access the pipes. Under plaintiffs' contract with the City, they were required to replace the pipes and pay for replacement of the sod. Asserting subrogation rights under the contract, plaintiffs sued North American and Westlake¹ for products liability, breach of implied warranty, and negligence.² Plaintiffs allege that defendants designed and manufactured defective pipes. Plaintiffs also allege that defendants acted negligently by designing defective pipes, causing damage to the golf course, and failing to warn plaintiffs the pipes could leak. Defendants argue that the economic loss rule recognized by the Oklahoma Supreme Court bars plaintiffs' claims for manufacturers' products liability and negligence. According to defendants, plaintiffs may not seek recovery under a tort theory when the only injury they complain of is damage to the subject product. Plaintiffs claim that they have also pled damages for replacing sod in order to access the damaged pipes, which is sufficient to state a products liability claim for damage to other property.

¹ Plaintiffs have filed a stipulation of dismissal with prejudice of Westlake, leaving North American as the sole defendant.

² Plaintiffs have asserted several varieties of products liability and negligence claims, including: (1) products liability—design defect; (2) products liability—manufacturing defect; (3) products liability—failure to warn; (5) negligent damage to property; (6) negligent design defect; (7) negligent manufacturing; and (8) negligent failure to warn.

II.

When reviewing a motion to dismiss under Rule 12(b)(6), the court must construe the allegations of the complaint as true and view the allegations in the light most favorable to the nonmoving party. *Moffett v. Halliburton Energy Services, Inc.*, 291 F.3d 1227, 1231 (10th Cir.2002). A Rule 12(b)(6)

motion “should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Sutton v. Utah State School for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999).

III.

*2 North American raises two primary arguments in its motion to dismiss. First, defendant argues that plaintiffs have failed to state a basis for equitable subrogation and may not pursue products liability or negligence claim for injuries to the City. Second, defendant argues that the economic loss rule prevents plaintiffs from proceeding with their claim for products liability and negligence, because their alleged injury is harm to the product itself and consequential economic damages.

A.

Plaintiffs have based their right to bring claims against North American on an alleged right of equitable subrogation under their contract with the City. The Oklahoma Supreme Court has recognized the doctrine of equitable subrogation, but has provided few bright lines rules for its application. *Sexton v. Continental Cas. Co.*, 816 P.2d 1135, 816 P.2d 1135, 1138 (Okla.1991); *Republic Underwriters Ins. Co. v. Fire Ins. Exchange*, 655 P.2d 544, 546 (Okla.1982); *Lawyers' Title Guar. Fund v. Sanders*, 571 P.2d 454, 456 (Okla.1977); *Rice-Bell Partnership v. Capitol Indem. Corp.*, 8 P.3d 189, 192 (Okla.Civ.App.2000). Equitable subrogation is a purely equitable doctrine

based on the relationship of the parties and equitable principles of establishing substantial justice, and it is broad enough to include every instance where one person who is not a mere volunteer, pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter.

United States Fidelity and Guar. Co. v. Federated Rural Electric Ins. Corp., 37 P.3d 828, 831 (Okla.2001). North American argues that plaintiffs never received an assignment of rights from the City to pursue a subrogation claim and that it is not primarily answerable for any debt to the City.

The Court does not find that dismissal as a matter of law would be appropriate, because of the fluid and fact specific nature of equitable subrogation. Plaintiffs were not required to seek a formal assignment or transfer of rights from the City before alleging a right to equitable subrogation. “Equitable subrogation ... does not depend upon a contract but arises by implication in equity to prevent an injustice.” *Id.* Plaintiffs have alleged a basis for equitable subrogation by stating that they entered a contract with the City and were required to pay for repairs due to defendants' defective pipes. Construing the facts in favor of plaintiffs, it is possible that plaintiffs incurred a debt to replace and reinstall pipes which defendants had a duty to guaranty under warranty. This satisfies the pleading requirements for equitable subrogation. The Court may not weigh the facts to determine if the equities will inevitably support plaintiffs' claims, because plaintiff has stated sufficient facts to allege an equitable right to recovery. The law does not clearly favor dismissal of plaintiffs' claims based on a failure to plead a right to equitable subrogation and defendants' motion to dismiss is denied on the issue of equitable subrogation.

B.

*3 North American asserts that plaintiffs are barred from proceeding with products liability or negligence claims against it, because plaintiffs' exclusive remedy is provided by the UCC. Oklahoma recognizes the economic loss rule, which provides that a manufacturers' products liability claim is not available “for injury only to the product itself resulting in purely economic loss.” *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 653 (Okla.1990). The reasoning of *Waggoner* applies to the full range of unintentional torts, precluding negligence or products liability claims when the UCC provides a comprehensive remedy for plaintiff's economic injury. *Id.* at 652–53. Plaintiffs respond that, in order to repair and reinstall the leaking pipes, they were required to remove sod from the golf course, and that they are seeking damages for something more than replacing the allegedly defective PVC pipes.

Oklahoma adopted the economic loss rule stated by the Supreme Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), where the Court held that a products liability claim was not available in admiralty cases when the only injury suffered by plaintiff was harm to the product itself. *Id.* at 874–75. In cases where the only harm is to the product, the underlying rationale for products liability claims—protecting the general public from accidental injury—is significantly weakened. *Id.* at 871. The Oklahoma Supreme Court adopted this rule in *Waggoner*, where the plaintiffs' only injury was to the mobile home they purchased from the defendant manufacturer. The *Waggoner* court stated:

The facts of this case involve only economic loss and disappointment associated with manufacturer's unsuccessful attempts to remedy condensation within consumers' mobile home. No personal injury or damage to other property occurred. Damage was limited to the product itself. Therefore, any recovery must be based upon the contractual relationship, specifically the warranty provisions, express or implied.

Id. at 653. In cases where the plaintiff suffers economic injury only, the proper remedies are provided by the warranty provisions of the UCC.

The Oklahoma Supreme Court has amended the economic loss rule in two important ways. The economic loss rule does not apply in any case where the plaintiff is alleging a personal injury from using an allegedly defective and unreasonably dangerous product. *Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 193–94 (Okla.1992) (plaintiff could collect damages for personal injury and damage to the product in a products liability action without bringing a separate breach of warranty claim to recover damages for economic loss). However, when plaintiff alleges an economic injury for damage to the product itself and for consequential damages, such as to ancillary equipment, clean-up, repair, and reinstallation costs, the economic loss rule applies. *Oklahoma Gas & Electric Co. v. McGraw-Edison Co.*, 834 P.2d 980, 982 (Okla.1992) (“damages to the product and consequential economic losses sounds in contract, not in manufacturers' products liability”).

In order to resolve defendant's motion to dismiss, the Court must discuss the parameters of the economic loss rule as clarified in *Dutsch* and *Oklahoma Gas & Electric Co.*

*4 In *Dutsch*, a motor boat exploded, causing the boat owner personal injuries and destroying the boat. 845 P.2d at 188. The owner sued the manufacturer using a manufacturers' products liability theory and recovered damages for his personal injuries and property loss. The manufacturer appealed, claiming that *Waggoner* prevented the boat owner from recovering for property damage to the defective product. The Oklahoma Supreme Court held that the economic loss rule did not preclude recovery for damage to the product in cases where the plaintiff was personally injured or suffered damage to other property. *Id.* at 193. The court focused on the presence of a personal injury and distinguished *Waggoner* based on the lack of a personal injury to the plaintiff in *Waggoner*. The court found that it would not be consistent with the policy supporting manufacturers' products liability claims to require a plaintiff suffering a personal injury to bring two separate claims to recover for personal injuries and economic loss. *Id.* at 193–94.

In *Oklahoma Gas & Electric Company*, the Oklahoma Supreme Court was asked to answer a certified question from the Tenth Circuit, which was whether “a plaintiff in a manufacturers' products liability action [can] recover damages for injury to the allegedly defective product itself and consequential economic harm flowing from that injury.” 834 P.2d at 981. The Oklahoma Supreme Court answered in the negative, finding that *Waggoner* prevented a plaintiff from using a tort claim to recover purely economic damages flowing from damage to a defective product. *Id.* In this case, the plaintiff purchased a three-phase power transformer designed by McGraw-Edison Company (“McGraw-Edison”). The transformer exploded, destroying the transformer and damaging equipment connected to the transformer. Plaintiff filed a products liability claim to recover “actual damages for injury to the allegedly defective transformer and ancillary equipment and consequential damages for clean-up, repair and reinstallation of the transformer, rental and handling of a temporary transformer and lost profits.” *Id.* The Oklahoma Supreme Court found that this case was controlled by *Waggoner*, because there was no personal injury or damage to other property. In cases where the “buyer's economic expectations are adequately protected by the warranty provisions of the Uniform Commercial Code,” no unintentional tort claim is available. *Id.* at 982.

However, the court did not define the terms “consequential damages” or “other property,” leaving those questions open.

Plaintiffs do not dispute that they are seeking damages for “the repair and replacement of the sprinkler system and the replacement of damaged sod at the Page Belcher Golf Course.” Plaintiffs claim that the damaged sod qualifies as “other property” under *Waggoner* and *Dutsch*, and that this case does not fall under the economic loss rule. To date, the Oklahoma Supreme Court has not clarified what was intended by the term “consequential damages” in *Oklahoma Gas & Electric Co.* However, the UCC does provide a definition:

***5** (2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty. *Okla. Stat. tit. 12A, § 2–715*. Subsection (b) is directly on point and provides strong evidence that the Oklahoma legislature intended claims such as plaintiffs' to be governed by the UCC instead of tort law. The UCC provides a remedy to a buyer for “all damages resulting from his breach if they arise from circumstances that the seller knew about or had reason to know about, even if he did not consciously assume the risk of such liability.” *Atlan Indus., Inc. v. O.E.M., Inc.*, 555 F.Supp. 184, 190 (W.D.Okla.1983). The Oklahoma Supreme Court has focused on the foreseeability of damages to determine if the alleged harm qualifies as consequential damages under the UCC. *John A. Brown Co. v. Shelton*, 391 P.2d 259, 263–64 (Okla.1964). In *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458 (Okla.1980), a farmer sued a tractor manufacturer for crop losses because the manufacturer sold a defective tractor. The Oklahoma Supreme Court found the crop losses to be consequential damages, stating:

The element of foreseeability circumscribes the outer limit of damages recoverable both ex contractu and ex delicto. It is risk reasonably to be anticipated from the breach of an obligation. Occurrence of crop loss while equipment designed and sold for use in harvesting remains disabled and repairs diligently made come too late for meaningful deployment of the machine in the field certainly is an event that flows naturally from the breach of implied warranty of

fitness. It is a loss well within the contemplation, and hence within the sweep, of the warrantor's assumed liability.

Id. at 464 n. 13.

Plaintiffs' claim falls within the scope of the UCC and they can receive all of the damages they seek through their breach of warranty claim. *Moss v. Polyco, Inc.*, 522 P.2d 622, 625 (Okla.1974). This case falls squarely under *Oklahoma Gas & Electric Co.* It was foreseeable that the surface of the golf course would be damaged if North American sold plaintiffs defective pipes that had to be replaced. Plaintiffs did not incur any expense for the sod because they had an ownership interest in the sod. They had a contractual duty to the City to repair the sprinkler system and clean up the golf course after performing their required repairs to the defective pipes. In essence, the damage to the sod flowed from the breach of warranty and plaintiffs' interest in the sod arose from the breach of warranty. In *Oklahoma Gas & Electric Co.*, the injured plaintiff owned all of the damaged equipment, but as long the damages sought were economic in nature and could be considered consequential to the breach of warranty, the plaintiff could not pursue a tort claim. In products liability cases for damage to other property, Oklahoma courts have allowed the claims because the defective product directly damaged other property owned by the plaintiff. See *Kimbrell v. Zenith Radio Corp.*, 555 P.2d 590 (1976) (defective wiring in television allegedly caused fire damage to plaintiff's home); *Canadian Public School Dist. No. 2 v. McGraw–Edison Mfg. Co.*, 634 P.2d 782, 786 (Okla.Civ.App.1981) (defendant's failure to keep pressure in gas lines caused plaintiff's school to burn down). Here, the damage to the sod is a foreseeable injury flowing from the alleged defects with the pipes, and this is not the type of “other property” products liability claim allowed by Oklahoma law.

***6** The present case is a classic breach of warranty case. Defendants sold plaintiffs PVC piping that allegedly did not meet the required specifications. Plaintiffs had to remove defendants' pipes and reinstall new pipes from a different manufacturer to satisfy their customer. Plaintiffs did not acquire the product as members of the general public, but instead, through a contract negotiated with defendants and its distributor. Incidentally, some sod on the golf course was damaged because plaintiffs had to dig up the pipes in order to reinstall new PVC pipes for the sprinkler system. Although there may be cases where products liability and breach of warranty theories provide parallel types of relief, this case is not one of them. The rationale for allowing a products liability claim in the present case is strained, because the primary

reason for adopting a manufacturers' products liability cause of action was to protect members of the general public from injuries caused by defective products. *Allenberg v. Bentley Hedges Travel Serv., Inc.*, 22 P.3d 223, 227 (Okla.2001) (“We recognized that manufacturers' products liability is founded upon public interest in human safety and that the rationale for adopting the rule is that the manufacturer of the product is responsible for the product reaching its market, and the manufacturer is best situated to provide protection against the risk of injuries caused by a defective product.”); *Waggoner*, 808 P.2d at 652 (“[products liability] is independent of UCC warranty provisions because recovery under manufacturers' products liability arises from a duty to the public rather than from a contractual relationship”); *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1362 (Okla.1974) (“The rationale for such a rule is founded upon public interest in human safety ...”). This is precisely the kind of case the Oklahoma

Supreme Court intended to fall under *Oklahoma Gas & Electric Co.*, because plaintiffs are adequately protected by UCC remedies and there is no risk of harm to the general public if plaintiffs are not allowed to pursue a products liability claim. The Court finds that plaintiffs' tort claims should be dismissed, because the UCC provides the exclusive remedy for the purely economic recovery sought by plaintiffs.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss and Brief in Support (Dkt.# 20) is **granted**; claims 1, 2, 3, 5, 6, 7, and 8 of plaintiff's First Amended Complaint (Dkt.# 13) are **dismissed**.

All Citations

Not Reported in F.Supp.2d, 2006 WL 2807342

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 54

2013 WL 6152312

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

Bruce VIND, et al., Appellants,

v.

Shane McGUIRE d/b/a The Gold Guys,
and Gold Guys MN, LLC, defendant
and third party plaintiff, Respondent,

v.

Kevin Weiss, et al., Third Party Defendants.

No. A13-0591.

|

Nov. 25, 2013.

Synopsis

Background: In separate conciliation-court actions, based on allegations that registered precious-metals dealer violated the precious-metals-holding statute, victims of jewelry thefts were granted damages against dealer. Dealer appealed the conciliation-court judgments to the district court, and in district court, victims filed complaints for money damages. The District Court, Hennepin County, consolidated the cases and granted summary judgment to dealer. Victims appealed.

Holdings: The Court of Appeals, [Stoneburner](#), J., held that:

[1] legislature has not authorized a private-attorney-general action for alleged violations of the precious-metals-holding statute, and

[2] victims could not pursue an action in negligence per se against precious-metals dealer.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (3)

[1] **Action** Statutory Rights of Action
Antitrust and Trade Regulation Private
Entities or Individuals

Legislature has not authorized a private-attorney-general action for alleged violations of the precious-metals-holding statute. [M.S.A. §§ 8.31, subds. 1, 3a, 325F.731-325F.744.](#)

[2] **Action** Statutory Rights of Action
Antitrust and Trade Regulation Private
Entities or Individuals

Legislature plainly limited the attorney general's authority to bring a civil action to licensing issues regarding precious-metals dealer and invoked powers under statute, setting forth additional duties of attorney general, only for the purpose of pursuing such licensing actions, and thus, legislature did not contemplate a private-attorney-general action for an alleged violation of precious-metals statutes. [M.S.A. § 8.31, 325.744, 325F.731-325F.744.](#)

[3] **Negligence** Violations of Statutes and
Other Regulations

Even if victims of jewelry thefts were within the intended protection of the precious-metals-holding statute and the harm suffered was of the type the statute was intended to prevent, because the legislature did not provide a private cause of action for violation of the statute, victims could not pursue an action in negligence per se against precious-metals dealer. [M.S.A. § 325F.731-325.744.](#)

Hennepin County District Court, File No. 27CV1210652.

201WL 3 4162W2

Attorneys and Law Firms

Michael B. Lammers, Heimerl & Lammers, LLC, Minneapolis, MN, for appellants.

Richard A. Saliterman, Brett M. Larson, Saliterman & Siefferman, P.C., Minneapolis, MN, for respondents.

Considered and decided by [STONEBURNER](#), Presiding Judge; [HUDSON](#), Judge; and [HOOTEN](#), Judge.

UNPUBLISHED OPINION

[STONEBURNER](#), Judge.

*1 Appellants, victims of jewelry thefts, challenge summary judgment to respondents, precious-metal dealers, dismissing appellants' private-attorney-general claims for damages under [Minn.Stat. § 8.31, subd. 3a \(2012\)](#), and their negligence per se claims for violation of [Minn.Stat. § 325F.736 \(2012\)](#) (precious-metals-holding statute), which requires precious-metal dealers to retain secondhand items containing precious metal without alteration for a period of at least 14 days. Appellants argue that the district court erred by (1) concluding that respondents' compliance with a local ordinance, which provides an alternative to the holding period, precludes action under the precious-metals-holding statute and (2) holding, in the alternative, that appellants failed to meet the public-interest requirement to pursue a private-attorney-general action for violation of the statute. Because the legislature has not extended the right to bring a private-attorney-general action to claims for violation of the precious-metals-holding statute and has not provided a private cause of action for violations of the statute, the district court correctly concluded that appellants cannot pursue their private actions for violation of the statute. We affirm without deciding the validity of the ordinance challenged by appellants.

FACTS

The facts in this appeal are not in dispute. Respondents, The Gold Guys and Gold Guys MN, LLC (collectively, Gold Guys), are registered precious-metals dealers in Minnesota, operating a store in the Mall of America that is licensed by the City of Bloomington under a local ordinance. At all times relevant, Gold Guys has complied with the ordinance under which it is licensed.

In 2011, four rings, valued at \$4,220 were stolen from the residence of appellants Bruce and Laura Vind and were sold to Gold Guys on the day they were stolen. In an unrelated transaction, jewelry stolen from appellant Alice Menchaca's residence, valued at \$5,000, was sold to Gold Guys within one to three days of the theft. Gold Guys melted down or altered the Vinds' rings within 24 hours of purchasing them and melted down or altered Menchaca's jewelry within a week of purchasing it.

In separate conciliation-court actions, based on allegations that Gold Guys violated the precious-metals-holding statute, the Vinds and Menchaca were granted damages against Gold Guys. Gold Guys appealed the conciliation-court judgments to the district court. In district court, the Vinds and Menchaca filed complaints for money damages, invoking the private-attorney-general statute to argue that the ordinance relied on by Gold Guys is void, and that Gold Guys violated the required 14-day holding requirement in [Minn.Stat. § 325F.736](#). They also alleged negligence per se for violating the holding duty imposed by the statute. The district court consolidated the cases.

Gold Guys moved for dismissal of both complaints or, in the alternative, summary judgment, arguing, in relevant part, that (1) there is no private-attorney-general action or direct tort action for an alleged violation of the precious-metals-holding statute and (2) its business is governed by the Bloomington City Code (ordinance), precluding any action against them based on violation of the state statute. The Vinds and Menchaca argued that, because the ordinance's waiver scheme effectively eliminates the state's *required* 14-day holding period altogether, the ordinance is less restrictive than the statute, is void as a result, and Gold Guys violated the precious-metals-holding statute.

*2 Because Gold Guys relied on material outside the pleadings, the district court treated the motion as a motion for summary judgment and granted summary judgment, concluding that: (1) the ordinance is more restrictive than the statute and is therefore valid, precluding any action against Gold Guys for violation of the precious-metals-holding statute and (2) because Gold Guys complied with the ordinance, as a matter of law, it did not violate any law and was not negligent. In the alternative, the district court concluded that the Vinds and Menchaca do not have standing to bring private-attorney-general actions because they failed demonstrate that their actions are in the public interest. This appeal followed.

DECISION

I. Standard of review

The district court properly grants summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” *Minn. R. Civ. P. 56.03*. “When the material facts are not in dispute, we review the lower court's application of the law de novo.” *In re Collier*, 726 N.W.2d 799, 803 (Minn.2007). “No deference is given to a lower court on questions of law.” *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn.2003). “Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court.” *Davies v. W. Publ'g Co.*, 622 N.W.2d 836, 841 (Minn.App.2001), review denied (Minn. May 29, 2001).

II. There is no private-attorney-general action for violation of the precious-metals-holding statute.

[1] Gold Guys' summary-judgment motion argued that there is no private-attorney-general action for an alleged violation of the precious-metals-holding statute. The district court did not address that argument, but concluded that, even if such an action is possible, the Vinds and Menchaca cannot pursue it because they failed to demonstrate that their lawsuits benefit the public at large. See *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn.2000) (holding that the private-attorney-general statute “applies only to those claimants who demonstrate that their cause of action benefits the public”). Because we conclude that the legislature has not authorized a private-attorney-general action for alleged violations of the precious-metals-holding statute, we affirm the district court's ruling that the Vinds and Menchaca cannot pursue such an action.

Minn.Stat. § 8.31, subd. 1 (2012), contains a nonexclusive list of statutes, violations of which the attorney general is mandated to investigate. The list includes several sections of *Minn.Stat. §§ . 325F.001 to .991* (2012) (titled Consumer Protection: Products and Sales), but the list does not include any portion of *sections 325F.731–325F.744*, governing precious metals.

*3 The private-attorney-general statute provides in relevant part:

In addition to the remedies otherwise provided by law, any person injured by a violation of *any of the laws referred to in subdivision 1* may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court.

Minn.Stat. § 8.31, subd. 3a (emphasis added).

In *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 236 (Minn.1986), the supreme court considered whether a private-attorney-general action applies to a statute that is not specifically referenced in *Minn.Stat. § 8.31, subd. 1*, if the non-referenced statute deals with an unlawful business practice. The statute involved in *Morris* was the Unfair Claims Practices Act, *Minn.Stat. § 72A.17* (1984), relating to practices in the insurance business. The supreme court addressed the issue by analyzing whether the legislature contemplated that a statute not referenced in *section 8.31, subdivision 1*, was subject to the private-civil-action provision of *Minn.Stat. § 8.31, subd. 3a*. *Id.* The supreme court concluded that, because there was no “legislative intention to create a new cause of action in derogation of our common law[,] ... a private person does not have a cause of action for violation of the Unfair Claims Practices Act.” *Id.* at 238.

[2] A person who violates provisions of the precious-metals statute is guilty of a felony, punishable by up to three years in prison and/or a fine of not more than \$40,000. *Minn.Stat. § 325F.743*. The Vinds and Menchaca nonetheless rely on *Minn.Stat. § 325.744*, to assert that the legislature also contemplated that the precious-metals statute is subject to civil action by the attorney general and, therefore, is subject to a private-attorney-general action for damages. But *Minn.Stat. § 325.744* provides:

The attorney general or any county attorney may institute a civil action in the name of the state in the district court to revoke, deny or suspend

for a period of time the license [of a precious-metals dealer] on the ground that the licensee has violated a provision of [Minn.Stat. §§ 325F.731 to 325F.744]. *For this purpose*, the attorney general or county attorney shall be invested with the additional powers contained in [section 8.31](#). It is no defense to the action that the state has adequate remedies at law.

(Emphasis added.) Because the legislature plainly limited the attorney general's authority to bring a civil action to licensing issues and invoked [section 8.31](#) powers only for the purpose of pursuing such licensing actions, we find no merit in the Vinds and Menchaca's argument that this provision demonstrates that the legislature contemplated a private-attorney-general action for an alleged violation of any of the provisions of sections 325F.731–325F.744. *See Ly*, 615 N.W.2d at 313 (stating that “the sweep of the [private-attorney-general] statute can be no broader than the source of its authority that of the attorney general.”).

III. Claims for negligence-per-se action were properly dismissed.

*4 “Negligence per se substitutes a statutory standard of care for that of an ordinarily prudent person, so that violation of the statute is conclusive evidence of duty and breach.” *Renswick v. Wenzel*, 819 N.W.2d 198, 206 (Minn.App.2012), review denied (Oct. 16, 2012). Whether a violation of a statute or ordinance constitutes negligence per se is generally determined by a two-part test:

It is well settled that breach of a statute gives rise to negligence per se if [1] *the persons harmed by that violation are within the intended protection of the statute* and [2] *the harm suffered is of the type the legislation was intended to prevent*. The statute or ordinance imposes a fixed duty of care, so its breach constitutes conclusive evidence of negligence.

Alderman's Inc. v. Shanks, 536 N.W.2d 4, 8 (Minn.1995) (quoting *Pac. Indemnity Co. v. Thompson–Yaeger, Inc.*, 260 N.W.2d 548, 588–59 (Minn.1977)). But a statute that provides a criminal penalty “does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication.” *Valtakakis v. Putnam*, 504 N.W.2d 264, 266 (Minn.App.1993) (citing *Larson v. Dunn*, 460 N.W.2d 39, 47 n. 4 (Minn.1990)). And where no common-law duty existed before the statute was enacted, we are limited “to the explicit language and clear implication of the statute. *Id.* (citing *Bruegger v. Faribault Cnty. Sheriff's Dep't*, 497 N.W.2d 260, 262 (Minn.1993). “The principles of judicial restraint forbid us from creating new causes of action which the legislature has not expressed or implied.” *Id.*

[3] In this case, the legislature provided a criminal penalty for violation of the precious-metals statute and did not explicitly or implicitly create a private cause of action. Even if the Vinds and Menchaca are within the intended protection of the precious-metals-holding statute and the harm suffered is of the type the statute was intended to prevent, because the legislature did not provide a private cause of action for violation of the statute, the Vinds and Menchaca cannot pursue an action in negligence per se. The district court did not err in granting summary judgment to Gold Guys on claims asserting negligence per se.

IV. The validity of the Bloomington ordinance, providing for waiver of the precious-metals-holding statute's required 14-day holding period, is not determined in this appeal.

Minn.Stat. § 325F.742 provides, in relevant part, that government subdivisions are not prohibited from regulating or licensing precious-metals dealers within their jurisdictions “in a manner more restrictive than [sections 325F.731–325F.744].” Both parties extensively briefed whether the provision in the Bloomington ordinance, which eliminates *any* holding period for secondhand items containing precious metals, provided that a dealer posts a specified bond and complies with recording and reporting requirements designed to aid law enforcement, is valid as more restrictive than the required 14-day holding period mandated by the precious-metals-holding statute. But because the unavailability of private causes of action for alleged damages is dispositive of the challenge by the Vinds and Menchaca to the district court's grant of summary judgment to Gold Guys, we do not reach the issue of the validity of the ordinance.

201WL 3 4162W2

***5 Affirmed.**

All Citations

Not Reported in N.W.2d, 2013 WL 6152312

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

TAB 55

2018 WL 2976126

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Houston (1st Dist.).

Daniel YBARRA and Lisa Ybarra, Appellants

v.

AMERIPRO FUNDING, INC., U.S. Bank, N.A. as
Trustee for the [Banc of America Funding 2005–
H Trust](#); Bank of America, N.A.; Nationstar
Mortgage, LLC; and Mortgage Electronic
Registration Systems, Inc. aka “MERS”, Appellees

NO. 01–17–00224–CV

|

Opinion issued June 14, 2018

**On Appeal from the 55th District Court, Harris County,
Texas, Trial Court Case No. 2014–64169**

Attorneys and Law Firms

Jeffrey Craig Jackson, for Daniel Ybarra and Lisa Ybarra.

[Connie Flores Jones](#), Kathryn Davis, for Bank of America.

[Michael J. McKleroy Jr.](#), [Matthew Lindsey](#), [Randal Burton Clark](#), for Nationstar Mortgage, LLC and Mortgage Electronic Registration Systems, Inc. aka “MERS” and U.S. Bank, N.A. as trustee for the [Banc of America Funding 2005–H Trust](#).

Panel consists of Justices [Bland](#), [Lloyd](#), and [Caughey](#).

MEMORANDUM OPINION

[Jennifer Caughey](#), Justice

*1 This case involves a dispute over a home foreclosure. After appellants Daniel and Lisa Ybarra defaulted on their mortgage, they received a foreclosure notice. The Ybarras then sued appellees Ameripro Funding, Inc.; U.S. Bank, N.A. as Trustee for the [Banc of America Funding 2005–H Trust](#) (the 2005–H Trust); Bank of America, N.A.; Nationstar Mortgage, LLC; and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively appellees), asserting

various causes of action and disputing appellees' standing to foreclose. Appellees sought summary judgment on all of the Ybarras' claims, and the trial court ruled in appellees' favor. The Ybarras appeal.

Because the trial court properly granted appellees summary judgment, we affirm.

Background

In 2005, Daniel purchased a property and received a mortgage loan of \$526,476.¹ To evidence the loan, Daniel executed a note promising to repay the loan amount plus interest. He secured the loan with a deed of trust, which he and Lisa executed. The note required Daniel to make regular monthly payments beginning October 1, 2005 and continuing on the first day of each month thereafter until September 1, 2035. The deed of trust contemplated foreclosure if the Ybarras did not comply with their obligations and failed to cure a default.

¹ He also obtained a second loan, but that loan is not relevant to this lawsuit.

The deed of trust provided that Mortgage Electronic Registration Systems (MERS) would serve as the deed's beneficiary and the nominee for Lender and Lender's successors and assigns.² The deed made clear that MERS's assignee would become the deed's beneficiary: it stated that MERS “and the successors and assigns of MERS” would be the “beneficiary of this Security Instrument.”

² It lists the initial Lender as Ameripro Funding Inc.

Moreover, the deed made clear that MERS (and its assigns) had the right to foreclose on and sell the Property: “if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, *the right to foreclose and sell the Property*.” (emphasis added). This deed of trust was recorded on August 11, 2005 in the Official Records of Harris County, Texas.

As time went by, MERS exercised its right to assign its interest. Specifically, in 2012, MERS assigned its interest to U.S. Bank, N.A. (successor trustee to Wachovia Bank, N.A.), as Trustee for the 2005–H Trust. In the assignment, MERS

201WL 8 295©12©

stated that it was granting, selling, assigning, transferring, and conveying:

all beneficial interest under that certain Deed of Trust described below together with the note(s) and obligations therein described and the money due and to become due thereon with interest and all rights accrued or to accrue under said Deed of Trust.

Mary Ann Hierman (listed as Assistant Secretary of MERS) signed and recorded the assignment.

In addition to the lender (and its nominee), the loan had a servicer. A “mortgage servicer” is “the last person to whom a mortgagor has been instructed by the current mortgagee to send payments for the debt secured by a security instrument.” [TEX. PROP. CODE § 51.0001\(3\)](#). Bank of America, N.A. serviced the mortgage loan at issue at the time of the assignment, and it continued to do so until July 1, 2013, when Nationstar began servicing the loan.

*2 While Nationstar was servicing the loan, the Ybarras defaulted on their loan payments. After some back and forth, the Ybarras received a “Notice of Foreclosure Sale” notifying them that, on November 4, 2014, U.S. Bank (as Trustee for the 2005–H Trust) and Nationstar intended to sell their property. The Ybarras then sued appellees Ameripro, U.S. Bank (as Trustee for the 2005–H Trust), Bank of America, N.A., Nationstar, and MERS, seeking to enjoin the sale, disputing the appellees' standing to foreclose, and asserting numerous additional causes of action including claims for fraud, breach of contract, violations of [section 12.002 of the Texas Civil Practice and Remedies Code](#), and negligence per se.³

³ The crux of the Ybarras' claims on appeal are directed at U.S. Bank (as Trustee for the 2005–H Trust); MERS, the predecessor in interest to U.S. Bank; and Nationstar acting on behalf of the 2005–H Trust. The Ybarras asserted additional claims in their petition on which the trial court granted summary judgment. Because the Ybarras have not challenged the trial court's ruling on those claims on appeal, we do not address them here.

Ameripro, U.S. Bank (as Trustee for the 2005–H Trust), Nationstar, and MERS filed a no-evidence and traditional summary judgment motion on the Ybarras' claims. Bank of America, N.A. also moved separately for summary judgment. The trial court granted both summary judgment motions and dismissed all of the Ybarras' claims.

Standard of Review

We review a trial court's summary judgment de novo. [Travelers Ins. Co. v. Joachim](#), 315 S.W.3d 860, 862 (Tex. 2010). If a trial court grants summary judgment without specifying the grounds for granting the motion, we uphold the trial court's judgment if any of the grounds are meritorious. [Beverick v. Koch Power, Inc.](#), 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. [Valence Operating Co. v. Dorsett](#), 164 S.W.3d 656, 661 (Tex. 2005).

When reviewing a traditional summary judgment motion, we must determine whether the movant met its burden to establish that (1) no genuine issue of material fact exists, and (2) the movant is entitled to judgment as a matter of law. [TEX. R. CIV. P. 166a\(c\)](#); [Provident Life and Accident Ins. Co. v. Knott](#), 128 S.W.3d 211, 215–16 (Tex. 2003). To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* [TEX. R. CIV. P. 166a\(i\)](#); [Hahn v. Love](#), 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. [Mack Trucks, Inc. v. Tamez](#), 206 S.W.3d 572, 582 (Tex. 2006).

Discussion

The Ybarras argue that they raised a fact issue with regard to their claims that appellees (1) lacked standing to foreclose; (2) breached the parties' contract; (3) committed fraud; (4) violated [section 12.002 of the Texas Civil Practice & Remedies Code](#) (prohibiting the recording of fraudulent liens); and (5) committed negligence per se. We address

201WL 8 295©12©

each of these points in turn and conclude that the trial court properly granted summary judgment on the Ybarras' claims.

Standing to Foreclose

This case focuses in large part on the Ybarras' argument that appellees lacked standing to foreclose on the Ybarras' property. In particular, the Ybarras argue that none of the appellees had an enforceable interest in the Ybarras' property because the alleged transfers of interest in the property were invalid. Thus, they contend, the foreclosing parties lacked standing to foreclose. We disagree.

A. Applicable Law

*3 Chapter 51 of the Texas Property Code governs the type of foreclosure sale at issue here. See [TEX. PROP. CODE § 51.002](#) (addressing non-judicial sale of real property under power of sale conferred by deed of trust or other contract lien); see also [Morlock, L.L.C. v. Nationstar Mortg., L.L.C.](#), 447 S.W.3d 42, 47 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Under Chapter 51, a “mortgagee” or “mortgage servicer” may conduct foreclosure proceedings. See [TEX. PROP. CODE §§ 51.0001\(3\), \(4\); 51.002; 51.0025](#).⁴

⁴ “A mortgage servicer may administer the foreclosure of property under [Section 51.002](#) on behalf of a mortgagee” [TEX. PROP. CODE § 51.0025](#).

Relevant here, Chapter 51 defines “mortgagee” to include a beneficiary of the deed of trust as well as the last person to whom the deed was assigned of record. See [id.](#) § [51.0001\(4\)](#). In particular, the statute defines “mortgagee” as “(A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record.” See [id.](#); [Nationstar](#), 447 S.W.3d at 47. It defines “security instrument” as “a deed of trust, mortgage, or other contract lien on an interest in real property.” See [TEX. PROP. CODE § 51.0001\(6\)](#).

When an assignee of the security interest tries to foreclose, the mortgagor has limited ability to prevent foreclosure by challenging the assignment. [Ferguson v. Bank of N.Y. Mellon Corp.](#), 802 F.3d 777, 780 (5th Cir. 2015). Specifically, an obligor who is not a party to an assignment or a third-party beneficiary of the assignment cannot defend against

an assignee's efforts to enforce an obligation (here, through foreclosure) on a ground that renders the assignment merely voidable at the election of the assignor—rather than void. See [Morlock, L.L.C. v. Bank of N.Y.](#), 448 S.W.3d 514, 517 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); [Ferguson](#), 802 F.3d at 780; [Reinagel v. Deutsche Bank Nat'l Tr. Co.](#), 735 F.3d 220, 225 (5th Cir. 2013). An obligor may defend, however, on an allegation that an assignment was void. [Reinagel](#), 735 F.3d at 225.

This is because an attempted assignment that is merely “voidable” is valid and effective *unless and until* a party entitled to avoid it takes steps to disaffirm it. [Neese v. Lyon](#), 479 S.W.3d 368, 378 (Tex. App.—Dallas 2015, no pet.) (emphasis added). Thus, an obligor who is not entitled to void an assignment cannot escape foreclosure by challenging the voidable assignment. See [Morlock](#), 448 S.W.3d at 517. In contrast, an assignment that is void has no effect and does not bind any party. See [Abdullatif v. Choudhri](#), — S.W.3d. —, —, No. 14-16-00116-CV, 2018 WL 1559995, at *16 (Tex. App.—Houston [14th Dist.] Mar. 30, 2018, no pet. h.). Thus, a void assignment does not confer an interest on a purported assignee. See [Morlock](#), 448 S.W.3d at 517.

B. Analysis

The Ybarras make four allegations concerning appellees' standing. First, they contend that U.S. Bank (as Trustee for the 2005–H Trust) and its predecessor in interest, MERS, lacked standing to foreclose on their property because the assignment from MERS to the 2005–H Trust was void for noncompliance with the terms of the 2005–H Trust's Pooling Service Agreement (PSA). In other words, they contend that appellees were not properly assigned an interest, so they cannot qualify as mortgagees and foreclose on the home. Next, the Ybarras argue that U.S. Bank (as Trustee for the 2005–H Trust) lacked standing to foreclose because it did not own or hold the note (or relatedly, it did not show it paid value for the note); the assignment was the result of fraud and forgery; and the assignment was invalid for failing to identify for whom MERS acted in making the assignment.

1. Alleged Noncompliance with Pooling Service Agreement

*4 The Ybarras first argue that the purported assignment to U.S. Bank (as Trustee for the 2005–H Trust) was void because it violated the 2005–H Trust's Pooling Service Agreement (PSA). Specifically, they contend that the assignment did not go through the requisite chain of parties in the time-

period provided for in the Trust's PSA. The Ybarras assert that the allegedly void assignment did not legally transfer any interest into the 2005–H Trust, so U.S. Bank (as Trustee for the 2005–H Trust), “the purported mortgagee,” did “not have the requisite title, perfected security interest or standing to proceed in a foreclosure.”

The problem with this argument is that the Ybarras may not avoid foreclosure through a claim that would render the assignment merely voidable, but not void. *Morlock*, 448 S.W.3d at 517; *Ferguson*, 802 F.3d at 781. At best, however, this PSA claim would render the assignment voidable.

To begin, Ybarras are not parties to the PSA; nor do they contend that they are third-party beneficiaries of the PSA. They also presented no evidence that the parties to the PSA intended to benefit them. See *Basic Cap. Mgmt., Inc. v. Dynex Commercial, Inc.*, 348 S.W.3d 894, 900 (Tex. 2011) (Texas law presumes “that parties contracted for themselves ... unless it ‘clearly appears’ that they intended a third party to benefit from the contract”). Accordingly, they may not enforce the PSA's terms. See, e.g., *South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (“A third party may only enforce a contract when the contracting parties themselves intend to secure some benefit for the third party and entered into the contract directly for the third party's benefit.”); *Morlock*, 448 S.W.3d at 517 (“[A]s a nonparty to the transaction, Morlock lacks standing to claim that the assignment from MILA to Countrywide was executed without authorization.”); see also *Ferguson*, 802 F.3d at 781–82; *Reinagel*, 735 F.3d at 228.

Moreover, even if we were to assume that the assignment violated the PSA, the Ybarras would have shown only that the assignment was voidable—that one entitled to do so could sue for breach of the PSA. They have not shown that a purported breach of the PSA would render the assignment void.⁵ See, e.g., *Morlock*, 448 S.W.3d at 517 (challenge that assignment was unauthorized or even procured by fraud would render assignment voidable not void; forgery, by contrast, voids the assignment); *Ferguson*, 802 F.3d at 781–82 (“[Mortgagors] posit that the assignment to BNY was void because it violated the Trust's PSA. Our decision in *Reinagel* directly defeats that argument under Texas law.”); see also *Reinagel*, 735 F.3d at 228.

⁵ Even if the Ybarras had standing to enforce the PSA as intended third-party beneficiaries, their cause of action would be for breach of the PSA, and the assignment would still be voidable but not void.

Ferguson v. Bank of New York Mellon Corp., 802 F.3d 777, 781 (5th Cir. 2015).

The Fifth Circuit has addressed this question under Texas law and has come to the same conclusion. For instance, in *Ferguson*, the Fifth Circuit explained that “home-loan borrowers—such as the Fergusons—had no standing under Texas law to enforce a PSA because they were neither parties to the PSA nor intended third-party beneficiaries under it.” 802 F.3d at 782. The Court also stated, even if the borrowers had standing to enforce the PSA as intended third-party beneficiaries, their cause of action would be for breach of the PSA, and the assignment would thus be voidable but not void. *Id.* “Therefore, the borrowers lacked standing under Texas law to challenge the lender's efforts to foreclose on the ground that it violated the PSA.” *Id.*; see also *Reinagel*, 735 F.3d at 228 (similar); *Sigaran v. U.S. Bank Nat'l Ass'n*, 560 F. App'x 410, 413 (5th Cir. 2014) (similar).

*5 Because potential noncompliance with the PSA would render the assignment merely voidable, the Ybarras cannot defeat foreclosure through their argument that the assignment violated the PSA. *Morlock*, 448 S.W.3d at 517; *Ferguson*, 802 F.3d at 781–82; *Reinagel*, 735 F.3d at 225.

2. Owner and Holder of the Note

Next, the Ybarras argue that U.S. Bank (as Trustee for the 2005–H Trust) lacked standing to foreclose because it was not the owner or holder of the note.

Our Court has previously rejected the Ybarras' argument. Our precedent holds that, in Texas, “a deed of trust may be enforced by the mortgagee, regardless of whether the mortgagee also holds the note.” *Morlock*, 448 S.W.3d at 518 (“Since the Bank proved that it is the owner of the deed of trust, it established its interest in the property and right to foreclose as a matter of law regardless of whether it was also a holder or the owner of the note.”). Our sister court is in accord. See *Nationstar*, 447 S.W.3d at 47 (“Morlock's allegation that Nationstar is not the owner or holder of the Note is irrelevant with respect to Nationstar's right to enforce the Deed of Trust through non-judicial foreclosure”); see also *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013) (similar).

Here, too, MERS and its assigns (i.e., U.S. Bank as Trustee for the 2005 H–Trust) were entitled to foreclose based on the deed of trust. MERS—which was identified in the deed as its beneficiary—qualified as a mortgagee under Chapter 51. TEX.

PROP. CODE § 51.0001(4). Texas law and the deed granted MERS the ability to foreclose. The deed permitted MERS to assign its interests, and the assignment, in turn, assigned “all beneficial interest under that certain Deed of Trust ... and all rights accrued or to accrue under said Deed of Trust.” The deed also made clear that MERS’s assigns would be the deed’s beneficiaries. Thus, through MERS’s assignment, the 2005–H Trust (along with U.S. Bank, as Trustee for the 2005–H Trust) gained standing to foreclose. See *Morlock*, 448 S.W.3d at 518; *Nationstar*, 447 S.W.3d at 47.⁶

⁶ In light of our conclusion here, we need not address the Ybarras’ additional arguments concerning the note, including its assertion that the 2005–H Trust failed to show it paid value for the note.

3. Fraud and Forgery

The Ybarras’ fraud and forgery contentions are also unavailing. The Ybarras allege that the assignment from MERS to U.S. Bank was void because Mary Ann Hierman’s signature on the assignment was invalid, so the assignment was the result of fraud and forgery. In support of this contention, the Ybarras assert that a review of different signatures of Mary Ann Hierman shows that some are identical but others are not. The Ybarras argue that this creates a genuine issue of material fact as to whether the 2012 Assignment was a forgery.

As an initial matter, to the extent the Ybarras claim is one for fraud rather than forgery, they cannot defeat foreclosure on this basis. Under Texas law, “[d]eeds procured by fraud are voidable only, not void.” *Morlock*, 448 S.W.3d at 517 (quoting *Nobles v. Marcus*, 533 S.W.2d 923, 926 (Tex. 1976)).⁷ For the reasons explained above, the Ybarras cannot defeat foreclosure by arguing that the assignment was voidable, rather than void.

⁷ When someone without authorization signs a conveyance on behalf of a grantor, for instance, the fraud action to set aside the voidable assignment belongs to the grantor—not a third-party. *Morlock, L.L.C. v. Bank of N.Y.*, 448 S.W.3d 514, 517 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (citing *Nobles v. Marcus*, 533 S.W.2d 923, 926–27 (Tex. 1976)).

*6 Nevertheless, “[a] forged deed is void.” *Vazquez v. Deutsche Bank Nat’l Trust Co., N.A.*, 441 S.W.3d 783, 787–88 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Thus, if the

assignment was forged—if it was signed by one who purported to act as another—the assignment would be void. See *Morlock*, 448 S.W.3d at 517.

The Ybarras have failed to make the necessary showing to defeat summary judgment on their forgery claim. They offered no evidence—just their unsubstantiated suspicion—that the assignment was forged. For example, they offered no testimony from Mary Ann Hierman, an expert, or any other person to support their contention that Hierman did not execute this assignment. They offered no evidence on whether she did or did not execute (or authorize the execution of) any document they reference. And they offered no evidence that someone else signed Hierman’s name on this assignment, purporting to be her. Their mere unsubstantiated allegation that Hierman’s signature may look different on distinct documents does not create a fact issue (or constitute some evidence) as to whether *this* assignment was forged. See *Worthing v. Deutsche Bank Nat’l Trust Co. for Agent Sec. Inc.*, 545 S.W.3d 127, 134–36 (Tex. App.—El Paso, no pet.) (rejecting mortgagors’ claims that assignment of deed was forged and thus void where mortgagors failed to meet their burden of presenting evidence of forgery or explaining how submitted evidence supported forgery allegation); see also *Chance v. CitiMortgage, Inc.*, 395 S.W.3d 311, 315–16 (Tex. App.—Dallas 2013, no pet.) (“[M]ere speculation or conjecture regarding the authenticity of the signature cannot defeat competent summary judgment evidence.”); *Reinagel*, 735 F.3d at 227 (Texas recognizes typed or stamped signatures—and presumably also scanned signatures—so long as they are rendered by or at the direction of the signer); *Rodriguez v. Bank of Am., N.A.*, No. SA-12-CV-00905-DAE, 2013 WL 1773670, at *6 (W.D. Tex. Apr. 25, 2013) (“Even if Ms. Slee worked as part of a ‘document mill’ and had different signature variations, as long as MERS was aware of this and did not object to it, the assignment—though perhaps fraudulent—would not rise to the level of a forgery and thus would be voidable, not void.... Plaintiff’s allegations that Ms. Slee merely lacked authority to sign on behalf of MERS would render the assignment merely voidable.”), *aff’d*, 577 F. App’x 381 (5th Cir. 2014).

4. Identification

Finally, the Ybarras challenge the assignment from MERS to U.S. Bank (as Trustee for the 2005–H Trust) as “completely unclear” because it failed to identify “for whom MERS [was] acting i[n] its capacity as the ‘nominee’ for Ameripro or [Ameripro’s] successors or assigns.” The Ybarras have presented no evidence or authority—nor have we found any—to

201WL 8 295©12©

support their position that MERS's assignment here was void *ab initio* on this basis.⁸

⁸ Notably, the 2012 assignment of the deed of trust identifies Ameripro Funding, Inc. as the original lender.

Federal courts addressing similar arguments have rejected them. *See e.g., Bynane v. Bank of N.Y. Mellon*, No. H-15-2901, 2015 WL 8764272 (S.D. Tex. Dec. 15, 2015) (“Plaintiff argues that because MERS held the Note only as a nominee, and because the Assignment does not identify for whom MERS was a nominee, Plaintiff has validly pleaded that the Assignment in this case is void *ab initio* for lack of the essential elements of a contract, that is two identifiable real parties in interest. Plaintiff’s argument is without merit, factually and legally.”) (internal citations omitted); *Morgan v. Gov’t Nat’l Mortg. Ass’n*, No. H-15-1803, 2016 WL 3058301, at *4 (S.D. Tex. May 31, 2016) (“[T]he deed of trust indicates that MERS could exercise the rights granted to the lender by the deed of trust. Morgan agreed to this when he signed the deed of trust. There was no need to identify the lender in the assignment.”) (internal citations omitted).⁹

⁹ To the extent the Ybarras’ claims are directed at Nationstar, Nationstar qualifies as a servicer under Chapter 51 and could foreclose on behalf of the mortgagee, U.S. Bank (for the 2005–H Trust). *See TEX. PROP. CODE* § 51.0025.

Breach of Contract

*7 The Ybarras argue in the alternative that they raised a genuine issue of fact on whether the appellees breached the deed of trust. We disagree.

A. Applicable Law

“The essential elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach.” *CCC Grp., Inc. v. S. Cent. Cement, Ltd.*, 450 S.W.3d 191, 196 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (quoting *B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App.—Houston [1st Dist.] 2009, pet. denied)).

B. Analysis

The Ybarras argue the 2005–H Trust breached the deed of trust by relying “on an assignment that was void *ab initio* (the 2012 Assignment) and invalid endorsements, impairing their standing under both Texas statute and the Deed of Trust.” The gravamen of the Ybarras’ breach of contract claim thus hinges on their contentions that appellees lacked standing to foreclose and that the assignment was void. But we have already rejected these arguments. The Ybarras failed to raise a fact issue on this basis to support their breach of contract claim.

The Ybarras also argue that the 2005–H Trust breached the deed of trust because the deed required the foreclosing party to be a “lender,” but, they contend, the 2005–H Trust was not a lender under its terms. The deed refutes that argument. The deed identified MERS and MERS’s assigns as its beneficiary, and it provides that, as *nominee* for the lender and lender’s successors and assigns, MERS (the predecessor in interest to U.S. Bank, which was Trustee for the 2005–H Trust) had the right to foreclose.

The trial court did not err in granting summary judgment on the Ybarras’ breach of contract claim.

Fraud

The Ybarras next allege that the trial court erred in granting summary judgment on their fraud claim. It did not.

“A plaintiff seeking to prevail on a fraud claim must prove that (1) the defendant made a material misrepresentation; (2) the defendant knew the representation was false or made the representation recklessly without any knowledge of its truth; (3) the defendant made the representation with the intent that the other party would act on that representation or intended to induce the party’s reliance on the representation; and (4) the plaintiff suffered an injury by actively and justifiably relying on that representation.” *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 217 (Tex. 2011).

For their fraud claims to survive summary judgment, the Ybarras were required to put forth some evidence that the defendants knowingly or recklessly made a false misrepresentation. The Ybarras did not do so.

The alleged material misrepresentation the Ybarras identify was Nationstar’s and the 2005–H Trust’s purported representation that “they had title to the Property at the time

[they] filed the 2014 Notice of Sale” and “[t]his representation was aided by the 2012 Assignment previously filed by BANA.” But the Ybarras produced no evidence that the appellees knowingly or recklessly misrepresented their rights in the Notice of Foreclosure Sale (or in or by the 2012 assignment).¹⁰

¹⁰ The Notice of Foreclosure Sale provides that “Nationstar Mortgage, LLC, is acting as Mortgage Servicer for the Mortgagee of the Note and Deed of Trust associated with the above-referenced loan.” It further states that “Nationstar Mortgage, LLC, as Mortgage Servicer, is representing the Mortgagee ... Bank of America Funding Corporation Mortgage Pass-Through Certificates, Series 2005-H, U.S. Bank National Association, as Trustee, successor in interest to Wachovia Bank, National Association, as Trustee,” and notes that MERS was the original mortgagee (as nominee for the lender, Ameripro Funding, Inc.).

*8 The trial court did not err in granting summary judgment on the Ybarras' breach of contract claim.

Texas Civil Practice & Remedies Code § 12.002

We are likewise unpersuaded by the Ybarras' argument that they defeated summary judgment on their [section 12.002](#) claim.

A. Applicable Law

[Section 12.002 of the Texas Civil Practice & Remedies Code](#) provides that “[a] person may not make, present, or use a document or other record with:

- (1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property;
- (2) intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in [Section 37.01, Penal Code](#), evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and

- (3) intent to cause another person to suffer: (A) physical injury; (B) financial injury; or (C) mental anguish or emotional distress.¹¹

[TEX. CIV. PRAC. & REM. CODE § 12.002\(a\)](#).

¹¹ “Court record” has the same meaning as assigned in [section 37.01 of the Penal Code](#). [TEX. CIV. PRAC. & REM. CODE § 12.001\(1\)](#); *see* [TEX. PENAL CODE § 37.01\(1\)](#) (“‘Court record’ means a decree, judgment, order, subpoena, warrant, minutes, or other document issued by a court.”). “‘Lien’ means a claim in property for the payment of a debt and includes a security interest.” [TEX. CIV. PRAC. & REM. CODE § 12.001\(3\)](#).

B. Analysis

The Ybarras argue that appellees violated [Texas Civil Practice and Remedies Code section 12.002](#) because they recorded MERS's 2012 assignment of the deed of trust, knowing that it was fraudulent, with the intent that the assignment be given legal effect, and with the intent to cause the Ybarras financial injury.

Even if we were to assume without deciding that the assignment of the deed of trust fell within the definition of a “court record” or “lien” as those terms are defined in [section 12.001](#), the Ybarras have not established the necessary elements of their claim. To begin, the Ybarras' theory is premised on their argument—which we already rejected—that the assignment was void. *See Ferguson*, 802 F.3d at 783 (rejecting a similar argument).

In any event, the Ybarras failed to present any evidence that the assignment was executed with the intent to cause them to suffer physical injury, financial injury, or mental anguish. *See Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 897 (Tex. App.—Dallas 2008, no pet.) (affirming grant of summary judgment on debtor's [section 12.002](#) claim where record had no evidence that appellees intended to cause debtor financial injury); *see also Lassberg v. Bank of Am., N.A.*, 660 F. App'x 262, 268–69 (5th Cir. 2016) (affirming grant of summary judgment on mortgagor's [section 12.002](#) claim when mortgagor provided no evidence of how assignment of deed or appointment of substitute trustees were executed with intent to cause mortgagor injury).

201WL 8 295©12©

The trial court did not err in granting appellees summary judgment on the Ybarras' [section 12.002](#) claim.

Negligence Per Se

*9 Finally, the Ybarras argue that they raised a fact issue with regard to their negligence per se claim. They also argue that their claim is not time-barred.

A. Applicable Law

1. Negligence Per Se

"Negligence per se applies when the courts have determined that the violation of a particular statute is negligence as a matter of law." *Trevarthen v. U.S. Bank Nat'l Ass'n*, No. A-13-CA-154-SS, 2013 WL 12099974, at *3 (W.D. Tex. Apr. 29, 2013), *aff'd*, *Trevarthen v. U.S. Bank Nat. Ass'n*, 551 F. App'x 148 (5th Cir. 2014) (citation omitted). To establish negligence per se, a plaintiff must prove that: (1) the defendant's act or omission is in violation of a statute or ordinance; (2) the injured person was within the class of persons which the ordinance was designed to protect; and (3) the defendant's act or omission proximately caused the injury. *Miranda v. TriStar Convenience Stores, Inc.*, No. 01-11-01073-CV, 2013 WL 3968337, at *6 (Tex. App.—Houston [1st Dist.] Aug. 1, 2013, no pet.) (mem. op.) (citing *Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 265 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

2. Texas Local Government Code § 192.007

Chapter 192 of the Texas Local Government Code provides guidelines for "instruments to be recorded by counties." TEX. LOCAL GOV'T CODE §§ 192.001–007. [Section 192.007\(a\)](#) states that "[t]o release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded." TEX. LOCAL GOV'T CODE § 192.007(a).

B. Analysis

In their petition, the Ybarras assert that appellees violated [section 192.007 of the Texas Local Government Code](#) "by failing to properly record all releases, transfers, assignments, or other actions relating to instruments Defendants filed or

caused to be filed, registered, or recorded in the deed records of Texas in the same manner as the original instrument was required to be filed, registered, or recorded." They contend that this alleged statutory violation constituted negligence per se.

Even if we were to assume a statutory violation (we make no such finding) and that the Ybarras' claim is not time-barred, the Ybarras present no authority supporting their contention that an alleged violation of [section 192.007](#) would support a claim for negligence per se. See *Louisiana–Pac. Corp. v. Knighten*, 976 S.W.2d 674, 675 (Tex. 1998); *Burgess v. Bank of Am., N.A.*, Cv. No. 5:14-CV-00495-DAE, 2014 WL 5461803, at *12 (W. D. Tex. Oct. 27, 2014) (plaintiff failed to state a claim for negligence per se based on alleged violation of [section 192.007](#)); *Trevarthen*, 2013 WL 12099974, at *3 (rejecting negligence per se claim based on violation of [section 192.007](#), concluding that statutory violation claim fails and "there is simply no indication" that this statute establishes "a specific standard of conduct different from the common-law standard of ordinary care"); see also *Williams v. Sadrudeen*, No. 01-98-00851-CV, 1999 WL 447606 (Tex. App.—Houston [1st Dist.] June 17, 1999, pet. denied) ("Not every violation of a statute or administrative rule forms a basis for negligence per se.").

*10 We cannot conclude that the trial court erred in granting appellees summary judgment on the Ybarras' negligence per se claim.

* * *

Because we conclude the trial court properly granted appellees summary judgment on all of the Ybarras' claims, we overrule the Ybarras' issues on appeal.¹²

12 For the same reasons, Bank of America N.A. (the mortgage servicer before Nationstar) and Ameripro (the original lender) were entitled to summary judgment on the related claims against them.

Conclusion

We affirm the judgment of the trial court.

201WL 8 295©12©

All Citations

Not Reported in S.W. Rptr., 2018 WL 2976126

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE**

**IN RE: VALSARTAN, LOSARTAN,
AND IRBESARTAN PRODUCTS
LIABILITY LITIGATION**

This Document Relates to All Actions

MDL No. 2875

Honorable Robert B. Kugler,
District Court Judge

Honorable Joel Schneider,
Magistrate Judge

CERTIFICATE OF SERVICE

I, Seth A. Goldberg, hereby certify that on July 17, 2020, a copy of the foregoing Notice of Motion; Manufacturer Defendants' Memorandum of Law in Support of Their Motion to Dismiss; Certification of Seth A. Goldberg and Compendium of Charts Referenced in Manufacturer Defendants' Memorandum of Law in Support of Their Motion to Dismiss; Proposed Order Granting Motion in Full; Proposed Order Granting Motion in Part; Compendium of Unreported or Unpublished Authorities Cited in Manufacturer Defendants' Memorandum of Law in Support of Their Motion to Dismiss; and Compendium of Unreported or Unpublished Authorities Cited in the Manufacturer Defendants' Compendium of Charts has been served via ECF upon Counsel for Plaintiffs and all counsel of record in the Court's electronic filing system.

/s/ Seth A. Goldberg
Seth A. Goldberg