

**THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE: PHILIPS RECALLED CPAP,
BI-LEVEL PAP, AND MECHANICAL
VENTILATOR PRODUCTS
LITIGATION

This Document Relates to:

Amended Master Long Form Complaint
For Personal Injuries And Damages, And
Demand For Jury Trial (ECF No. 834)

:
: Master Docket: No. 21-mc-1230-JFC
:
: MDL No. 3014
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: (Oral Argument Requested)
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**MEMORANDUM OF LAW IN SUPPORT OF PHILIPS RS NORTH AMERICA LLC'S
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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Defendant Philips RS North America LLC (“Respironics”) hereby moves to dismiss Plaintiffs’ Amended Master Long Form Complaint for Personal Injuries and Damages (ECF No. 834) (the “PIAC”) pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).

PRELIMINARY STATEMENT

The PIAC generally alleges twenty-one potential causes of action under the laws of all fifty states, the District of Columbia, and U.S. territories, based on Respironics’ June 2021 decision to voluntarily recall its CPAP and BiPAP machines and ventilators in coordination with the FDA. Individual plaintiffs can adopt the potential claims in the PIAC by executing a Master Short Form Complaint attached to the PIAC.¹ However, as of the date of this filing Plaintiffs from only thirty-seven states and two territories have filed Short Form complaints adopting the PIAC.²

As demonstrated below, the PIAC and Master Short Form Complaint are structurally and substantively defective and must be dismissed for a number of independent reasons, each of which reflects that Plaintiffs have failed to tailor their claims and allegations to governing law. Instead of taking the work onto themselves to properly frame their pleadings, Plaintiffs have left the task to Defendants, and ultimately to the Court, to identify the myriad pleading and legal deficiencies of the PIAC and take appropriate action to address those deficiencies.

First, while the parties agreed to a master complaint and individual joinder process for the personal injury cases, Plaintiffs drafted the PIAC and Master Short Form Joinder (ECF No. 834-1) without input from Defendants or the Court. These pleadings are properly evaluated under Federal Rule 12(b) and should be dismissed because, even when taken together, they fail to allege

¹ Pretrial Order No. 28 (Oct. 5, 2022) (ECF No. 783).

² As of January 5, no Short Form Complaint has been filed by a plaintiff from Connecticut, Hawaii, Iowa, Maine, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Vermont, Wisconsin, or Wyoming, the District of Columbia, or any U.S. territory except Puerto Rico and the U.S. Virgin Islands.

facts necessary to state plausible claims. The PIAC standing alone alleges no injury in fact needed to invoke the Court’s Article III jurisdiction because it alleges only that *potential* Plaintiffs used recalled devices and *hypothetically* suffered a litany of *possible* diseases. PIAC ¶¶ 21–22. The Master Short Form Complaint does not solve this deficiency because, among other shortcomings, it does not require individual plaintiffs to allege facts that plausibly show causation. Taken together, the allegations of the PIAC and the Master Short Form Complaint do not add up to state plausible claims.³

Second, Plaintiffs’ failure to warn, negligence, fraud, negligent misrepresentation, unjust enrichment, and state consumer protection law claims must be dismissed under the learned intermediary doctrine principally because any duty of disclosure that Respironics had was owed to Plaintiffs’ physicians, not to Plaintiffs as the end-users. The PIAC is devoid of allegations with respect to communications to, and actions of, physicians and the Master Short Form Complaint is not designed to address those issues.

Third, Plaintiffs’ negligence, implied warranty, fraud, unjust enrichment, and state consumer protection law claims are impliedly preempted by federal law. All are premised on allegations of fraud-on-the-FDA and alleged violations of the Federal Food, Drug, and Cosmetic Act (the “FDCA”), which only the federal government may enforce. Even if such claims were not preempted, dismissal of all recall-related claims would be warranted under the doctrine of primary jurisdiction in deference to the FDA’s ongoing oversight of the Respironics voluntary recall.

Fourth, tort and strict liability claims asserted under the laws of certain states must be

³ E.g., *In re Zofran (Ondansetron) Prod. Liab. Litig.*, No. 1:15-MD-2657-FDS, 2017 WL 1458193, at *6 (D. Mass. Apr. 24, 2017) (“The master complaint has no legal effect, standing alone; it has an effect only when it is adopted by a plaintiff through the filing of an individual complaint.”).

dismissed because they are subsumed by the states' product liability acts.

Fifth, Plaintiffs' breach of warranty claims fail because, among other reasons, they allege a design defect expressly excluded by Respironics' written limited warranty and—owing to the flawed Master Short Form Complaint—Plaintiffs also fail to plead that any plaintiff's recalled device actually manifested the alleged defect.

Sixth, Plaintiffs' fraud, state consumer protection law, negligence, strict liability, manufacturing defect, battery, and unjust enrichment claims also must be dismissed for, among other things, failure to plead the elements of fraud with required particularity, failure to plead essential elements of state consumer protection claims, unavailability of relief under many state consumer protection laws, and other claim-specific defects.

Finally, Plaintiffs' medical monitoring cause of action must be dismissed under the laws of certain states that do not recognize this cause of action.

For all the foregoing reasons and those set out more particularly below, the PIAC should be dismissed in its entirety. If the Court should grant Plaintiffs leave to amend, then in addition to amending the PIAC's claims and allegations, the Court should direct Plaintiffs to draft a new, non-defective Master Short Form Complaint requiring individual plaintiffs to allege facts needed to state a plausible claim that use of the recalled devices caused the plaintiff's alleged injury. Doing so now is necessary to comply with the Federal Rules and also will enhance efficiency by permitting the Court to weed out deficient Short Form Complaints that fail to allege standing and/or the required elements of causes of action that they wish to pursue, and so should not be permitted to proceed to discovery.

LEGAL STANDARD

“[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time

and money by the parties and the court.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (cleaned up). “The creation of an MDL proceeding does not suspend the requirements of the Federal Rules of Civil Procedure, nor does it change or lower the requirements of those rules.” *In re Zofran*, 2017 WL 1458193, at *5. A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted where the complaint fails to allege facts plausibly establishing each element of the claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009); *Twombly*, 550 U.S. at 555–56. Plausibility “is analyzed through a three-step process”: (1) articulate the elements; (2) disregard “formulaic recitations of the elements,” “legal conclusion[s],” and naked, conclusory assertions; and (3) “evaluate[] the plausibility of the remaining allegations.” *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185, at *7 (W.D. Pa. Oct. 27, 2022) (Conti, J.) (quoting *Lasche v. New Jersey*, No. 20-2325, 2022 WL 604025, at *3–4 (3d Cir. Mar. 1, 2022)); accord *May v. Nat’l Guardian Life Ins. Co.*, No. 17-0638, 2017 WL 5069335, at *2 (W.D. Pa. Nov. 3, 2017) (Conti, J.). If the remaining allegations “are merely consistent with a defendant’s liability,” then the complaint falls “short of the line between possibility and plausibility” and should be dismissed. *Tatel*, 2022 WL 15523185, at *7 (quoting *Lasche*, 2022 WL 604025, at *3–4). Plaintiffs’ claims sounding in fraud must also satisfy Rule 9(b), which requires Plaintiffs to plead with particularity, among other things, “the date, time and place of the alleged fraud.” Fed. R. Civ. P. 9(b); *Travelers Indem. Co. v. Cephalon, Inc.*, 620 F. App’x 82, 86 & n.3 (3d Cir. 2015) (“Even when fraud is not a necessary element . . . claims that do sound in fraud must be pled with particularity.”) (citation omitted).

ARGUMENT

I. THE PIAC AND SHORT FORM COMPLAINT ARE DEFICIENT.

A. The Court's Order Establishing the Process for Filing the PIAC Does Not Relieve Personal Injury Plaintiffs of the Obligation to Plead Plausible Claims.

This Court's Pre-Trial Order No. 28 established the procedures for filing the PIAC and Individual Short Form Personal Injury Complaints. ECF No. 783. The Court made clear, however, that nothing in the Order is "intended to (or does) alter the applicable provisions of the Federal Rules of Civil Procedure" except as expressly set out in the Order. *Id.* at 1.

The Order authorizes Plaintiffs' Co-Lead Counsel to file a PIAC that would "supersede and replace all claims for personal injury in any action pending in this MDL," and a Master Short Form Complaint "that each Personal Injury Plaintiff will complete" to adopt the PIAC. *Id.* ¶¶ II(A)(2), II(B)(2). The Order further requires the Master Short Form Complaint to allege, among other things, and "at a minimum," the name of the individual plaintiff, the model device they used, where the plaintiff is located, the specific Defendants being sued, the causes of action being adopted, and any "[a]dditional allegations or causes of action not pleaded in the" PIAC. *Id.* ¶ II(B)(2). The Order states that for "each such personal injury action, the Amended Master Personal Injury Complaint together with the Personal Injury Plaintiff's Short Form Complaint shall be deemed that Plaintiff's operative Complaint." *Id.* ¶ II(B)(3).

The Order does not relieve individual plaintiffs of the obligation to allege the additional, case-specific facts needed to state plausible claims for relief under the Federal Rules. Despite that, Plaintiffs' Master Short Form Complaint neither requires nor invites additional, case-specific allegations concerning the claims already alleged in the PIAC. ECF No. 783 at ¶ II(B)(2)(k); PIAC Ex. A, ¶¶ 15, 17. It does not require, for example, individual plaintiffs to allege that their devices manifested the defect claimed, that they were exposed to any particular quantity or concentration

of emissions, or any facts establishing a causal connection between use of a recalled device and an alleged injury. The Master Short Form Complaint does not even require any details about the acquisition of a device to support a misrepresentation or omission-based claim. *See, e.g., In re Toshiba Am. DVD Mktg. & Sales Pracs. Litig.*, 2009 WL 2940081, at *13 (D.N.J. Sept. 11, 2009) (dismissing misrepresentation claims where complaint did not allege where and when plaintiffs purchased the product or when they were exposed to misrepresentations). As explained below, these failures require dismissal of the PIAC and Master Short Form Complaint.

B. The PIAC Alleges Only Potential Plaintiffs and Hypothetical Injuries.

By design, the PIAC alleges no *specific* facts about any *specific* plaintiffs or *specific* injuries. It instead generically alleges that “patients using the Recalled Devices were exposed to harmful particulates and the toxic Foam Toxins,” PIAC ¶ 148, that “exposure has harmed hundreds of thousands of patients,” *id.* ¶ 132, and that exposure has caused a laundry list of possible diseases, ranging from various rare cancers to ailments like respiratory disease and asthma that are common reasons individuals might be prescribed a device in the first place. *Id.* ¶¶ 22, 653.

For this reason, the PIAC standing alone would fail the minimum requirements to invoke this Court’s Article III jurisdiction. *E.g., In re Zofran*, 2017 WL 1458193, at *6 (“The master complaint has no legal effect, standing alone; it has an effect only when it is adopted by a plaintiff through the filing of an individual complaint.”). It is axiomatic that standing to sue is a prerequisite to Article III jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). This requires Plaintiffs to allege in the first instance a plausible “injury in fact.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “An injury in fact [is] an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (cleaned up) (cited by *Potter v. Cozen & O’Connor*, 46 F.4th 148, 154 (3d Cir. 2022)).

Because no injury alleged in the PIAC rises above the conjectural, it must be read together with the Master Short Form Complaint if it is to satisfy jurisdictional imperatives. *E.g., In re Zofran*, 2017 WL 1458193, at *6 (“[T]he complaint in each action in this proceeding consists of the master complaint *and* the individual short-form complaint, taken together.”). Absent Short Form Complaints alleging plausible claims, the PIAC must be dismissed. Moreover, for the thirteen states, the District of Columbia, and any U.S. territory except Puerto Rico and the U.S. Virgin Islands for which no plaintiff has filed a Short Form complaint, all claims alleged in the PIAC purportedly asserted under the laws of those jurisdictions necessarily fail as a matter of law, because Plaintiffs have no basis to invoke the laws of jurisdictions with which their claims have no connection. *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) (“Where . . . a representative plaintiff is lacking for a particular state, all claims based on that state’s laws are subject to dismissal.”).

C. The Master Short Form Complaint Is Deficient.

While the Master Short Form Complaint is designed to identify a particular plaintiff alleging a particular injury, it neither requires nor invites the inclusion by individual plaintiffs of plausible allegations that using the recalled device *caused* a particular plaintiff’s alleged injury. This fatal pleading error is baked into the Master Short Form Complaint.

Stating a claim “under any theory of recovery” requires plausible allegations that the defendant’s conduct caused the plaintiff’s alleged injury. *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Pracs. & Relevant Prod. Liab. Litig.*, No. 3:09-CV-20003, 2010 WL 3937414, at *5–7 (S.D. Ill. Oct. 4, 2010); *Sindell v. Abbott Laboratories*, 607 P.2d 924, 928 (Cal. 1980) (“[A]s a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant . . . whether the injury resulted from an accidental event or from the use of a defective product.”) (citations omitted). “Specific causation” requires a

pleading that a particular individual suffered from a particular injury as a result of exposure to a particular substance. *See Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 928 (8th Cir. 2001). While “detailed factual allegations are not required to survive a motion to dismiss, the allegations still must be sufficient to make a Plaintiff’s claim plausible.” *SUEZ Water New York Inc. v. E.I. du Pont de Nemours and Company*, 578 F. Supp. 3d 511, 541 (S.D.N.Y. 2022) (dismissing claims for failure to allege causation). Plaintiffs have not met the plausibility threshold because the PIAC and the Master Short Form Complaint together allege no facts from which the Court reasonably could infer specific causation, *i.e.*, that any particular plaintiff has suffered an actionable injury as a result of using a recalled device. *See Sabol v. Bayer Healthcare Pharm. Inc.*, 439 F. Supp. 3d 131, 138 (S.D.N.Y. 2020) (dismissing plaintiff’s claims for failure to allege specific causation).

The PIAC’s allegations alone are insufficient for at least two main reasons. ***First***, the PIAC alleges that exposure to harmful emissions and particulate matter from foam degradation is not a uniform condition for all recalled devices. *See, e.g.*, PIAC ¶ 8 (“PE-PUR foam ***may*** break down into particles and be inhaled or ingested, and ***may*** emit VOCs”); *id.* ¶ 249 (“[F]oam ***may*** degrade ***under certain circumstances, influenced by factors*** including use of unapproved cleaning methods, such as ozone, and certain environmental conditions”) (all emphases added). Standing alone, these allegations at most raise an inference of a ***possible*** injury, not a ***plausible*** injury.

To bridge that gap, the Master Short Form Complaint must at least require individual plaintiffs to allege plausible facts showing that each plaintiff’s device manifested a relevant defect that motivated the Respironics voluntary recall and that the plaintiff was exposed, presumably through use of the product. The Master Short Form Complaint, however, does not require or even invite individual plaintiffs to do so, and so cannot cure this fatal pleading failure.

Second, merely alleging that a potential plaintiff “used” a device for an unspecified time as a basis for an “exposure” to an unknown quantity of emissions is not enough factual substance to state a plausible claim. PIAC ¶¶ 21–22, 148. The PIAC does not identify any particular threshold of exposure beyond which any of the alleged emissions is known to be harmful to humans. Nor does it allege whether the recalled devices are even capable of producing emissions in excess of such thresholds. *See id.* ¶¶ 152–57, 161–65 (no allegations of actionable or threshold levels of TDI, TDA, DD or Phenol). The PIAC’s conclusory allegation of hypothetical exposure to formaldehyde in excess of “tolerable limits,” *id.* ¶ 149, is likewise insufficient because the PIAC fails to specify any tolerable “levels” or limits that were exceeded. In fact, in numerous instances, the PIAC admits that the chemicals are only “possibly” or “potential[ly]” toxic. *Id.* ¶ 153 (“TDI . . . classified as ***possibly*** carcinogenic to humans” and citing studies of rats and mice); *id.* ¶¶ 156–57 (alleging TDA is a “possibly” or “***probable***” human carcinogen” and noting that “[a]vailable data on TDA primarily comes from animal studies”); *id.* ¶ 162 (acknowledging that “IARC has ***not yet evaluated*** the potential ***carcinogenicity of DD to humans***”) (emphases added). These allegations do not move a claim from *possible* to *plausible*.

The Master Short Form Complaint cannot cure this pleading failure because it does not require or even prompt Plaintiffs to allege facts showing it is plausible that they were exposed to a sufficient quantity and concentration of emissions over a sufficient period of time to cause the alleged injury. *See In re Zofran*, 2017 WL 1458193, at *6. Absent such allegations, no individual plaintiff’s claims possibly can rise beyond the realm of the “speculative” or “conceivable,” and as a result the PIAC, read together with the Master Short Form Complaint, fails to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 547, 555, 563, 570.

II. PLAINTIFFS’ FAILURE TO WARN, NEGLIGENCE, FRAUD, NEGLIGENT MISREPRESENTATION, UNJUST ENRICHMENT, AND CONSUMER

PROTECTION LAW CLAIMS (COUNTS I, IV, V, XIII, XIV, XVI, XVII) MUST BE DISMISSED UNDER THE LEARNED INTERMEDIARY DOCTRINE.

The PIAC’s factual allegations and claims borrow heavily from the claims and allegations asserted in the Third Amended Class Action Complaint For Economic Losses (the “TAC”), ECF No. 785. For reasons similar to those presented in Section IV of Respironics’ Memorandum of Law in support of its motion to dismiss the TAC for failure to state a claim (the “TAC Motion to Dismiss”), ECF No. 916, the learned intermediary doctrine forecloses the seven causes of action premised on the notion that Respironics owed a duty to warn consumers and that the absence of such communications with consumers creates a basis for a claim.

Under that doctrine, Respironics had no duty to warn consumers *directly* of the alleged risks of the prescription medical devices at issue here.⁴ As this Court has held, a manufacturer’s duty to warn applies to the physician as a “learned intermediary” rather than to the patient. *See Kline v. Zimmer Holdings, Inc.*, No. 13-513, 2015 WL 4077495, at *27 (W.D. Pa. July 6, 2015) (Conti, J.), *aff’d*, 662 F. App’x 121 (3d Cir. 2016). The rationale for the learned intermediary doctrine is that the “manufacturer’s duty to warn of dangers associated with its product runs only to the physician,” because the prescribing physician (not the plaintiff) is the one making the decision about the device and advising as to its use. *Taupier v. Davol, Inc.*, 490 F. Supp. 3d 430, 447 (D. Mass. 2020). The doctrine “encompasses all claims based upon a [] manufacturer’s failure to warn, including claims for fraud, misrepresentation, and violation of consumer protection laws.” *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1372–73 (S.D. Fla. 2007).⁵

⁴ *E.g., Andren v. Alere, Inc.*, No. 16-CV-1255, 2018 WL 1920179, at *4 n.6 (S.D. Cal. Apr. 24, 2018) (no “dispute that the learned intermediary doctrine applies to medical device cases in failure to warn cases” and that “the learned intermediary doctrine[] is nearly universal”) (citation omitted).

⁵ “[I]f the learned intermediary doctrine could be avoided by casting what is essentially a failure-to-warn claim under a different cause of action such as [a consumer protection law] or a claim for misrepresentation, then the doctrine would be rendered meaningless.” *Gutierrez v. Ethicon, Inc.*, 535 F. Supp. 3d 608, 633–34 (W.D. Tex. Apr. 23, 2021).

To state a claim, Plaintiffs must, *inter alia*, allege that physicians received an “inadequate warning” and “state that these physicians would have acted differently had they received a different warning.” *Baca v. Johnson & Johnson*, No. CV-20-01036, 2020 WL 6450294, at *3 (D. Ariz. Nov. 2, 2020); *Dye v. Covidien LP*, 470 F. Supp. 3d 1329, 1338–41 (S.D. Fla. 2020) (dismissing failure to warn and negligence claims as inadequately pled under the learned intermediary doctrine). In marked contrast here, the PIAC alleges that ***Plaintiffs—not their physicians***—would have made different decisions had they received adequate warnings. PIAC ¶ 576 (“Philips’ fraudulent conduct actually and proximately caused harm to Plaintiffs because absent Philips’ concealment and omissions, ***Plaintiffs would have behaved differently*** and would not have used the Recalled Devices.”), *id.* ¶ 614 (“Had Philips not engaged in the deceptive conduct described herein, ***Plaintiffs would not have purchased, leased, or used the Recalled Devices . . .***”) (emphases added).

The Master Short Form Complaint does not cure this pleading failure because, as explained above, it does not require or even prompt individual plaintiffs to allege any facts relating to the warnings received by their doctors or any decisions their doctors might have made differently. Plaintiffs’ pleadings taken together thus lack allegations of a plausible “causative nexus” between the alleged failure to disclose and any alleged injuries. *E.g., Adams v. Medtronic, Inc.*, No. 19-CV-870, 2020 WL 5868113, at *5 (E.D. Tex. Oct. 1, 2020) (“[W]here the learned-intermediary doctrine applies, plaintiffs must allege that the manufacturer’s failure to warn the intermediary caused the intermediary to act differently than she otherwise would have.”).

Plaintiffs’ failure to warn, negligence, fraud, negligent misrepresentation, unjust enrichment, and consumer protection law claims accordingly should be dismissed. *See Aquino v. C.R. Bard, Inc.*, 413 F. Supp. 3d 770, 789–90 (N.D. Ill. 2019) (dismissing strict liability and

negligent failure to warn claims under the learned intermediary doctrine).

III. PLAINTIFFS' NEGLIGENCE, IMPLIED WARRANTY, FRAUD, UNJUST ENRICHMENT, AND CONSUMER PROTECTION CLAIMS (COUNTS I, III, V, VI, IX, XIII, XIV – XVII) ARE PREEMPTED.

For many of the same reasons presented in Respironics' TAC Motion to Dismiss (Section I), the PIAC's negligence,⁶ breach of implied warranty, fraud, unjust enrichment, and state consumer protection law claims are impliedly preempted by federal law. Each of these claims is alleged in the PIAC to arise out of alleged fraud-on-the-FDA and purported non-compliance with the FDCA and its implementing regulations. As enforcement of the FDCA is the exclusive province of the federal government, Plaintiffs' efforts to privately enforce the FDCA are impliedly preempted and warrant dismissal.

A. State Law Claims Alleging Fraud on the FDA Are Preempted.

There is no private right of action under the FDCA. 21 U.S.C. § 337(a). In *Buckman Co. v. Plaintiffs' Legal Committee*, the Supreme Court held that “state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law.” 531 U.S. 341, 348 (2001). The Court held that “allowing fraud-on-the-FDA claims under state tort law” could “skew[]” the “delicate balance of statutory objectives” embodied in the FDCA. *Id.* at 353.

State law claims premised on allegations that medical devices failed to satisfy FDA quality standards are, likewise, impliedly preempted because enforcement of those standards is the exclusive domain of the FDA. *E.g., Gile v. Optical Radiation Corp.*, 22 F.3d 540, 544 (3d Cir. 1994) (“violations of the FDCA do not create private rights of action . . . Thus, only the government has a right to take action with respect to adulterated products”); *Frere v. Medtronic, Inc.*, No.

⁶ Counts I, III, V, VI, IX, XIV, XV of the PIAC state various permutations of negligence: negligence, negligent design, negligent failure to warn, negligent recall/negligent failure to recall, negligent manufacturing, negligent misrepresentation, and negligence *per se*. However the claim is formulated, all claims premised on state law negligence are preempted by federal law.

EDCV 15-02338-BRO (DTBx), 2016 WL 1533524, at *7–9 (C.D. Cal. Apr. 6, 2016) (plaintiff’s claims based on “alleged conduct that violates the FDCA” held preempted under *Buckman*).

Buckman leaves only a “narrow gap.” To escape preemption, “the plaintiff must not be suing *because* the conduct violates the FDCA.” *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1204 (8th Cir. 2010) (citations omitted); *Bell v. Boehringer Ingelheim Pharms., Inc.*, No. CV 17-1153, 2018 WL 2447788, at *6 (W.D. Pa. May 31, 2018) (Conti, J.) (holding, in the context of leave to amend, that “[t]here is a narrow legal theory that may be cognizable” that would avoid preemption and that it was “incumbent” on the plaintiff “to clearly articulate the legal theory he is pursuing and to allege sufficient facts to make each element of the claim plausible” without “overbroad, conclusory ‘shotgun’ allegations”). The PIAC’s allegations do not pass the “narrow gap,” nor do they articulate a “narrow legal theory” that avoids preemption.

B. The PIAC’s State Law Claims Are Premised on Alleged Violations of the FDCA and Failures to Report Those Alleged Violations to the FDA.

The PIAC’s attempted state law claims rely on Respironics’ alleged violations of federal duties, including alleged noncompliance with the FDCA and purported misrepresentations to the FDA. Underscoring this point, the PIAC:

- alleges that Respironics violated its federal duty to investigate and file adverse reports with the FDA pursuant to 21 C.F.R. § 803, PIAC ¶¶ 122–23;
- alleges that Respironics failed to comply with the FDA’s Quality System Regulation (“QSR”) requirements, and sold “adulterated” products in violation of the FDCA, *id.* ¶¶ 125–31;
- alleges that Respironics failed to “apprise the FDA” of known facts, problems, and reports, *id.* ¶¶ 226–27;
- alleges that Respironics violated “requirements codified in 21 C.F.R. § 820.100” and violated “applicable statutes and regulations . . . including . . . 21 C.F.R. § 807 *et seq.*[,] . . . 21 C.F.R. part 803 and 21 C.F.R. § 820.198,” *id.* ¶¶ 181, 597–98; and

- relies on references to an FDA Form 483 inspection observation report, an FDA Notice of an Opportunity for Hearing for a Proposed Section 518(b) Order (“Section 518(b) Notice”), an FDA Section 518(a) Order, and FDA updates about the recalled devices.⁷

These and other PIAC allegations judicially admit that the FDA not only possesses but is also exercising its exclusive enforcement jurisdiction, reinforcing application of the principles underlying implied preemption and primary jurisdiction.

C. The PIAC’s State Law Claims Are Impliedly Preempted.

Under *Buckman*, the PIAC’s claims premised on the foregoing allegations of noncompliance with the FDCA and misstatements or omissions to the FDA are impliedly preempted. See *In re Medtronic*, 623 F.3d at 1205 (claims grounded in failure “to provide the FDA with sufficient information” and to “timely file adverse event reports” are “foreclosed by § 337(a) as construed in *Buckman*”); *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1330 (11th Cir. 2017) (affirming implied preemption dismissal of tort claims based on allegation that defendant failed to investigate and report adverse events to the FDA); *Brooks v. Mentor Worldwide*, 985 F.3d 1272, 1281 (10th Cir. 2021) (“*Buckman* made clear that only the federal government may enforce reporting requirements and investigate and respond to suspected fraud.”).

As in *Buckman*, “were plaintiffs to maintain their fraud-on-the-agency claims here, they would not be relying on traditional state tort law,” but instead on the obligations imposed by the FDCA. See 531 U.S. at 353. *Buckman* held that the FDCA does not create a private right of action to enforce the FDCA, and permits only the “Federal Government . . . to file suit for noncompliance with the [FDCA’s] medical device provisions.” *Id.* at 348. Under *Buckman* and its progeny, Plaintiffs here “cannot escape preemption by reference to provisions of the FDCA that govern the sale of adulterated and misbranded devices because there is no private right of action under the

⁷ PIAC ¶¶ 7, 11, 168–69, 171–72, 177, 181–82, 191–94, 197, 200–01, 203–05, 220–22, 228–34, 254–56, 286–90, 300.

FDCA.” *Parker v. Stryker Corp.*, 584 F. Supp. 2d 1298, 1301 (D. Colo. 2008). Plaintiffs’ claims premised on allegations that the recalled devices failed to satisfy FDA quality standards and “current good manufacturing practice requirements codified in FDA regulations,” PIAC ¶ 181, accordingly are preempted. *Lewkut v. Stryker Corp.*, 724 F. Supp. 2d 648, 659 (S.D. Tex. 2010).

Plaintiffs’ negligence claims, to the extent they are based on the same alleged violations of the FDCA and its implementing regulations, are likewise preempted. This is so even though Plaintiffs may frame their negligence claim in terms of negligence *per se* using FDCA requirements in place of ordinary negligence standards. *See Williams v. Zimmer US Inc.*, No. 5:14-CV-468-F, 2015 WL 4256249, at *7 (E.D.N.C. July 14, 2015) (dismissing negligence *per se*, negligence, and negligent failure to warn claims because they “depend entirely upon alleged violations of the FDCA”); *Franklin v. Medtronic, Inc.*, No. 09-cv-02301-REB-KMT, 2010 WL 2543579, at *8 (D. Colo. May 12, 2010) *report and recommendation adopted*, 2010 WL 2543570 (D. Colo. June 22, 2010) (“[T]o the extent that Plaintiff seeks to ground her negligence *per se* and misrepresentation claims on allegations that Defendant violated the FDCA . . . these claims are impliedly preempted pursuant to 21 U.S.C. § 337(a).”).⁸

Plaintiffs’ negligent recall claim, which expressly relies on the FDA’s order under Section 518(a) of the FDCA, PIAC ¶ 423, is impliedly preempted for the additional reason that the FDA has acted by issuing the Section 518(a) Order and the Section 518(b) Notice. Plaintiffs’ allegations regarding Respironics’ voluntary recall process amount to an attempt to enforce the FDCA, “conflict [] with the FDCA’s enforcement scheme,” and would also interfere with the FDA’s ongoing efforts. *Perez v. Nidek Co.*, 711 F.3d 1109, 1119 (9th Cir. 2013); *Cohen v. Subaru*, No.

⁸ *See also Evans v. Rich*, No. 5:13-CV-868-BO, 2014 WL 2535221, at *2 (E.D.N.C. June 5, 2014) (“*Buckman* has been applied in particular contexts to impliedly preempt such state law claims as breach of warranty, negligence *per se*, design defect, and failure to warn.”).

1:20 CV 08442 JHR AMD, 2022 WL 721307, at *38–40 (D.N.J. Mar. 10, 2022) (claim that defendant “could have or should have performed a better recall” held preempted).

D. Plaintiffs’ Claims Alleging Negligent Recall Should Also Be Dismissed Under the Primary Jurisdiction Doctrine.

Separate from preemption, Plaintiffs’ negligent recall claims, and any claims predicated on allegations of negligent recall, should be dismissed under the primary jurisdiction doctrine. Primary jurisdiction “comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Atlantis Express, Inc. v. Standard Transp. Servs. Inc.*, 955 F.2d 529, 532 (8th Cir. 1992) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956)). Under the doctrine, “when an activity is arguably subject to an administrative agency’s expertise, such as the FDA, federal courts must defer to the exclusive competence of that agency.” *In re Human Tissue Prods. Liab. Litig.*, 488 F. Supp. 2d 430, 432 (D.N.J. 2007). Here, the FDA has exclusive enforcement authority *and* is engaged in active oversight.

Courts in the Third Circuit weigh four factors when evaluating primary jurisdiction:

(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.

Baykeeper v. NL Indus., Inc., 660 F.3d 686, 691 (3d Cir. 2011). Each of the *Baykeeper* factors weighs in favor of deferral to the FDA’s jurisdiction.

First, Respironics’ voluntary recall involves technical and policy considerations within the FDA’s expertise. *See, e.g.*, PIAC Ex. 72 (Section 518(b) Notice) at 12 (acknowledging that certain remedial measures in this case “may present significant risks” and thus require the FDA’s careful

consideration); *see also id.* ¶ 297 n.408 (FDA FAQs) (noting that FDA continues to “[c]arefully evaluate the totality of information available to the FDA in determining appropriate next steps”).

Second, review of the voluntary recall is particularly within the FDA’s discretion. Courts acknowledge “[t]he regulations implementing the [FDCA] vest the FDA with the authority to monitor and supervise product recall.” *In re Human Tissue*, 488 F. Supp. 2d at 432 (citing 21 C.F.R. § 7.40(a)). “These regulations set forth specific recall procedures whereby the FDA assumes control over monitoring recalls and assesses the adequacy of a firm’s efforts in undertaking the recall.” *Id.* (citing 21 C.F.R. §§ 7.40-7.59). The regulations dictate the elements considered in formulating a recall strategy and outline a process for the FDA to “review the adequacy of [the] proposed recall strategy developed by a recalling firm and recommend changes as appropriate.” 21 C.F.R. § 7.42(a); *see Clark v. Actavis Group hf*, 567 F. Supp. 2d 711, 719 (D.N.J. 2008) (“[I]t is the FDA, not this Court who has the expertise in modifying the procedures associated with the recall.”).

Third, judicial action poses a clear and substantial danger of inconsistent rulings given that the FDA’s active monitoring and supervision of the voluntary recall are both material and ongoing. *See* PIAC ¶ 297 n.408 (FDA FAQs) (identifying ongoing FDA involvement in recall); *see also Harshbarger v. Pa. Mut. Life Ins. Co.*, No. 12-6172, 2014 WL 1409445, at *6 (E.D. Pa. Apr. 11, 2014) (ongoing agency oversight weighed in favor of abstention).

Finally, the FDA continues to be engaged actively in its own duly authorized review of the voluntary recall. *See Ferrare v. IDT Energy, Inc.*, No. 14-4658, 2015 WL 3622883, at *4 (E.D. Pa. June 10, 2015); *see also, e.g.*, PIAC ¶¶ 9, 16, 191 and Exs. 72, 136.

Thus, even if Plaintiffs’ negligent recall and recall-based claims were not preempted, dismissal under the primary jurisdiction doctrine is warranted. *Baykeeper*, 660 F.3d at 691.

IV. NEGLIGENCE FAILURE TO RECALL (COUNT VI) IS NOT RECOGNIZED AS A CAUSE OF ACTION IN TEN STATES.

Plaintiffs improperly combine two causes of action, negligent recall and negligent failure to recall, in Count VI. Ten states do not recognize “negligent failure to recall” as an independent cause of action.⁹ *See* Citation Table A(1); *Cleaver v. Honeywell Int’l, LLC*, No. CV 21-4921, 2022 WL 2442804, at *4 (E.D. Pa. Mar. 31, 2022) (“Under Pennsylvania law, manufacturers and distributors do not have a duty to recall or retrofit products.”). This cause of action should be dismissed insofar as it is alleged under the laws of jurisdictions that do not recognize it. Furthermore, Plaintiffs’ allegations necessarily foreclose their negligent failure to recall claims, because they allege that Respironics voluntarily initiated a recall. *See, e.g., Montiel v. Hitachi Am., Ltd.*, No. EDCV21848, 2021 WL 3124955, at *2 (C.D. Cal. July 23, 2021) (elements of negligent failure to recall include that defendant failed to recall the allegedly defective product).

V. PLAINTIFFS’ TORT AND WARRANTY CLAIMS (COUNTS I – XV, XVIII – XXI) ARE SUBSUMED BY CERTAIN STATES’ PRODUCT LIABILITY ACTS.

The product liability acts (“PLAs”) of nine states create an exclusive statutory cause of action for claims falling within their purview, subsuming common law and state consumer protection law causes of action asserting physical harm to the person or property resulting from an allegedly defective product. *See, e.g., Repola v. Morbark Industries, Inc.*, 934 F.2d 483, 492 (3d Cir. 1991) (N.J. PLA “subsumes claims for common law negligence” based on alleged failure to warn of product defect); Citation Table B(1) (common law) and B(2) (consumer protection).

Plaintiffs’ negligence, strict liability, breach of express warranty,¹⁰ implied warranty, battery, loss of consortium, wrongful death, medical monitoring, punitive damages, common law

⁹ This claim is also impliedly preempted, as set forth in Section III, *supra*.

¹⁰ Except in New Jersey. *See* Citation Table B(1).

fraud and consumer protection act¹¹ claims (Counts I – XVI and XVIII – XXI) are subsumed by the Connecticut, Indiana, Kansas, Louisiana, Mississippi, New Jersey, Ohio, Tennessee, and Washington PLAs and should be dismissed. *See, e.g., In re Valsartan, Losartan, and Irbesartan Products Liab. Litig.*, MDL No. 2875 (RBK/KW), 2021 WL 364663, at *6 (D.N.J. Feb. 03, 2021) (“[P]roduct-liability-related claims based on common law theories” are subsumed by New Jersey PLA); *Young v. Bristol-Myers Squibb Company*, 16-cv-00108, 2017 WL 706320, at *4 (N.D. Miss. Feb. 27, 2017) (“To the extent a subsumed common law claim is asserted as an independent tort claim . . . the count must be dismissed for failure to state a claim.”) (quotation omitted).

VI. PLAINTIFFS’ WARRANTY CLAIMS (COUNTS X THROUGH XII) FAIL.

A. Respireonics’ Written Warranty Excludes the Design Defect Plaintiffs Allege.

As explained in the TAC Motion to Dismiss (Section III(A)(1)),¹² Plaintiffs claim that Respireonics breached its written limited warranty¹³ that the devices “shall be free from defects *of workmanship and materials*.” PIAC ¶ 490 (emphasis added). But Plaintiffs *do not* allege a “workmanship and materials” defect in the *manufacture* of *some* of the devices; they allege a *design* defect in the selection of PE-PUR foam for use within *all* of the devices. *E.g., id.* ¶ 3 (“Philips designed its devices to include polyester-based polyurethane (‘PE-PUR’) foam.”); *id.* ¶ 4 (“All of these recalled products . . . are defective because they contain PE-PUR foam.”).¹⁴ Respireonics’ written warranty concerns only *manufacturing* defects—not design defects.

¹¹ Except in Kansas, Mississippi, Tennessee and Washington. *See* Citation Tables B(1) and (2).

¹² The points addressed in Sections V(B) through (E) below were also addressed in the TAC Motion to Dismiss, in Sections III(A)(3) and (4), III(B)(2) and (3), and III(E).

¹³ An additional basis for dismissal of this claim is set forth in Section V, *supra*.

¹⁴ To the extent Plaintiffs claim that the alleged use of “incorrect and non-specified PE-PUR” foam to construct “certain recalled Trilogy EVO ventilators” constitutes a manufacturing defect under Respireonics’ limited warranty, PIAC ¶ 455, that claim fails because, among other reasons, those ventilators are outside the scope of this MDL proceeding. *See supra* Section VI(C).

Manufacturing defects are “unintended deviation[s] from normal” production, while design defects “involve products made in the precise manner intended by the manufacturer.” *Miller v. Hyundai Motor Am.*, No. 15-cv-4722, 2017 WL 4382339, at *4 (S.D.N.Y. Sept. 29, 2017). Manufacturing defects “inevitably occur in a typically small percentage of products of a given design.” *Id.* at 5. A “manufacturer’s choice to use a certain material to construct a product is a ‘design decision,’ not a defect in ‘materials and workmanship.’” *Davidson v. Apple, Inc.*, No. 16-CV-04942-LHK, 2017 WL 976048, at *11 (N.D. Cal. Mar. 14, 2017). Because Respironics’ limited warranty does not cover the design defect alleged, Plaintiffs’ breach of express warranty claim fails on its face and must be dismissed.¹⁵ See *Cooper v. Samsung*, 374 F. App’x 250, 253 (3d Cir. 2010) (“[M]aterials and workmanship” warranty did not apply where “TV was manufactured as designed.”).¹⁶

¹⁵ Because Plaintiffs allege no defect covered by Respironics’ limited warranty, their claim that the warranty’s durational limit is unconscionable is irrelevant. In any event, a two-year warranty period is not “unconscionable.” See PIAC ¶¶ 502–03. A warranty is procedurally unconscionable where consumers are without “other options for purchasing warranty coverage other than directly from [defendant].” *In re General Motors Air Conditioning Marketing and Sales Practices Litigation*, 406 F. Supp. 3d 618, 629 (S.D. Mich. 2019). As in *General Motors*, Plaintiffs fail to allege they lacked “other options” apart from the recalled devices. See generally PIAC ¶¶ 502–06, 524–28. To the contrary, Plaintiffs concede that ResMed has been an industry competitor since 1989 and markets competing devices. See *id.* ¶¶ 83–84.

¹⁶ Even if the PIAC had alleged issues covered by Respironics’ limited warranty, Plaintiffs would still need to allege that a defect actually manifested in their particular devices within the two-year limited warranty period, and that Respironics was timely notified of the defect. *E.g.*, PIAC Ex. 47 (Respironics’ Limited Warranty) at 32 (stating devices “shall be free from defects of workmanship and materials” for “two (2) years from the date of sale by Respironics, Inc. to the dealer,” and that to “exercise [their] rights under th[e] warranty,” users must contact Respironics or an authorized dealer). The PIAC lacks such allegations and the Master Short Form Complaint neither requires nor invites their provision. See, *e.g.*, *Brisson v. Ford*, 349 F. App’x 433, 434 (11th Cir. 2009) (“[F]ailure to allege that [plaintiffs] experienced a defect within the warranty period . . . is fatal.”).

B. Respironics' Written Warranty Expressly Excludes Consequential Damages.

Plaintiffs are not entitled to the consequential damages they seek in the PIAC.¹⁷ Respironics' limited warranty expressly disclaims all liability for consequential damages. Its remedial provisions (i) set out that "[i]f the product fails to perform in accordance with the product specifications," Respironics "will repair or replace – at its option – the defective material or part," (ii) specify that the limited repair or replacement warranty "is given *in lieu of all other express warranties*," and (iii) "*disclai[m] all liability* for economic loss, loss of profits, overhead, or *consequential damages which may be claimed to arise from sale or use of [a device]*." *E.g.*, PIAC Ex. 47 at 32 (emphasis added). Under the Uniform Commercial Code ("UCC"), such limitations are expressly allowed and fully enforceable,¹⁸ and they bar personal injury claims. *See, e.g., Reibold v. Simon Aerials, Inc.*, 859 F. Supp. 193, 198 (E.D. Va. 1994) ("[Defendant] may properly disclaim any contractual liability for consequential damages including personal injury."); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1146 (N.D. Cal. 2010) (holding that warranty properly "limit[ed] Plaintiffs' entitlement to consequential and incidental damages" in products liability case involving alleged personal injury).¹⁹

¹⁷ *See* PIAC ¶ 510; Prayer For Relief (p. 172).

¹⁸ *See* UCC § 2-719(1)(a) (warranties may "limi[t] the buyer's remedies to . . . repair and replacement of non-conforming goods or parts"); *id.* § 2-719(3) ("Consequential damages may be limited or excluded."). Every state has either codified these UCC provisions or established similar common law warranty principles. *See, e.g., Shaw v. Toshiba*, 91 F. Supp. 2d 942, 956–57 (E.D. Tex. 2000) (noting "forty-nine states and the District of Columbia have enacted [UCC] § 2-719" and that "Louisiana state-law establishes the same warranty principles as § 2-719").

¹⁹ In addition to the reasons for dismissal of the express warranty claim set forth in Sections V.A and B above, for reasons addressed in the TAC Motion to Dismiss, the PIAC does not allege a breach of warranty because Respironics is providing no-cost repair or replacement of all recalled devices—the sole remedy available under the limited warranty. *See* TAC Motion to Dismiss § III.A.4.

C. Certain Plaintiffs’ Implied Warranty Claims Fall Outside of the Two-Year Limited Warranty Period.

Thirty-one jurisdictions permit manufacturers to limit the duration of an implied warranty to the same term as the express warranty.²⁰ *See* Citation Table C(1). Respironics’ written limited warranty states that implied warranties “are limited to two years.” *E.g.*, PIAC Ex. 47 at 32. The PIAC does not allege when any plaintiff acquired a recalled device, let alone that any plaintiff filed suit or otherwise notified Respironics of a defect within two years of acquiring a device. The Master Short Form Complaint also lacks this basic information, and in fact, does not even invite Plaintiffs to allege it. Plaintiffs’ failure to allege both manifestation of the defect and notice to Respironics within the two-year warranty period requires dismissal of the implied warranty claims of any plaintiff whose claims arise under those thirty-one jurisdictions’ laws.²¹ *See Brisson*, 349 F. App’x at 434–35 (affirming dismissal of implied warranty claim limited by express warranty for failure to allege manifestation or breach “within that period”); *Edin v. BSH Home Appliances*, No. 8:20-cv-00576-SVW-ADS, 2021 WL 890702, at *4 (C.D. Cal. Jan. 19, 2021) (dismissing implied warranty claim “because no defect manifested during the limited warranty period”).

D. Certain Plaintiffs’ Implied Warranty Claims Fail for Lack of Privity.

Seven jurisdictions require direct vertical privity to assert an implied warranty claim for alleged personal injuries. *See* Citation Table C(2). The PIAC does not allege that any Plaintiff acquired a device directly from Respironics, and in fact, admits that Respironics is a “remote manufacturer,” not a direct seller. PIAC ¶ 506. Nor does the Master Short Form Complaint call

²⁰ Additional bases for dismissal of these claims are set forth in Sections III and V, *supra*.

²¹ At a minimum, the implied warranty claims of any Plaintiff who acquired a recalled device more than two years before the first lawsuit concerning the alleged PE-PUR foam defect was filed in June 2021, and whose claims arise under those thirty-one jurisdictions’ laws, fall outside of the two-year limited warranty period, and must be dismissed. *See* Class Action Complaint, *Manna v. Koninklijke Philips N.V., et al.*, No. 1:21-cv-11017 (D. Mass.) (June 17, 2021) (ECF No. 1).

for information concerning how (or from whom) any Plaintiff obtained their device. Because the PIAC concedes that Respironics was not in privity with any individual consumer, Plaintiffs' implied warranty claims under these jurisdictions' laws must be dismissed. *See, e.g., Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1233 (S.D. Fla. 2014) (“[I]mplied warranty claim[s] for personal injury no longer exists under Florida law absent privity”).

E. Pennsylvania Law Bars Plaintiffs' Implied Warranty Claims.

The implied warranty claims of any plaintiffs whose claims arise under Pennsylvania law should be dismissed because the devices are prescription medical devices.²² *See, e.g., Kee v. Zimmer, Inc.*, 871 F. Supp. 2d 405, 409 n.3 (E.D. Pa. 2012) (“[I]mplied warranties . . . are inapplicable to prescription medical devices in Pennsylvania.”); *Bell v. Boehringer Ingelheim Pharms., Inc.*, No. CV 17-1153, 2018 WL 928237, at *3 (W.D. Pa. Feb. 15, 2018) (Conti, J.) (holding that Pennsylvania law bars “claim[s] against a prescription drug manufacturer based on an alleged breach of warranty”).

F. Certain Plaintiffs' Express and Implied Warranty Claims Should Be Dismissed for Failure to Provide the Required Pre-Suit Notice.

In thirty-five jurisdictions, pre-suit notice is a prerequisite to asserting warranty claims. *See* Citation Table C(3). The express and implied warranty claims of any plaintiffs asserting claims under the laws of those jurisdictions should be dismissed for failure to provide Respironics with compliant pre-suit notice. While the PIAC references letters, dated September 8, 2021 and May 16, 2022, as purportedly satisfying Plaintiffs' notice obligations, PIAC ¶¶ 506, 529, 558, the letters were not sent *prior to* commencing litigation nor are they otherwise compliant. Respironics' October 8, 2021 and June 15, 2022 responses identify the numerous deficiencies in Plaintiffs'

²² *See, e.g.,* PIAC ¶ 617.uu; *see also* PIAC Ex. 47 at 1, 23.

letters, compelling dismissal of these Plaintiffs’ express and implied warranty claims.²³ Moreover, these shortcomings are not remedied by the Master Short Form Complaint, which does not provide space for, let alone require, notice allegations.

VII. PLAINTIFFS’ STRICT LIABILITY CLAIMS (COUNTS II, IV, VIII) MUST BE DISMISSED FOR ADDITIONAL REASONS.

A. Three States Do Not Recognize Strict Liability Claims.

Delaware, North Carolina, and Virginia do not allow for product liability claims based on a theory of strict liability. *See Cline v. Prowler Industries of Maryland, Inc.*, 418 A.2d 968, 980 (Del. 1980); N.C. Gen. Stat. § 99B-1.1; *Stoddard v. Wyeth, Inc.*, 630 F. Supp. 2d 631, 632 (E.D.N.C. 2009); *Harris v. T.I., Inc.*, 413 S.E.2d 605, 609–10 (Va. 1992). As a result, all strict liability claims under the laws of those states must be dismissed.²⁴

B. Strict Liability Design Defect Claims (Count II) Under the Laws of Certain States Must Be Dismissed Under Comment K of Restatement Section 402a.

Strict liability design defect claims are barred, and fail to state a cause of action, under the laws of fourteen states and the District of Columbia as a result of their adoption of Restatement (Second) of Torts § 402A, comment k (“comment k”).²⁵ *See* Citation Table D(1). Under comment k, manufacturers of “unavoidably unsafe” products are not liable for injuries under a strict liability defective design theory. *See* Restatement (Second) of Torts § 402A, comment k; *see also* Citation Table D(1). Courts in these fifteen jurisdictions that have addressed the issue have found that prescription medical devices are unavoidably unsafe products for purposes of comment k analysis.

²³ Copies of the letters and responses are attached as Exhibits A–D to the Motion and may be considered by the Court to evaluate Plaintiffs’ claims. *See Beto v. Barkley*, 706 F. App’x 761, 765 (3d Cir. 2017) (court may consider documents incorporated by reference in the complaint). In addition to the other deficiencies, Plaintiffs’ letters omit mention personal injury claims. This failure, too, renders Plaintiffs’ letters ineffective.

²⁴ An additional basis for dismissal of these claims is set forth in Section V, *supra*.

²⁵ An additional basis for dismissal of this claim is set forth in Section V, *supra*.

See, e.g., Yalter v. Endocare, Inc., No. SACV03 80 DOC, 2004 WL 5237598, at *4 (C.D. Cal. Nov. 8, 2004), *aff'd* 220 F. Appx. 657 (9th Cir. 2007) (“An exception to [the] general doctrine of strict products liability applies to manufacturers that make prescription drugs and medical devices ... [P]rescription drugs and medical devices are considered to be unavoidably unsafe products.”).²⁶ Accordingly, Plaintiffs’ strict liability design defect claims must be dismissed for any plaintiff in one of the fifteen jurisdictions referenced in Citation Table D(1).

This Court should also find that Plaintiffs’ strict liability design defect and failure to warn claims are barred by comment *k* under Pennsylvania law, as it did in both *Killen v. Stryker Spine*, No. 11-1508, 2012 WL 4498865, at *3–4 (W.D. Pa. Sep. 28, 2012) (Conti, J.), and again in *Kline v. Zimmer Holdings, Inc.*, No. 13-513, 2013 WL 3279797, at *1 (W.D. Pa. Jun. 27, 2013) (Conti, J.). In both cases, this Court correctly held that under Pennsylvania law comment *k* bars strict liability design defect and failure to warn claims with respect to medical devices.

In *Killen*, this Court agreed with Magistrate Judge Kelly’s finding that comment *k* applies to medical devices in Pennsylvania. 2012 WL 4498865, at *5 (adopting report and recommendation finding that comment *k* applies to medical devices under Pennsylvania law); *Killen v. Stryker Spine*, 2012 WL 4482371, at *10 (W.D. Pa. 2012) (report and recommendation). Judge Kelly’s report and recommendation relied on the leading Pennsylvania appellate decision addressing whether comment *k* applies to medical devices, *Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 31 (Pa. Super. 2006). There, the Pennsylvania Superior Court considered the state Supreme Court’s decision adopting comment *k* for prescription drugs, *Hahn v. Richter*, 673 A.2d 888, 890–91 (1996), and found “no reason why the same rationale applicable to prescription drugs may not

²⁶ Courts in the remaining jurisdictions have not reached the issue. None have expressly declined to apply comment *k* to prescription medical devices.

be applied to medical devices.” Since then, “numerous” courts (in addition to this Court) have followed *Creazzo* and “predicted that the Pennsylvania Supreme Court will extend comment K to” medical devices. *Parkinson v. Guidant Corp.*, 315 F. Supp. 2d 741, 747 (W.D. Pa. 2004) (Diamond, J.) (predicting “that the Pennsylvania Supreme Court likely would find that comment K to § 402A applies as equally to prescription medical devices as it does to prescription drugs”).²⁷

A few district courts in Pennsylvania erroneously have declined to extend comment *k* to claims involving prescription medical devices based on non-binding dicta from two Pennsylvania Supreme Court decisions, *Tincher v. Omega Flex, Inc.*, 628 Pa. 296 (2014) and *Lance v. Wyeth*, 624 Pa. 231, 261 n.21 (2014).²⁸ Reliance on mere dicta to expand liability for medical device manufacturers in Pennsylvania is misplaced. In the “absence of controlling Third Circuit or Pennsylvania Supreme Court precedent,” courts are to “give serious consideration to the decisions of the intermediate appellate courts in ascertaining and applying state law.” *Mikula v. C.R. Bard, Inc.*, No. 2:21-CV-01307-MJH, 2021 WL 5989130, at *5 (W.D. Pa. Dec. 17, 2021) (Horan, J.). That rule requires substantial deference to *Creazzo* as the only on-point decision of a Pennsylvania intermediate appellate decision.

Further, when predicting state law under *Erie*, district courts must “opt for the interpretation that restricts liability, rather than expands it.” *Travelers Indem. Co. v. Dammann &*

²⁷ E.g., *Davenport v. Medtronic, Inc.*, 302 F. Supp. 2d 419, 441–42 (E.D. Pa. 2004); *Murray v. Synthes U.S.A., Inc.*, No. CIV. A. 95-7796, 1999 WL 672937, at *6–7 (E.D. Pa. Aug. 23, 1999); *Taylor v. Danek Med., Inc.*, No. Civ.A. 95-7232, 1998 WL 962062, at *7 (E.D. Pa. Dec. 29, 1998).

²⁸ E.g., *Patchcoski v. W.L. Gore & Assocs., Inc.*, No. CV 3:19-1556, 2020 WL 4335016, at *10 (M.D. Pa. July 28, 2020) (predicting that the Pennsylvania Supreme Court would not extend *Hahn* and comment *k* to all prescription medical device manufacturers); *Schrecengost v. Coloplast Corp.*, 425 F. Supp. 3d 448, 464–66 (W.D. Pa. 2019) (Gibson, J.), *motion to certify appeal denied*, No. 3:17-CV-220, 2019 WL 7499923, at *8–10 (W.D. Pa. Dec. 19, 2019) (Gibson, J.) (predicting that the Pennsylvania Supreme Court would hold that strict liability claims against medical device manufacturers are cognizable); *Moultrie v. Coloplast*, No. 18-231, 2020 WL 1249354, at *7–10 (W.D. Pa. Mar. 16, 2020) (Dodge, M.J.).

Co., 594 F.3d 238, 253 (3d Cir. 2010), *accord Carreiro v. Rhodes Gill & Co., Ltd.*, 68 F.3d 1443, 1448 (1st Cir. 1995) (litigants “in federal court under diversity jurisdiction cannot expect that new trails will be blazed”). Those interpretive guard rails reinforce the correctness of this Court’s rulings in *Killen* and *Kline*, and consistent with those decisions this Court should hold here that comment *k* applies to medical device manufacturers.

C. Plaintiffs’ Strict Liability Manufacturing Defect Claim (Count VIII) Fails.

Plaintiffs’ Strict Liability Manufacturing Defect Claim must be dismissed because it is premised on allegedly faulty manufacturing of a medical device—the Trilogy Evo Ventilator—that is not a part of this MDL. The PIAC alleges that “Philips used defective, incorrect and non-specified PE-PUR, raw foam product, not intended for use in Recalled Devices, to manufacture *some* of the Recalled Devices *including* certain recalled Trilogy Evo ventilators,” but Plaintiffs identify no other device. PIAC ¶ 455 (emphasis added). Other allegations and exhibits attached to the PIAC confirm that the *only* device about which Plaintiffs allege a manufacturing defect claim (as opposed to a design defect claim) is the Trilogy Evo. *Compare* PIAC ¶ 455 *with* PIAC ¶ 182 (citing PIAC Ex. 5) (which repeat the same allegations but apply only to the Trilogy Evo).

The MDL Court’s transfer order includes only litigation arising from Respironics’ voluntary recall of certain devices on June 14, 2021. Transfer Order, ECF No. 203. The Trilogy EVO is not one of those devices and is not on the Transfer Order’s list of recalled devices at issue in this MDL. *Id.* at 2, n.4.²⁹ Dismissal therefore is required because “[a] plaintiff may not unilaterally add actions in the MDL . . . which were not transferred to the transferee court through the MDL process.” *In re Mortg. Elec. Registration Sys. (Mers) Litig.*, No. MD-09-02119-PHX-

²⁹ See, e.g., <https://www.usa.philips.com/healthcare/e/sleep/communications/src-update> (listing devices “not affected” by Respironics’ voluntary June 2021 recall, which include the Trilogy Evo ventilators).

JAT, 2016 WL 3931820, at *5 (D. Ariz. July 21, 2016), *aff'd sub nom. In re Mortg. Elec. Registration Sys., Inc., Litig.*, 719 F. App'x 550 (9th Cir. 2017).³⁰

VIII. PLAINTIFFS' NEGLIGENT MANUFACTURING CLAIM (COUNT IX) IS A MISLABELED NEGLIGENT DESIGN CLAIM.

Plaintiffs' negligent manufacturing claim fails because they allege no negligence during the manufacturing process. *Foge, McKeever LLC v. Zoetis Inc.*, 565 F. Supp. 3d 647, 654 (W.D. Pa. 2021) (Coville, J.).³¹ “Without any factual allegation as to the nature of what went wrong during the manufacturing process, there is no plausible road to recovery for negligent manufacturing.” *Smith v. Howmedica Osteonics Corp.*, 251 F. Supp. 3d 844, 853 (E.D. Pa. 2017).

The PIAC is devoid of any such factual allegations. Plaintiffs allege “the Recalled Devices are defective in manufacture because the PE-PUR foam comprising part of the devices is subject to degradation and off-gassing and the PE-PUR foam contains toxic and carcinogenic materials.” PIAC ¶ 475. Alleging that the foam used was negligently selected because of its tendency to degrade does not allege a *manufacturing* defect—it alleges a *design* defect. *See Zetz v. Bos. Sci. Corp.*, 398 F. Supp. 3d 700, 708 (E.D. Cal. 2019) (“A plaintiff pursuing a manufacturing defect claim must identify/explain how the product either deviated from the manufacturer’s intended result/design or how the product deviated from other seemingly identical models; therefore, a bare allegation that the product had ‘a manufacturing defect’ is an insufficient legal conclusion.”).³²

That the PIAC repeats the same defective foam allegation in both the manufacturing and design defect claims underscores the point. PIAC ¶¶ 327, 347, 475. Mislabeling an alleged design defect as a manufacturing defect does not state a plausible manufacturing defect claim and dismissal is warranted. *See, e.g., Cummings v. FCA US LLC*, 401 F. Supp. 3d 288, 315 (N.D.N.Y.

³⁰ An additional basis for dismissal of this claim is set forth in Section V, *supra*.

³¹ Additional bases for dismissal of this claim are set forth in Sections III and V, *supra*.

³² *See also* discussion of manufacturing defect/design defect distinction in Section V(A) *supra*.

2019) (holding that where “Plaintiff’s references to a defect in manufacturing . . . are conclusory and unsupported,” that “suggests that [Plaintiff] is alleging a design defect”).

IX. PLAINTIFFS’ FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS (COUNTS XIII, XIV) MUST BE DISMISSED FOR ADDITIONAL REASONS.

A. Plaintiffs’ Fraud and Negligent Misrepresentation Claims Fail Because Plaintiffs Have Not Pled an Actionable Misstatement or Omission.

Plaintiffs’ fraud and negligent misrepresentation claims should be dismissed for the independent reason that the PIAC fails to plead any actionable conduct for either claim with the particularity required by Rule 9(b), much less any causal relationship between such conduct and Plaintiffs’ purported harm, and the Master Short Form Complaint neither requires, nor invites, such pleading. Further, certain states require a confidential or fiduciary relationship before imposing a duty to disclose on a defendant that could support Plaintiffs’ omission-based claims, and no basis for finding such a relationship is alleged here.³³

First, the PIAC’s allegations are so vague that Respironics cannot discern whether Plaintiffs’ fraud and negligent misrepresentation claims are based upon purported misrepresentations and omissions, or only upon omissions.³⁴ *Frederico v. Home Dep’t*, 507 F.3d 188, 200 (3d Cir. 2007) (purpose of Rule 9(b) is “to place the defendant on notice of the precise misconduct with which [it is] charged”) (cleaned up). Both claims allege that Plaintiffs suffered harm “[a]s a direct and proximate result of Philips’ material omissions, misrepresentations, and concealment of material information.” PIAC ¶¶ 577, 590. But any misrepresentation-based claim should be dismissed because the PIAC identifies no purported false or misleading statement at all,

³³ Additional bases for dismissal of these claims are set forth in Sections II, III, and V, *supra*.

³⁴ Plaintiffs’ negligent misrepresentation claim “sounds in fraud” because it is predicated on the same alleged underlying conduct as the fraud claim. *See Travelers Indem. Co.*, 620 F. App’x at 86; *accord Webb v. Volvo Cars of N.A., LLC*, No. Civ. 13-2394, 2018 WL 1470470, at *6 (E.D. Pa. Mar. 26, 2018) (analyzing negligent misrepresentation claim under Rule 9(b)).

let alone with the detail required by what this Court described as the “rigorous pleading standards” of Rule 9(b). *Bell*, 2018 WL 2447788, at *6 (W.D. Pa. May 31, 2018) (Conti, J.); *see also Webb*, 2018 WL 1470470, at *6 (dismissing fraud and negligent misrepresentation claims for failure to identify a false statement). These fatal pleading shortcomings are not remedied by the Master Short Form Complaint, which does not require individual plaintiffs to allege facts with particularity in support of their fraud and negligent misrepresentation claims—namely the time, place, or content of any actual statements made by Respiroics that were purportedly false—and provides no space for them to do so. *See In re Zofran*, 2017 WL 1458193, at *6–7 (broad allegations that defendant misrepresented safety of product in advertising materials, marketing efforts, and “written and oral information” provided to “patients and medical providers” held insufficient under Rule 9(b)).

Second, Plaintiffs plead no facts establishing causation for their fraud claim (*see* Citation Table E(1)(a)) or their negligent misrepresentation claim (*see* Citation Table E(1)(b)). Plaintiffs’ fraud claim relies on the threadbare assertion that Respiroics “concealed and omitted information about the Defect and its related serious health effects” from various sources of information and that Plaintiffs “justifiably and reasonably relied on the omissions” when deciding whether “to use, purchase, lease, and pay” for a device. PIAC ¶¶ 574–75. Plaintiffs’ negligent misrepresentation claim falls shorter still, lacking **any** allegation of reliance while resting on equally threadbare assertions of Respiroics’ alleged omissions that Respiroics “concealed,” “failed to disclose,” and “misrepresented to Plaintiffs that the Recalled Devices were safe for use.” *Id.* ¶ 586. Here too, the Master Short Form Complaint, which does not require individual plaintiffs to allege facts establishing causation and provides no space for them to do so, provides no remedy.

Plaintiffs do not plausibly plead that they (as opposed to a physician or supplier of the device) selected or purchased their devices as a result of seeing, reading, or in reliance on any representation *made by Respireonics* such that an omission (or representation) plausibly could have caused any plaintiff to act differently. *See, e.g., Brown v. C.R. Bard*, No. 21-cv-01552, 2022 WL 420914, at *9 (E.D. Pa. Feb. 11, 2022) (conclusory allegation for fraud and negligent misrepresentation claims that “[plaintiff] and her implanting physician ‘justifiably acted or relied upon, to [plaintiff’s] detriment, the concealed and/or non-disclosed facts as evidenced by her purchase of the . . . pelvic mesh product’ failed to satisfy Rule 9(b)); *Martell v. GM LLC*, 492 F. Supp. 3d 1131, 1143–44 (D. Or. 2020) (dismissing fraudulent omission claim where complaint “recite[d] numerous advertisements,” but plaintiff “failed to allege that he saw or heard any of those statements”). Accordingly, Plaintiffs’ claims should be dismissed for failure to plead facts (much less facts with particularity) supporting causation. *See, e.g., In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, No. 06-CV-5774, 2009 WL 2043604, at *33 (D.N.J. July 10, 2009) (dismissing fraud and negligent misrepresentation claims for failure to “establish[] a causal connection between Plaintiffs’ alleged injury and [defendant’s] conduct”).

Finally, Plaintiffs’ failure to allege a fiduciary or similar relationship with Respireonics (there was none) is fatal to their omissions-based fraud and negligent misrepresentation claims under the laws of states that impose no duty to disclose information absent a confidential or fiduciary relationship. *See* Citation Tables at E(2)(a) (fraud, eighteen states) and E(2)(b) (negligent misrepresentation, sixteen states); *accord Coburn Supply Co., Inc. v. Kohler Co.*, 342 F.3d 372, 377–78 (5th Cir. 2003) (relationship was not the kind of confidential or fiduciary relationship that would give rise to a duty to disclose); *Slippery Rock Area School District v. Tremco Inc.*, Civ. A. No. 15-1020, 2016 WL 3198122, at *12 (W.D. Pa. June 9, 2016) (J. Conti) (dismissing fraudulent

omission claim for failure to plausibly allege a fiduciary relationship); *Cohen*, 2022 WL 721307, at *19–20 (dismissing fraud by omission claims under various state laws, including fourteen states identified in Citation Table E(1)); *Argabright v. Rheem Manuf. Co.*, 201 F. Supp. 3d 578, 604 (D.N.J. 2016) (dismissing omission-based fraud and negligent misrepresentation claims for failure to plead special relationship).³⁵

B. Plaintiffs’ Negligent Misrepresentation Claims Further Fail as a Matter of Law in Eight Jurisdictions.

Four states (Arkansas, Idaho, North Carolina, and Virginia) do not recognize an independent cause of action for negligent misrepresentation, *see* Citation Table E(3), compelling dismissal of any such claim under these laws. An additional four states (Indiana, Florida, Maine, and Minnesota) limit negligent misrepresentation causes of action to pecuniary losses related to a business transaction, and not physical harm as alleged here. *See* Citation Table E(4).

X. PLAINTIFFS’ STATE CONSUMER PROTECTION CLAIMS (COUNT XVI) FAIL FOR MULTIPLE INDEPENDENT REASONS.

In Count XVI of the PIAC, Plaintiffs attempt to allege causes of action under the consumer protection statutes of all fifty states and the District of Columbia primarily by perfunctorily listing the citations to sixty-five distinct consumer protection statutes in a single paragraph with sixty subparts.³⁶ Bare citation of a statute does not suffice to allege the elements needed to state a plausible claim for relief under sixty-five different consumer protection laws, particularly given

³⁵ Certain states, including New Jersey, may also imply a duty to disclose for purposes of an omission-based claim if the plaintiff alleges that the defendant made a partial disclosure, on which the plaintiff relied. As addressed above, however, no plaintiff has pled any representation made by Respirationics on which they purportedly relied. *See, e.g., Rose v. Ferrari NA*, No. 21-cv-20772, 2022 WL 14558880, at *6–7 (D.N.J. Oct. 25, 2022).

³⁶ *See* PIAC ¶ 617 a–hhh. There are sixty-five different consumer protection statutes cited because there are five states for which two different statutes are listed in the subpart. *See id.* ¶ 617 j, m, ee, oo, qq. For all sixty-five statutes, the PIAC is devoid of even simple acknowledgment of the distinctions of one statute from another.

the unique and distinct provisions of the statutes at issue. *Cf. Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 776–77 (W.D. Pa. 2015) (Conti, J.) (“Plaintiffs’ allegations in support of their individual and class-wide CPL claims are not entitled to the assumption of truth because they are legal conclusions unsupported by factual allegations.”).

Dismissal is further compelled because (i) Plaintiffs’ consumer protection claims fail for the same reasons as their tort-based causes of action, (ii) the cited state consumer protection laws do not permit the relief requested, and (iii) of statute-specific pleading deficiencies.³⁷

A. Plaintiffs’ Consumer Protection Law Claims Fail for the Same Reasons as Their Other Claims.

Preemption. Because Plaintiffs’ consumer protection claims are grounded in alleged failures to report to the FDA, or in alleged concealment of information from the FDA, they are all preempted as a matter of federal law, *see supra* Section III. For similar reasons, Plaintiffs’ consumer protection claims are further foreclosed in twelve states because the relevant statutes preclude claims in areas (as here) that are subject to regulatory oversight.³⁸

Rule 9(b). All of Plaintiffs’ consumer protection claims sound in fraud (*see, e.g.*, PIAC ¶¶ 606–15, 618–23), but they are not pled with the particularity required by Rule 9(b), *see supra* Section IX. Plaintiffs, likewise, ignore statutory particularity requirements.³⁹

Causation. Thirty-seven states require factual pleading of causation and/or reliance to

³⁷ Many of the grounds for dismissal of the consumer protection claims in the PIAC parallel the bases for their dismissal as outlined in Respironics’ TAC Motion to Dismiss (Section VII).

³⁸ *See* Citation Table F(1). Claims of all Plaintiffs under these consumer protection laws of twelve states are foreclosed and must be dismissed. *See* Motion ¶ xxiii.

³⁹ For example, Plaintiffs assert claims under the Minnesota False Statement in Advertising Act (*id.* ¶ 617 ee) and the Florida False Advertising Statute (*id.* ¶ 617 m). Both statutes require identification of the misleading advertisement and allegation of when and how the advertisement was published, which are absent from the PIAC. *See Baker v. Best Buy Stores*, 812 N.W. 2d 177, 184 (Minn. Ct. App. 2012); *Club Exploria, LLC v. Aaronson, Austin, P.A.*, No. 18-CV-576, 2019 WL 1297964, at *7 (M.D. Fla. Mar. 21, 2019).

state a consumer protection claim.⁴⁰ As shown in Sections I(C) & IX, *supra*, Plaintiffs fail to adequately plead either element.⁴¹ Plaintiffs' conclusory use of the phrase "and as a direct and proximate result thereof" does not suffice. *Papurello*, 144 F. Supp. 3d at 777 ("[P]laintiffs must allege facts from which the court can plausibly infer . . . justifiable reliance by plaintiffs on defendant's deceptive conduct that caused plaintiffs' harm."). Plaintiffs also fail to allege scienter with specificity, a key element of the relevant statutes in nineteen states.⁴²

B. Plaintiffs' Claims Are Barred by the State Statutes They Seek to Invoke, Fail to Satisfy Conditions Precedent or Fail to Allege Essential Elements.

Under the consumer protection laws of thirty-three states and the District of Columbia, a claim for relief of the type sought in the PIAC cannot be stated because those laws bar personal injury claims, do not permit private rights of action for damages, do not permit actions by indirect purchasers (which all putative plaintiffs are), or are inapplicable to prescription medical devices. With respect to the few remaining states, the PIAC disregards the elements and/or conditions precedent to pleading consumer protection causes of actions under the laws of the subject jurisdictions.⁴³ Dismissal of all state consumer protection claims is compelled because Plaintiffs either (or both) seek to pursue claims that are unavailable under state consumer protection laws or

⁴⁰ See Citation Table F(2); see also, e.g., *In re Vioxx Prods. Liab. Litig.*, 874 F. Supp. 2d 599, 609 (E.D. La. 2012) (plaintiffs' "generalized and conclusory allegation[s]" insufficient to show "any plausible nexus or causation between [Defendant's] conduct and Plaintiff"). Claims of all Plaintiffs under these consumer protection laws of thirty-seven states are foreclosed and must be dismissed on these grounds. See Motion ¶ xxiv.

⁴¹ See also, e.g., *Beale*, 492 F. Supp. at 1372–73 (learned intermediary doctrine encompasses "claims for fraud, misrepresentation, and violation of consumer protection laws"). Further, the learned intermediary doctrine precludes Plaintiffs from establishing reliance or causation. See *supra* n.40; *Kee*, 871 F. Supp. 2d at 411 (dismissing consumer protection claim because "learned intermediary doctrine breaks the chain in terms of reliance") (cleaned up).

⁴² See Citation Table F(3). Failure to plead scienter compels dismissal of the claims of all Plaintiffs under these consumer protection laws of nineteen states. See Motion ¶ xxv.

⁴³ The Master Short Form Complaint does not cure these pleading failures. It does not require individual plaintiffs even to identify which of the sixty-five consumer protection claims they are asserting, much less require them to allege facts to satisfy the elements of any particular statute.

fail to plead essential elements necessary to state such claims:

Personal Injury Excluded. In fourteen states, recovery for personal injury—the sole relief sought in the PIAC—is precluded under the consumer protection statute.⁴⁴ Consumer protection claims under the laws of these states are foreclosed. *See* Citation Table F(4); Motion ¶ xxvi.

Damages Barred. Five state consumer protection statutes preclude private rights of action for damages, mandating dismissal of the PIAC’s claims. *See* Citation Table F(5); Motion ¶ xxvii.

Limited to Direct Purchasers. In fourteen states and the District of Columbia, a private right of action for consumer protection claims is afforded only to direct purchasers of goods or services or where there is privity between the parties. *See* Citation Table F(6). The allegations of the PIAC foreclose consumer protection claims in these states. *See, e.g.*, PIAC ¶¶ 506, 529, 558 (referring to Respironics as a “remote manufacturer”). Motion ¶ xxviii.

Prescription Medical Devices Excluded. Twenty-three states and the District of Columbia limit their consumer protection statutes to claims involving the purchase or lease of goods for personal, family, or household uses. Prescription medical devices have been held ***not*** to be goods for personal, family or household use because they are prescribed by doctors for a medical use and are outside the purview of these statutes.⁴⁵ *See* Citation Table F(7); Motion ¶ xxiv.

Subsumed. In five states, consumer protection claims are subsumed by state product

⁴⁴ *See, e.g., Donahue v. Ledgens, Inc.*, 331 P.3d 342, 354 (Alaska 2014) (“Alaska’s UTPA does not provide the basis for a claim for personal injury.”); *Orr v. Ethicon, Inc.*, No. 20-CV-110, 2020 WL 9073528, at *3 (E.D. Tenn. Sept. 11, 2020) (“TCPA claim must be dismissed where a plaintiff seeks to recover for injuries to his person resulting from [a defendant’s] alleged violation of the TCPA.”) (quotation omitted).

⁴⁵ *See, e.g., Otis-Wisher v. Medtronic, Inc.*, 616 F. App’x 433, 435 (2d Cir. 2015) (affirming dismissal of consumer protection statute claim and holding that “Plaintiff did not constitute a ‘consumer’ under the statute because, she . . . was prescribed the medical device by her doctor.”); *Williams v. Bos. Sci. Corp.*, No. 12-CV-1080, 2013 WL 1284185, at *6 (N.D. Ohio Mar. 27, 2013) (explaining “prescription medical device is not a consumer good under the [Ohio Consumer Sales Practice Act].”) (citation omitted).

liability acts, compelling the dismissal of claims asserted under the state consumer protection laws. *See* Citation Table B(2); *supra* Section IV; Motion ¶ viii.

In-state Conduct. Twenty states and the District of Columbia require that the conduct at issue in a consumer protection claim has occurred within the state, in some cases, primarily and substantially within the state.⁴⁶ The PIAC lacks any such allegations, foreclosing the claims sought to be stated under these jurisdictions' laws. *See* Citation Table F(8); Motion ¶ xxx.

Pre-Suit Notice. In eleven states, timely service of compliant pre-suit notice is a condition precedent to filing suit. *See* Citation Table F(9). The PIAC incorporates by reference letters dated September 8, 2021 and May 16, 2022, and responses sent by Respironics on October 8, 2021 and June 15, 2022.⁴⁷ As those letters and responses affirm, the letters were neither sent pre-suit nor compliant with the relevant statutes. Thus, the claims of all Plaintiffs under these consumer protection laws of these states should be dismissed.⁴⁸ *See* Motion ¶ xxxi.

Dismissal of *all* of the PIAC's sixty-five consumer protection law claims is compelled based on general principles of preemption, failure to plead with particularity, and the learned intermediary doctrine, as well as multiple statute-specific issues that, *inter alia*, foreclose the ability, in any context, to state a claim of the nature sought in all states and the District of Columbia.

⁴⁶ *See, e.g., Thuney v. Lawyer's Title of Ariz.*, No. 18-CV-1513, 2019 WL 467653, at *7 (D. Ariz. Feb. 6, 2019) ("While this case may have some nexus to Arizona, the [CFA] only applies to acts committed in Arizona that violate the Act. Plaintiffs have not alleged any conduct that [defendant] committed in Arizona."); *Au New Haven, LLC v. YKK Corp.*, No. 15-CV-3411, 2020 WL 4366394, at *15 (S.D.N.Y. July 30, 2020) ("[P]laintiffs' invocation of [the Connecticut Unfair Trade Practices Act] to punish conduct that, it asserts, occurred in connection with YKK's worldwide sale of zippers is flatly inconsistent with the express geographical limitation in the text itself.").

⁴⁷ *See* PIAC ¶¶ 288, 506, 529, 558; *see also* Exhibits A-D; *supra* n.23.

⁴⁸ Any claim by an Alabama plaintiff also is foreclosed because Alabama's consumer protection statute bars a consumer protection claim unless all other related claims are waived. *See* Ala. Code 8-19-15. *See* Motion ¶ xxxii.

XI. PLAINTIFFS' UNJUST ENRICHMENT CLAIM (COUNT XVII) FAILS.

Unjust enrichment is a quasi-contract claim in the nature of restitution for the return of money. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”). It has no place in the PIAC, a personal injury complaint. This alone warrants dismissal of Plaintiffs’ claim. Assuming *arguendo* that unjust enrichment could be framed as a personal injury cause of action, Plaintiffs still fail to state a claim for the following reasons described in Respironics’ TAC Motion to Dismiss (Section VII): (1) Plaintiffs acknowledge they received and used their devices, TAC Motion to Dismiss at 32–33; (2) Plaintiffs’ other claims, predicated on the same allegations, provide adequate remedies at law, *id.* at 33; (3) in certain jurisdictions, unjust enrichment claims cannot be maintained (even in the alternative) where, as here, an express warranty governs the subject matter of the dispute, *id.*; (4) Plaintiffs acknowledge that Respironics is a “remote manufacturer,” which bars Plaintiffs claims in states requiring allegations of a “direct purchase” and “direct benefit,” *id.*; and (5) in certain jurisdictions, unjust enrichment is not recognized as an independent cause of action, *id.*

XII. PLAINTIFFS' BATTERY CLAIM (COUNT VII) MUST BE DISMISSED.

A defendant is liable for battery only if “(a) he acts *intending* to cause a harmful or offensive contact ... or an imminent apprehension of such a contact,” and such contact in fact occurs. Restatement (Second) of Torts § 13 (emphasis added); *accord* *Zion v. Nassan*, 283 F.R.D. 247, 264 (W.D. Pa. 2012) (Conti, J.), *aff’d*, 556 F. App’x 103 (3d Cir. 2014). “Intent” requires allegations that the defendant acted “for the purpose of bringing about a harmful or offensive contact or an apprehension of such contact,” or “with knowledge that such a result will, to a substantial certainty, be produced by [the] act.” *Id.* § 18, comment e. Plaintiffs have not pled facts plausibly demonstrating Respironics intended to commit battery.

Plaintiffs allege that the recalled devices “are intended to help people breathe.” PIAC ¶ 2. They do not plead that Respironics manufactured and distributed the recalled devices “for the purpose” of causing harmful contact. Plaintiffs’ battery claim accordingly fails because Plaintiffs have not and cannot plausibly allege the essential element of intent. *See Acosta Orellana v. CropLife Int’l*, 711 F. Supp. 2d 81, 91 (D.D.C. 2010) (dismissing battery claim where plaintiffs failed to allege defendant “acted with any intent to commit [harmful or offensive] contact”).

Plaintiffs’ attempt to plead around the element of intent by alleging that Respironics had knowledge of the alleged defect is unavailing. Regardless of Respironics’ alleged knowledge of the alleged defect, Plaintiffs plead no facts from which the Court reasonably could infer that Respironics knew that any particular plaintiff was “substantial[ly] certain” to experience a harmful contact. PIAC ¶ 442. Battery claims based on generalized allegations of this nature fail to state a claim. *Boumelhem v. Bic. Corp.*, 535 N.W.2d 574, 579 (1995) (dismissing battery claim where “plaintiffs presented no factual support for their claim that defendant marketed its lighter with the intent or substantial certainty that a harmful contact . . . would result”).⁴⁹

XIII. NEGLIGENCE PER SE (COUNT XV) IS NOT AN INDEPENDENT CAUSE OF ACTION IN MANY STATES.

In addition to all of the reasons for dismissal presented above (including failure to allege causation and implied preemption), twenty-seven states do not recognize negligence *per se* as an independent cause of action.⁵⁰ *See* Citation Table G(1). In these states, negligence *per se* is a rule of evidence that permits courts to use statutory or regulatory standards of care in place of the ordinary “reasonableness” standard used for negligence claims. *E.g.*, *Scheele v. Rains*, 874 N.W.2d 867, 873 (Neb. 2016) (“[T]he violation of a regulation or statute is not negligence *per se*,

⁵⁰ Additional bases for dismissal of this claim are set forth in Sections III and V, *supra*.

but may be evidence of negligence to be considered with all the other evidence in the case.”). The PIAC’s negligence *per se* cause of action accordingly should be dismissed insofar as it is alleged under the laws of a jurisdiction that does not recognize the cause of action.

XIV. MEDICAL MONITORING (COUNT XX) IS NOT AN INDEPENDENT CAUSE OF ACTION IN MOST JURISDICTIONS.

The PIAC’s “independent claim of medical monitoring” (Count XX) fails to state a valid cause of action under the laws of all but a few jurisdictions in the United States. PIAC ¶ 649. In almost all jurisdictions, medical monitoring is merely an element of damages that may be available where a defendant’s liability is established under other traditional tort theories, like negligence or strict liability. For all the reasons set out both in this Motion and in Respironics’ Motion to Dismiss Plaintiffs’ Consolidated Second Amended Class Action Complaint for Medical Monitoring, Plaintiffs fail to state any claims for which medical monitoring may be granted as relief.

Only seven states permit plaintiffs to allege an independent cause of action for medical monitoring: (1) the District of Columbia; (2) Florida; (3) Massachusetts; (4) Pennsylvania; (5) Utah; (6) Vermont; and (7) West Virginia.⁵¹ All other jurisdictions either have expressly rejected arguments for adopting an independent medical monitoring cause of action or have not passed on the question and so must be assumed to adhere to the traditional approach under the settled rule that federal courts may not predict state law in ways that expand liability. *See* Memorandum in Support of Motion to Dismiss Second Amended Complaint for Medical Monitoring, filed contemporaneously herewith, at IV.A.4 (discussing medical monitoring as an independent cause

⁵¹ *See Friends for All Child., Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 824 (D.C. Cir. 1984); *Reed v. Philip Morris Inc.*, No. 96-5070, 1997 WL 538921, at *18, n.10 (D.C. Super. Ct. Aug. 18, 1997); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 104, 107 (Fla. Dist. Ct. App. 1999); *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 901–02 (Mass. 2009); *Redland Soccer Club, Inc., v. Dep’t of the Army*, 696 A.2d 137, 145–46 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979–80 (Utah 1993); Vt. Stat. Ann. tit. 12, § 7202; *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 426, 430–31 (W. Va. 1999).

of action); Citation Table A to Respirationics’ Motion to Dismiss Plaintiffs’ Consolidated Second Amended Class Action Complaint for Medical Monitoring (identifying jurisdictions that do not acknowledge medical monitoring as an independent cause of action); *Travelers*, 594 F.3d at 253 (when predicting state law “[federal courts] should opt for the interpretation that restricts liability, rather than expands it” until the state’s high court or legislature “decides differently”). Accordingly, Plaintiffs’ independent cause of action for medical monitoring must be dismissed insofar as it is asserted under the laws of any jurisdiction other than the foregoing seven states that have adopted the minority approach.

XV. PUNITIVE DAMAGES (COUNT XXI) ARE NOT A CAUSE OF ACTION.

Finally, the PIAC includes an independent claim for “Punitive Damages.” PIAC ¶¶ 667–71. Punitive damages are a remedy, not an independent cause of action. *N. Side Foods Corp. v. Bag-Pack, Inc.*, No. CIV.A. 06-1612, 2007 WL 954106, at *3 (W.D. Pa. Mar. 28, 2007) (Conti, J.) (“A request for punitive damages does not constitute a cause of action in an [sic] of itself. . . . [It] is merely incidental to a cause of action.”) (quoting *Nix v. Temple Univ.*, 596 A.2d 1132, 1138 (Pa. Super. 1991)). Accordingly, Count XXI should be dismissed. *See Salvio v. Amgen, Inc.*, 810 F. Supp. 2d 745, 756 (W.D. Pa. 2011) (McVerry, J.) (dismissing punitive damages count and explaining “punitive damages are not an independent cause of action, and may only be recovered if there is a valid underlying claim”); *Waye v. Commonwealth Bank*, 846 F. Supp. 321, 330 (M.D. Pa. 1994) (“Punitive damages are an element of damages, not an independent cause of action, and as such, cannot stand alone.”).

CONCLUSION

For all the foregoing reasons, the PIAC should be dismissed in its entirety, and because Plaintiffs already have had ample opportunity to amend their allegations, dismissal should be granted with prejudice.

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Respectfully Submitted,

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CITATION TABLE

CITATION TABLE A — FAILURE TO RECALL

A(1) Jurisdictions that do not recognize failure to recall as a cause of action.

Alaska (*Nelson v. Original Smith & Wesson Bus. Entities &/or Corps.*, No. 4:10-CV-0003 RBB, 2010 WL 7125187, at *1 (D. Alaska June 14, 2010)); **Illinois** (*Modelski v. Navistar Int'l Transp. Corp.*, 707 N.E.2d 239, 247 (Ill. App. Ct. 1999)); **Indiana** (*Tober v. Graco Children's Prod., Inc.*, No. 1:02-CV-1682-LJM-WTL, 2004 WL 1987239, at *9 (S.D. Ind. July 28, 2004), *aff'd*, 431 F.3d 572 (7th Cir. 2005)); **Mississippi** (*Goodwin v. Premier Ford Lincoln Mercury*, No. 1:19-CV-182, 2020 WL 3621317, at *4 n.2 (N.D. Miss. Jul. 2, 2020)); **Missouri** (*Hackethal v. Harbor Freight Tools USA*, No. 4:15-CV-01398, 2016 WL 695615, at *1 (E.D. Mo. Feb. 22, 2016)); **Nebraska** (*Dubas v. Clark Equip. Co.*, 532 F. Supp. 3d 819, 829-30 (D. Neb. 2021)); **Ohio** (*Kondash v. Kia Motors Am.*, No. 1:15-cv-506, 2016 WL 11246421, at *14 (S.D. Ohio Jun. 24, 2016)); **Oklahoma** (*Wicker ex rel. Est. of Wicker v. Ford Motor Co.*, 393 F. Supp. 2d 1229, 1236 (W.D. Okla. 2005)); **Pennsylvania** (*Cleaver v. Honeywell Int'l, LLC*, No. CV 21-4921, 2022 WL 2442804, at *4 (E.D. Pa. Mar. 31, 2022)); **and Texas** (*Hernandez v. Ford Motor Co.*, No. C.A. C-04-319, 2005 WL 1574474, at *1 (S.D. Tex. June 28, 2005)).

CITATION TABLE B — SUBSUMPTION OF CLAIMS

B(1) Jurisdictions in which common law causes of action asserting physical harm to the person or property resulting from an allegedly defective product are subsumed by state product liability acts.

Connecticut (*Collazo v. Nutribullet*, 473 F. Supp. 3d 49, 51 (D. Conn. 2020)); **Indiana** (*Palm v. Taurus Int’l Manufacturing, Inc.*, 3:22-cv-337, 2022 WL 17714600 (N.D. Ind. Dec. 15, 2022)); **Kansas** (*Mattos v. Eli Lilly & Co.*, No. 12-1014, 2012 WL 1893551 (D. Kan. May 23, 2012)); **Louisiana** (*McKinney v. Superior Van & Mobility, LLC*, No. 20-1169, 2021 WL 1238906, at *4 (E.D. La. Apr. 2, 2021)); **Mississippi** (*Young v. Bristol-Myers Squibb Company*, 4:16-cv-00108-DMB-JMV, 2017 WL 706320 at *3 (N.D. Miss. Feb. 27, 2017)); **New Jersey** (*Calender v. NVR Inc.*, 548 F. App’x 761, 764 (3d Cir. 2013) (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]”)); **Ohio** (*Mitchell v. Proctor & Gamble*, 2:09-cv-426, 2010 WL 728222 (S.D. Ohio Mar. 1, 2010)); **Tennessee** (*Strayhorn v. Wyeth Pharmaceuticals, Inc.*, 737 F.3d 378, 392 (6th Cir. 2013)); **and Washington** (*Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1073–74 (Wash. 2012) (*en banc*)).

B(2) Jurisdictions in which consumer protection act causes of action asserting physical harm to the person or property resulting from an allegedly defective product are subsumed by state product liability acts.

Connecticut (*Gerrity v. R.J. Reynolds Tobacco Co.*, 818 A.2d 769, 775 (Conn. 2003)); **Indiana** (*Elward v. Electrolux Home Products, Inc.*, 264 F. Supp. 3d 777, 895 (N.D. Ill. 2017)); **Louisiana** (*Mayard v. St. Judge Medical Inc.*, No. 6:19-CV-00761, 2019 WL 7476714 at *3 (W.D. La. Dec. 10, 2019)); **New Jersey** (*In re Valsartan, Losartan, and Irbesartan Products Liab. Litig.*, MDL No. 2875 (RBK/KW), 2021 WL 364663 (D.N.J. Feb. 03, 2021)); **and Ohio** (*Traxler v. PPG Indus., Inc.*, 158 F. Supp. 3d 607, 628 (N.D. Ohio 2016)).

CITATION TABLE C — BREACH OF WARRANTY

C(1) Jurisdictions in which manufacturers may limit an implied warranty's term to that of the express warranty.

Alabama (*Century 21-Reeves Realty, Inc. v. McConnell Cadillac, Inc.*, 626 So. 2d 1273, 1275 (Ala. 1993), *overruled on other grounds by Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909 (Ala. 1994)); **Arizona** (*Amato v. Subaru of North America, Inc.*, 2019 WL 6607148, at *7 (D.N.J. Dec. 5, 2019) (applying Arizona law)); **Arkansas** (*Perez v. Volkswagen Grp. of Am., Inc.*, No. 2:12-CV-02289, 2013 WL 1661434, at *6 (W.D. Ark. Apr. 17, 2013)); **California** (*Hovsepian v. Apple, Inc.*, No. 08-5788 JF (PVT), 2009 WL 2591445, at *6 (N.D. Cal. Aug. 21, 2009)); **Colorado** (*Great N. Ins. Co. v. Toto U.S.A., Inc.*, No. 15-CV-01120-RBJ, 2016 WL 4091177, at *1 (D. Colo. July 13, 2016)); **Delaware** (*Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 166 (Del. Super. Ct. 1986)); **Florida** (*Speier-Roche v. Volksw Agen Grp. of Am. Inc.*, No. 14-20107-CIV, 2014 WL 1745050, at *8 (S.D. Fla. Apr. 30, 2014)); **Georgia** (*Soto v. Carmax Auto Superstores*, No. 02-C-10244-4, 2003 WL 25969773, at *4 (Ga. State Ct. Dec. 19, 2003)); **Illinois** (*Sampler v. City Chevrolet Buick Geo, Inc.*, 10 F. Supp. 2d 934, 941 (N.D. Ill. 1998)); **Indiana** (*Popham v. Keystone RV Co.*, No. 3:15-CV-197-TLS, 2016 WL 4993393, at *5 (N.D. Ind. Sept. 19, 2016)); **Kentucky** (*Peacock v. Damon Corp.*, 458 F. Supp. 2d 411, 418 (W.D. Ky. 2006)); **Louisiana** (*Datamatic, Inc. v. Int'l Bus. Machines Corp.*, 613 F. Supp. 715, 720 (W.D. La. 1985), *aff'd*, 795 F.2d 458 (5th Cir. 1986)); **Massachusetts** (*L & T Yacht Sales, Inc. v. Post Marine Co.*, No. CV 05-11682-MLW, 2007 WL 9797838, at *8 (D. Mass. Dec. 27, 2007)); **Michigan** (*Melborn Ltd. v. Nat'l Marine Corp.*, No. 03-CV-70028-DT, 2004 WL 5496217, at *7 (E.D. Mich. Aug. 20, 2004)); **Minnesota** (*Knotts v. Nissan N. Am., Inc.*, 346 F. Supp. 3d 1310, 1322 (D. Minn. 2018)); **Missouri** (*Hall v. Gen. Motors, LLC*, No. 19-CV-10186, 2020 WL 1285636, at *11 (E.D. Mich. Mar. 18, 2020) (applying Missouri law)); **Montana** (*McJunkin v. Kaufman & Broad Home Sys., Inc.*, 748 P.2d 910, 915-16 (Mont. 1987)); **New Jersey** (*Kennedy v. Samsung Elecs. Am., Inc.*, No. 14-4987, 2015 WL 2093938, at *7 (D.N.J. May 5, 2015)); **New York** (*Meserole v. Sony Corp. of Am.*, No. 08 CV. 8987 (RPP), 2009 WL 1403933, at *9 (S.D.N.Y. May 19, 2009)); **North Carolina** (*Drake v. Marine Mfg.*, No. 7:06-CV-146-F, 2008 WL 11431043, at *3 (E.D.N.C. Aug. 29, 2008)); **Ohio** (*Asp v. Toshiba Am. Consumer Prod., LLC*, 616 F. Supp. 2d 721, 732 (S.D. Ohio 2008)); **Oklahoma** (*Dinwiddie v. Suzuki Motor of Am., Inc.*, 111 F. Supp. 3d 1202, 1209 (W.D. Okla. 2015)); **Pennsylvania** (*Haft v. Haier US Appliance Sols., Inc.*, No. 1:21-CV-00506-GHW, 2022 WL 62181, at *5 (S.D.N.Y. Jan. 5, 2022) (applying Pennsylvania law)); **South Carolina** (*Pier View Condo. Ass'n, Inc. v. Johns Manville, Inc.*, No. CV 2:18-22-BHH, 2022 WL 632933, at *4 (D.S.C. Mar. 4, 2022)); **Tennessee** (*Hatley v. Crossville Bnrv Sales, LLC*, No. CV 2:14-CV-24, 2015 WL 12547618, at *5 (E.D. Tenn. Nov. 20, 2015)); **Texas** (*Deburro v. Apple, Inc.*, No. A-13-CA-784-SS, 2013 WL 5917665, at *6 (W.D. Tex. Oct. 31, 2013)); **Vermont** (*Heath v. Palmer*, 915 A.2d 1290, 1293-94 (Vt. 2006)); **Virginia** (*King v. Flinn & Drefflein Eng'g Co.*, No. 7:09-CV-00410, 2012 WL 3133677, at *12 (W.D. Va. July 30, 2012)); **Washington** (*Elfaridi v. Mercedes-Benz USA, LLC*, No. 4:16 CV 1896 CDP, 2018 WL 4071155, at *10 (E.D. Mo. Aug. 27, 2018) (applying Washington law)); **West Virginia** (*Anderson v. Chrysler Corp.*, 403 S.E.2d 189, 196 (W.Va. 1991)); **and Wisconsin** (*Hackel v. Nat'l Feeds, Inc.*, 986 F. Supp. 2d 963, 977 (W.D. Wis. 2013)).

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C(2) Jurisdictions that require direct vertical privity to assert an implied warranty claim for alleged personal injuries.

Arizona (*Flory v. Silvercrest Indus., Inc.*, 129 Ariz. 574, 578 (1981)); **Florida** (*Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37, 39 (Fla. 1988)); **Georgia** (*Andrews v. RAM Med., Inc.*, No. 7:11-CV-147 HL, 2012 WL 1358495, at *2-3 (M.D. Ga. Apr. 19, 2012)); **Idaho** (*Oats v. Nissan Motor Corp. in U.S.A.*, 126 Idaho 162, 169 (1994)); **Kentucky** (*In re ConAgra Peanut Butter Prod. Liab. Litig.*, No. 1:07-MD-1845-TWT, 2012 WL 3779088, at *2 (N.D. Ga. Aug. 29, 2012) (applying Kentucky law)); **Oregon** (*Simonsen v. Ford Motor Co.*, 196 Or. App. 460, 479 (2004)); **and Wisconsin** (*Staudt v. Artifex Ltd.*, 16 F. Supp. 2d 1023, 1030 (E.D. Wis. 1998)).

C(3) Jurisdictions in which Plaintiffs' express and implied warranty claims require pre-suit notice.

Alabama (*Smith v. Apple, Inc.*, No. CIV.A.08-AR-1498-S, 2009 WL 3958096, at *2 (N.D. Ala. Nov. 4, 2009)); **Arkansas** (*Cotner v. Int'l Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977)); **California** (*Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 929 (N.D. Cal. 2012)); **Colorado** (*Hoffman's Double Bar Pine Nursery v. Fyke*, 633 P.2d 516, 519 (Colo. App. 1981)); **Connecticut** (*Zeigler v. Sony Corp. of Am.*, 849 A.2d 19, 24 (Conn. Super. Ct. 2004)); **Delaware** (*Theis v. Viewsonic Corp.*, No. CIV.A. 12-1569-RGA, 2013 WL 1632677, at *1 (D. Del. Apr. 16, 2013)); **Florida** (*Jackmack v. Bos. Sci. Corp.*, No. 2:20-CV-692-SPC-NPM, 2021 WL 1020981, at *3 (M.D. Fla. Mar. 17, 2021)); **Georgia** (*Paws Holdings, LLC v. Daikin Applied Americas Inc.*, No. CV 116-058, 2018 WL 475013, at *5 (S.D. Ga. Jan. 18, 2018)); **Idaho** (*Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 544 P.2d 306, 314 (Idaho 1975)); **Illinois** (*Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 590 (Ill. 1996)); **Indiana** (*Lemon v. Anonymous Physician*, No. 1:04CV2083LJMWTL, 2005 WL 2218359, at *2 (S.D. Ind. Sept. 12, 2005)); **Iowa** (*Winter v. Honeggers' & Co.*, 215 N.W.2d 316, 327 (Iowa 1974)); **Maryland** (*Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 542 (D. Md. 2011)); **Massachusetts** (*Shoutov v. LD Assocs., Inc.*, 19-P-1151, 2020 WL 3865560, at *1 (Mass. App. Ct. July 9, 2020)); **Michigan** (*Knudsen v. Ethicon, Inc.*, 535 F. Supp. 3d 1231, 1234 (M.D. Fla. 2021) (applying Michigan law)); **Minnesota** (*Wheeler v. Subaru*, 451 F. Supp. 3d 1034, 1037-39 (D. Minn. 2020)); **Mississippi** (*Graham v. All Am. Cargo Elevator*, No. 1:12-CV-58-HSO-RHW, 2013 WL 5216529, at *7 (S.D. Miss. Sept. 16, 2013)); **Missouri** (*Huskey v. Colgate-Palmolive Co.*, No. 4:19-CV-02710-JAR, 2020 WL 6342704, at *2 (E.D. Mo. Oct. 27, 2020)); **Montana** (*Potter v. Ethicon, Inc.*, No. CV 20-95-BLG-SPW, 2021 WL 6498267, at *3 (D. Mont. Feb. 19, 2021)); **Nevada** (*Flores v. Merck & Co.*, No. 321CV00166MMDCLB, 2022 WL 798374, at *6 (D. Nev. Mar. 16, 2022)); **New Hampshire** (*Sawyer v. Purdue Pharm. Corp.*, No. 4:11-CV-01471, 2013 WL 6840145, at *6 (M.D. Pa. Dec. 27, 2013) (applying New Hampshire law)); **New Jersey** (*Hammer v. Vital Pharms., Inc.*, No. CIV.A. 11-4124, 2012 WL 1018842, at *10 (D.N.J. Mar. 26, 2012)); **New Mexico** (*Thornton v. Tyson Foods, Inc.*, 482 F. Supp. 3d 1147, 1162 (D.N.M. 2020), *aff'd*, 28 F.4th 1016 (10th Cir. 2022)); **New York** (*Colpitts v. Blue Diamond Growers*, 527 F. Supp. 3d 562, 590 (S.D.N.Y. 2021)); **North Carolina** (*Sani-Pure Food Lab'ys, LLC v. bioMerieux, Inc.*, No. CIV.A. 13-6643 ES, 2014 WL 6386803, at *6 (D.N.J. Nov. 13, 2014) (applying North Carolina law)); **North Dakota** (*Stamper Black Hills Gold Jewelry, Inc. v. Souther*, 414 N.W.2d 601, 604 (N.D. 1987)); **Ohio** (*St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902 (N.D. Ohio 2008)); **Oregon** (*Parkinson v. Novartis Pharms. Corp.*, 5 F. Supp. 3d 1265, 1277 (D. Or. 2014)); **Pennsylvania** (*Am. Fed'n of State Cnty. & Mun. Emps. v. Ortho-McNeil-Janssen Pharms., Inc.*, No. 08-CV-5904, 2010 WL

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891150, at *7 (E.D. Pa. Mar. 11, 2010)); **South Carolina** (*Sandviks v. PhD Fitness, LLC*, No. 1:17-CV-00744-JMC, 2018 WL 1393745, at *3 (D.S.C. Mar. 20, 2018)); **Tennessee** (*Bunn v. Navistar, Inc.*, 797 F. App'x 247, 254 (6th Cir. 2020)); **Texas** (*U.S. Tire-Tech v. Boeran*, 110 S.W.3d 194, 200-02 (Tex. App. 2003)); **Vermont** (*Ehlers v. Ben & Jerry's Homemade Inc.*, No. 2:19-CV-00194, 2020 WL 2218858, at *8 (D. Vt. May 7, 2020)); **Virginia** (*In re Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Prac. Litig.*, No. 1:16MD2743 (AJT/TRJ), 2017 WL 2911681, at *14 (E.D. Va. July 7, 2017)); **and Wisconsin** (*Blitz v. Monsanto*, 317 F. Supp. 3d 1042, 1055 (W.D. Wis. 2018)).

CITATION TABLE D — STRICT LIABILITY CLAIMS

D(1) Jurisdictions in which Plaintiffs' strict liability design defect claims are barred by the Restatement (Second) of Torts § 402A, Comment K.

California (*Yalter v. Endocare, Inc.*, No. SACV03 80, 2004 WL 5237598, at *4 (C.D. Cal. Nov. 8, 2004), *aff'd* 220 F. Appx. 657 (9th Cir. 2007); *Paturzo v. Boston Scientific Corp.*, No. 8:16-cv-2174, 2017 WL 8220600, at *3 (C.D. Cal. Apr. 21, 2017)); **District of Columbia** (*Fisher v. Sibley Memorial Hospital*, 403 A.2d 1130, 1134 (D.C. 1979)); **Indiana** (*Parks v. Danek Medical, Inc.*, No. 2:95 CV 206, 1999 WL 1129706, *6 (N.D. Ind. Jun. 17, 1999); *McAfee v. Medtronic, Inc.*, 2015 WL 3617755, at *3–4 (N.D. Ind. Jun. 4, 2015)); **Iowa** (*Moore v. Vanderloo*, 386 N.W.2d 108, 116 (Iowa 1986); *Petty v. United States*, 740 F.2d 1428, 1439 (8th Cir. 1984); *Kehm v. Procter & Gamble Manufacturing Co.*, 724 F.2d 613, 621 (8th Cir. 1983)); **Maryland** (*Miles Laboratories, Inc. v. Doe*, 556 A.2d 1107, 1121 (Md. 1989); *Doe v. Miles Laboratories, Inc.*, 927 F.2d 187, 191–93 (4th Cir. 1991)); **Massachusetts** (*Lareau v. Page*, 840 F. Supp. 920, 933 (D. Mass. 1993), *aff'd*, 39 F.3d 384 (1st Cir. 1994); *Calisi v. Abbott Laboratories*, No. 11–10671, 2013 WL 5441355, at *15 (D. Mass. Sept. 27, 2013)); **Montana** (*Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 128–29 (9th Cir. 1968)); **New Mexico** (*Jones v. Minnesota Mining & Manufacturing Co.*, 669 P.2d 744, 759–60 (N.M. Ct. App. 1983) (Lopez, J., concurring); *Perfetti v. McGhan Medical*, 662 P.2d 646, 649–50 (N.M. Ct. App. 1983); *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1201–04 (D.N.M. 2008)); **New York** (*Martin v. Hacker*, 628 N.E.2d 1308, 1311 (N.Y. 1993); *Bravman v. Baxter Healthcare Corp.*, 984 F.2d 71, 75–76 (2d Cir. 1993)); **Ohio** (Ohio Rev. Code. §§ 2307.71(A)(16), 2307.75(D); *Aaron v. Medtronic, Inc.*, 209 F. Supp. 3d 994, 1014 (S.D. Ohio 2016)); **Pennsylvania** (*Hahn v. Richter*, 673 A.2d 888, 891 (Pa. 1996); *Creazzo v. Medtronic, Inc.*, 903 A.2d 24, 31 (Pa. Super. 2006); *Bostic v. Ethicon, Inc.*, No. 20-6533, 2022 WL 952129, at *8–9 (E.D. Pa. Mar. 29, 2022); *McGrain v. C.R. Bard*, No. 21-1539, 2021 WL 3288601, at *2 (E.D. Pa. Jul. 30, 2021); *Drumheller v. Johnson & Johnson*, No. 20-6535, 2021 WL 1853407, at *9–18 (E.D. Pa. May 10, 2021); *Rosenberg v. C.R. Bard, Inc.*, 387 F. Supp. 3d 572, 578, 580–81 (E.D. Pa. 2019); *Runner v. C.R. Bard*, 108 F. Supp. 3d 261, 265 (E.D. Pa. 2015)); *Kline v. Zimmer Holdings, Inc.*, No. 13-513, 2013 WL 3279797, at *1 (W.D. Pa. Jun. 27, 2013) (Conti, J.); *Killen v. Stryker Spine*, No. 11-1508, 2012 WL 4498865, at *3–4 (W.D. Pa. Sep. 28, 2012) (Conti, J.); *Parkinson v. Guidant Corp.*, 315 F. Supp. 2d 741, 747 (W.D. Pa. 2004) (Diamond, J.); *Davenport v. Medtronic, Inc.*, 302 F. Supp. 2d 419, 441–42 (E.D. Pa. 2004); *Murray v. Synthes U.S.A., Inc.*, No. CIV. A. 95-7796, 1999 WL 672937, at *6–7 (E.D. Pa. Aug. 23, 1999); *Taylor v. Danek Med., Inc.*, No. Civ.A. 95-7232, 1998 WL 962062, at *7 (E.D. Pa. Dec. 29, 1998)); **South Dakota** (*McElhaney v. Eli Lilly & Co.*, 575 F. Supp. 228, 230–31 (D.S.D. 1983), *aff'd without op.*, 739 F.2d 340 (8th Cir. 1984)); **Tennessee** (*Rodriguez v. Stryker Co.*, 680 F.3d 568, 575 (6th Cir. 2012) (applying Tennessee law); *Rodriguez v. Stryker Co.*, No. 2:08–0124, 2011 WL 31462, at *6–7 (M.D. Tenn. Jan. 5, 2011)); **Texas** (*Schwarz v. Block Drug Co.*, 180 F.3d 261, 261 (5th Cir. 1999); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264, 1273–76 (5th Cir. 1974); *Carter v. Tap Pharmaceuticals, Inc.*, No. SA–03–CA–0182, 2004 WL 2550593, at *2 (W.D. Tex. Nov. 2, 2004)); **and Wyoming** (*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851–52 (10th Cir. 2003); *Tobin v. Smithkline Beecham Pharmaceuticals*, 164 F. Supp. 2d 1278, 1288 (D. Wyo. 2001)).

CITATION TABLE E — FRAUD AND MISREPRESENTATION CLAIMS

E(1) Jurisdictions in which causation is a necessary element of common law fraud and negligent misrepresentation.**(a) Common Law Fraud**

Alabama (*McGregor v. Landmark Chevrolet, Inc.*, 596 So. 2d 909, 911 (Ala. 1992)); **Alaska** (*Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 987 (Alaska 2009)); **Arizona** (*Comerica Bank v. Mahamoodi*, 229 P.3d 1031, 1033-34 (Ariz. Ct. App. 2010)); **Arkansas** (*Rosser v. Columbia Mut. Ins. Co.*, 928 S.W.2d 813, 815 (Ark. Ct. App. 1996)); **California** (*Bower v. AT & T Mobility, LLC*, 196 Cal. App. 4th 1545, 1557 (2d Dist. 2011)); **Colorado** (*Greenway Nutrients, Inc. v. Blackburn*, 33 F.Supp.3d 1224, 1256 (D. Co. 2014)); **Connecticut** (*Cox v. Bland*, 2006 U.S. Dist. Lexis 80624, at * 13–14 (D. Conn. Oct. 27, 2006)); **Delaware** (*Lincoln Nat. Life Ins. Co. v. Snyder*, 722 F.Supp.2d 546, 560 (D. Del. July 15, 2010)); **District of Columbia** (*Lee v. Bos*, 874 F.Supp.2d 3, 6 (D.C. 2012)); **Florida** (*Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010)); **Georgia** (*Searcy v. Wvmf Funding, Inc.*, 14-CV-0019, 2015 WL 11251955, at *4 (N.D. Ga. May 29, 2015)); **Hawaii** (*Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co.*, 172 P.3d 1021, 1042 (Haw. 2007)); **Idaho** (*Deutz-Allis Credit Corp. v. Bakie Logging*, 824 P.2d 178, 182 (Idaho Ct. App. 1992)); **Illinois** (*Weidner v. Karlin*, 932 N.E.2d 602, 605 (Ill. App. Ct. 2010)); **Indiana** (*Hizer v. Holt*, 937 N.E.2d 1, 5 (Ind. Ct. App. 2010)); **Iowa** (*Vall Sickel Const. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010)); **Kansas** (*Bomhoff v. Nelnet Loan Servs., Inc.*, 109 P.3d 1241, 1246 (Kan. 2005)); **Kentucky** (*United Parcel Serv. Co. v. Rieken*, 996 S.W.2d 464, 468 (Ky. 1999)); **Louisiana** (*Sys. Eng'g and Sec., Inc. v. Sci. & Eng's Ass'ns, Inc.*, 962 So. 2d 1089, 1091 (La. Ct. App. 2007)); **Maine** (*Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979)); **Maryland** (*Van Buren v. Walmart, Inc.*, Civ. A. No. 19-0911, 2020 WL 1064823, at *7 (D. Md. Mar. 5, 2020)); **Massachusetts** (*Massachusetts v. Mylan Labs.*, 608 F. Supp. 2d 127, 155 (D. Mass. 2008)); **Michigan** (*Roberts v. Saffell*, 760 N.W.2d 715, 719 (Mich. Ct. App. 2008)); **Minnesota** (*Flynn v. Am. Home Prods Corp.*, 627 N.W.2d 342, 349 (Minn. Ct. App. 2001)); **Mississippi** (*Poe v. Summers*, 11 So. 3d 129, 133 (Miss. Ct. App. 2009)); **Missouri** (*Richards v. ABN AMRO Mortg. Group, Inc.*, 261 S.W.3d 603, 607 (Mo. Ct. App. 2008)); **Montana** (*Durbin v. Ross*, 916 P.2d 758, 762 (Mont. 1996)); **Nebraska** (*Schuelke v. Wilson*, 549 N.W.2d 176, 181-82 (Neb. 1996)); **Nevada** (*Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992)); **New Hampshire** (*Caledonia, Inc. v. Trainor*, 459 A.2d 613, 617–18 (N.H. 1983)); **New Jersey** (*In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 2:06-CV-5774, 2009 WL 2043604, at *33 (D.N.J. July 10, 2009)); **New Mexico** (*Papatheofanis v. Allen*, 242 P.3d 358, 361 (N.M. Ct. App. 2010)); **New York** (*Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank*, 57 F.3d 146, 153 (2d Cir. 1995)); **North Carolina** (*Forbis v. Neal*, 649 S.E.2d 382, 387 (N.C. 2007)); **North Dakota** (*Macquarie Bank v. Knickel*, 723 F. Supp. 2d 1161, 1196 (D.N.D. 2010)); **Ohio** (*Wagner v. Ohio State Univ. Med. Ctr.*, 934 N.E.2d 394, 402 (Ohio Ct. App. 2010)); **Oklahoma** (*Gibson v. Mendenhall*, 224 P.2d 251, 253 (Okla. 1950)); **Oregon** (*Pollock v. D.R. Horton, Inc.-Portland*, 77 P.3d 1120, 1131 (Or. Ct. App. 2003)); **Pennsylvania** (*Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994)); **Puerto Rico** (*Valle-Ortiz v. R.J. Reynolds Tobacco Co.*, 385 F.Supp.2d 126, 133 (D.P.R. 2005)); **Rhode Island** (*Parker v. Byrne*, 996 A.2d 627, 634 (R.I. 2010)); **South Carolina** (*Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 527 S.E.2d 371, 378 (S.C. Ct. App. 2000)); **South Dakota** (*Delka v. Cont'l Cas. Co.*, 748 N.W.2d 140, 151–52 (S.D. 2008)); **Tennessee** (*Davis v. McGuigan*, 325 S.W.3d 149, 154 (Tenn. 2010)); **Texas** (*Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 849–50 (Tex. Ct. App.

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2010)); **Utah** (*Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 536 (Utah 2002)); **Virginia** (*Beck v. Smith*, 538 S.E.2d 312, 315 (Va. 2000)); **Vermont** (*Bennington Hous. Auth. v. Bush*, 933 A.2d 207, 210–11 (Vt. 2007)); **Washington** (*Hunter v. Ferebauer*, 980 F.Supp.2d 1251, 1264 (E.D. Wash. 2013)); **West Virginia** (*Trafalgar House Constr., Inc. v. ZMM, Inc.*, 567 S.E.2d 294, 300 (W. Va. 2002)); **Wisconsin** (*Tietzworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 239 (Wis. 2004)); **and Wyoming** (*Excel Constr., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40, 48–49 (Wyo. 2010)).

(b) Negligent Misrepresentation

Alabama (*Hardy v. Jim Walter Homes, Inc.*, Civ. No. 06-0687, 2008 WL 906455, at *14 (S.D. Ala. Apr. 1, 2008)); **Alaska** (*Kambic v. Wells Fargo Bank, N.A.*, 20-cv-00120, 2020 WL 5048362, at *7–10 (D. Ak. Aug. 26, 2020)); **Arizona** (*Carrel v. Lux*, 420 P.2d 564, 570 (Ariz. 1966); *Comerica Bank v. Mahmoodi*, 229 P.3d 1031, 1033–34 (Ariz. Ct. App. 2010)); **Arkansas** (*Wheeler Motor Co. v. Roth*, 867 S.W.2d 446 (Ark. 1993)); **California** (*Wells Fargo Bank, N.A. v. FSI, Financial Solutions, Inc.*, 127 Cal. Rptr. 3d 589, 1573 (Cal. Ct. App. 2011)); **Colorado** (*Allen v. Steele*, 252 P.3d 476, 482 (Colo. 2011)); **Connecticut** (*Capital Mortg. Assocs., LLC v. Hulton*, NNICV065000431S, 2009 WL 567057, at *14 (Conn. Super. Feb. 13, 2009)); **Delaware** (*Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 564 (D. Del. 2010)); **District of Columbia** (*Burlington Ins. Co. v. Okie Dokie, Inc.*, 329 F. Supp. 2d 45, 48 (D.D.C. 2004)); **Florida** (*Nianni, LLC, v. Mitchell FOX*, 11-cv-118, 2011 WL 5357820, at *6 (M.D. Fl. Nov. 7, 2011)); **Georgia** (*DaimlerChrysler Motors Co. v. Clemente*, 668 S.E.2d 737, 749 (Ga. 2008)); **Hawaii** (*Hawaii Forest & Trial, Ltd. v. Davey*, 07-cv-00538, 2009 WL 3425302, at *3 (D. Haw. Oct. 23, 2009)); **Idaho** (*Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 462 (Idaho 1996)); **Illinois** (*Capiccioni v. Brennan Naperville, Inc.*, 791 N.E.2d 553, 562 (Ill. 2003)); **Indiana** (*Cotton v. Ethicon, Inc.*, 20-cv-00074, 2021 WL 736211, at *6–7 (N.D. Ind. Feb. 25, 2021)); **Iowa** (*Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 227 (Iowa 1998)); **Kansas** (*Evolution. Inc. v. Suntrust Bank*, 342 F. Supp. 2d 964, 971 (D. Kan. 2004)); **Kentucky** (*Presnell Constr. Managers, Inc. v. EH Constr., LLC*, 134 S.W.3d 575, 582 (Ky. 2004)); **Louisiana** (*Sys. Eng'g and Sec., Inc. v. Sci. & Eng's Ass'ns, Inc.*, 962 So. 2d 1089, 1092 (La. Ct. App. 2007)); **Maine** (*Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990)); **Maryland** (*Baney Corp. v. Agilysys NV, LLC*, 773 F. Supp. 2d 593, 608 (D. Md. 2011)); **Massachusetts** (*Ricciardelli v. Home Depot U.S.A., Inc.*, 679 F. Supp. 2d 192, 210 (D. Mass. 2009)); **Michigan** (*Roberts v. Saffell*, 760 N.W.2d 715, 721 at n.2 (Mich. Ct. App. 2008)); **Minnesota** (*Flynn v. Am. Home Prods Corp.*, 627 N.W.2d 342, 350–51 (Minn. Ct. App. 2001)); **Mississippi** (*McPeck v. Taylor*, 06-CV-492, 2006 WL 2192667, at *2 (S.D. Miss. Aug. 1, 2006)); **Missouri** (*Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, 134 (Mo. 2010)); **Montana** (*United First Fed. Sav. & Loan Ass'n v. White-Stevens, Ltd.*, 833 P.2d 170, 174 (Mont. 1992)); **Nebraska** (*Nathan v. McDermott*, 945 N.W.2d 92, 109 (Neb. 2020)); **Nevada** (*G.K. Las Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*, 460 F. Supp. 2d 1246, 1262 (D. Nev. 2006)); **New Hampshire** (*BAE Sys. Info. & Elecs. Sys. Integration, Inc. v. SpaceKey Components, Inc.*, No. 10-cv-370, 2011 WL 5040705, at *13 (D. N.H. Oct. 2, 2011)); **New Jersey** (*McCall v. Metropolitan Life. Ins.*, 956 F. Supp. 1172, 1186 (D.N.J. 1996)); **New Mexico** (*Eckhardt v. Charter Hosp. of Albuquerque*, 953 P.2d 722, 734 (N.M. Ct. App. 1997)); **New York** (*Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000)); **North Carolina** (*Forbis v. Neal*, 649 S.E.2d 382, 387 (N.C. 2007)); **North Dakota** (*Cooperative Power Ass'n v. Westinghouse Elec. Corp.*, 60 F.3d 1336, 1341–42 (8th Cir. 1995)); **Ohio** (*Premier Bus. Grp., LLC v. Red Bull of N. Am., Inc.*, No. 08-CV-01453, 2009 WL 3242050, at *11 (N.D. Ohio

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Sep. 30, 2009)); **Oklahoma** (*Lopez v. Rollins*, 303 P.3d 911, 916 (Ok. Civ. App. 2013)); **Oregon** (*Prosser v. Safeco Ins. Co.*, No. CV 00-1512-BR, 2001 WL 34043385, *4 (D. Or. June 18, 2001)); **Pennsylvania** (*Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 657 (W.D. Pa. 1999) (Smith, J.)); **Puerto Rico** (*Linares-Acevedo v. Acevedo*, 38 F.Supp.3d 222, 229 (D.P.R. 2014)); **Rhode Island** (*Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 69 (R.I. 1995)); **South Carolina** (*Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 447 (4th Cir. 2001)); **South Dakota** (*Bayer v. PAL Newcomb Partners*, 643 N.W.2d 409, 412 (S.D. 2002)); **Tennessee** (*Roopchan v. ADT Sec. Sys., Inc.*, 781 F.Supp.2d 636, 654 (E.D. Tenn. 2011)); **Texas** (*Angle v. Mortgage Elec. Registration Sys.*, No. 11-cv-352, 2011 WL 4370969, at *1 (E.D. Tex. Sept. 19, 2011)); **Utah** (*Price-Orem Inc. Co. v. Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 59 (Utah 1986)); **Vermont** (*Limoge v. People's Trust Co.*, 719 A.2d 888, 890 (Vt. 1998)); **Virginia** (*Beck v. Smith*, 538 S.E.2d 312, 315 (Va. 2000)); **Washington** (*Baddeley v. Seek*, 156 P.3d 959, 962 (Wash. Ct. App. 2007)); **West Virginia** (*Trafalgar House Constr., Inc. v. ZMM, Inc.*, 567 S.E.2d 294, 300 (W.Va. 2002)); **Wisconsin** (*Green Spring Farms v. Kersten*, 401 N.W.2d 816, 822 (Wis. 1987)); **and Wyoming** (*Excel Constr., Inc. v. HKM Eng'g, Inc.*, 228 P.3d 40, 48–49 (Wyo. 2010)).

E(2) Jurisdictions in which a party has no duty to disclose information absent a confidential or fiduciary relationship.

(a) Common Law Fraud (Eighteen States)

Alabama (*Dodd v. Nelda Stephenson Chevrolet, Inc.*, 626 So. 2d 1288, 1293 (Ala. 1993)); **Arkansas** (*White v. Volkswagen Grp. of Am., Inc.*, No. 2:11-CV-02243, 2013 WL 685298, at *9 (W.D. Ark. Feb. 25, 2013)); **Connecticut** (*Est. of Axelrod v. Flannery*, 476 F. Supp. 2d 188, 194 (D. Conn. 2007)); **Florida** (*R.J. Reynolds Tobacco Co. v. Whitmire*, 260 So. 3d 536, 538–39 (Fla. Dist. Ct. App. 2018)); **Georgia** (*McCabe v. Daimler AG*, 160 F. Supp. 3d 1337, 1352 (N.D. Ga. 2015)); **Illinois** (*Flynn v. FCA US LLC*, 327 F.R.D. 206, 218 (S.D. Ill. 2018)); **Maryland** (*Estate of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 431 (D. Md. 2000)); **Massachusetts** (*Costa v. FCA US LLC*, 542 F. Supp. 3d 83, 100–01 (D. Mass. 2021)); **Mississippi** (*Ruth v. A.O. Smith Corp.*, 4-CV-18912, 2005 WL 2978694, at *4 (N.D. Ohio Oct. 11, 2005) (applying Mississippi law)); **New Jersey** (*Rose v. Ferrari NA*, No. 21-cv-20772, 2022 WL 14558880, at *6–7 (D.N.J. Oct. 25, 2022)); **Nevada** (*Nev. Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1417 (D. Nev. 1995)); **Ohio** (*Matanky v. Gen. Motors LLC*, 370 F. Supp. 3d 772, 795 (E.D. Mich. 2019) (applying Ohio law)); **Oregon** (*Martell v. Gen. Motors LLC*, 492 F. Supp. 3d 1131, 1143 (D. Or. 2020)); **Pennsylvania** (*Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999) (Smith, J.) (collecting cases)); **South Carolina** (*Regions Bank v. Schmauch*, 582 S.E.2d 432, 445–46 (S.C. Ct. App. 2003)); **South Dakota** (*Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 499 (S.D. 1990)); **Texas** (*Hoffman v. AmericaHomeKey, Inc.*, 23 F. Supp. 3d 734, 745 (N.D. Tex. 2014)); **and Virginia** (*McCabe v. Daimler AG*, 160 F.Supp.3d 1337, 1358 (N.D. Ga. 2015) (applying Virginia law)).

(b) Negligent Misrepresentation (Sixteen States)

Delaware (*Keystone Associates LLC v. Barclays Bank PLC*, C.A. No. 19-796, 2020 WL 109008, at *4 (D. Del. Jan. 9, 2020)); **Georgia** (*McCabe v. Daimler AG*, 160 F. Supp. 3d 1337, 1352 (N.D. Ga. 2015)); **Iowa** (*Estate of Butler v. Maharishi Univ. of Mgmt.*, 589 F. Supp. 2d 1150, 1163 (S.D.

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Iowa 2008); *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 227 (Iowa 1998)); **Illinois** (*Roe v. Ford Motor Company*, No. 18-12528, 2021 WL 2529825, at *9 (E.D. Mich. June 21, 2021) (applying Illinois law); *Flynn v. FCA US LLC*, 327 F.R.D. 206, 218 (S.D. Ill. 2018)); **Massachusetts** (*Carcillo v. National Hockey League*, 529 F.Supp.3d 768, 781–83 (N.D. Ill. 2021) (applying Massachusetts law)); **Mississippi** (*Ruth v. A.O. Smith Corp.*, 4-CV-18912, 2005 WL 2978694, at *4 (N.D. Ohio Oct. 11, 2005) (applying Mississippi law)); **New Jersey** (*Argabright v. Rheem Manufacturing Co.*, 201 F.Supp.3d 578, 604–05 (D.N.J. 2016)); **Nevada** (*Nev. Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1417 (D. Nev. 1995)); **New York** (*Prime Mover Capital Partners, L.P. v. Elixir Gaming Techs., Inc.*, 793 F.Supp.2d 651, 673–74 (S.D.N.Y. 2011)); **Ohio** (*Premier Bus. Grp., LLC v. Red Bull of N. Am., Inc.*, No. 08-CV-01453, 2009 WL 3242050, at *11 (N.D. Ohio Sep. 30, 2009); *Matanky v. Gen. Motors LLC*, 370 F. Supp. 3d 772, 795 (E.D. Mich. 2019) (applying Ohio law)); **North Carolina** (*Synovus Bank v. Karp*, 887 F.Supp.2d 677, 690 (W.D.N.C. 2012)); **Oregon** (*Conway v. Pacific Univ.*, 924 P.2d 818, 822 (Or. 1996); *see also Martell v. Gen. Motors LLC*, 492 F. Supp. 3d 1131, 1143 (D. Or. 2020)); **Pennsylvania** (*Carcillo v. National Hockey League*, 529 F.Supp.3d 768, 782–83 (N.D. Ill. 2021) (citing *Marcum v. Columbia Gas Transmission, LLC*, 423 F. Supp. 3d 115, 122 (E.D. Pa. 2019)); *Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999) (Smith, J.) (collecting cases)); **South Carolina** (*Regions Bank v. Schmauch*, 582 S.E.2d 432, 445–46 (S.C. Ct. App. 2003); *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 447 (4th Cir. 2001) (applying South Carolina law)); **South Dakota** (*Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 504 (S.D. 1990)); **and Texas** (*Hoffman v. AmericaHomeKey, Inc.*, 23 F. Supp. 3d 734, 745–47 (N.D. Tex. 2014)).

E(3) Jurisdictions that do not recognize an independent cause of action for negligent misrepresentation.

Arkansas (*Stube v. Pfizer Inc.*, 446 F.Supp.3d 424, 442 (W.D. Ark. 2020)); **Idaho** (*Duffin v. Idaho Crop. Improvement Ass’n.*, 895 P.2d 1195, 1203 (Idaho 1995) (tort of negligent misrepresentation is not recognized in Idaho except in narrow confines of professional relationship involving an accountant); **North Carolina** (*McBrayer v. Ethicon, Inc.*, 2017 WL 73934, at *4 (S.D.W.V. Jan. 6, 2017) (“The North Carolina Court of Appeals has indicated that, in products liability cases causing personal injury, the state does not recognize negligent misrepresentation as a theory of recovery independent from a traditional negligence claim.”) (applying North Carolina law and citing *Michael v. Huffman Oil Co.*, 661 S.E.2d 1, 11 (N.C. Ct. App. 2008)); **and Virginia** (*A.T. Massey Coal Co. v. Rudimex GmbH*, No. 3:05CV190-JRS, 2006 WL 44278 at *6 (E.D. Va. Jan. 9, 2006)).

E(4) Jurisdictions that limit negligent misrepresentation causes of action to business transactions.

Indiana (*Cotton v. Ethicon, Inc.*, No. 30-cv-00074, 2021 WL 736211, at *6–7 (N.D. Ind. Feb. 25, 2021)); **Florida** (*In Burrows v. Purchasing Power, LLC*, No. 12-cv-22800, 2012 WL 9391827, at *3 (S.D. Fla. Oct. 18, 2012)) (requiring damages that have “an apparent monetary value that fluctuates like the price of goods or service”); **Maine** (*Tardy v. Eli Lilly and Co.*, No. CV-03-538, 2004 WL 1925536, at *4 (Me. Super. Aug. 3, 2004); **and Minnesota** (*Forshund v. Stryker Corp.*,

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No. 09-2134, 2010 WL 3905854, at *6 (D. Minn. Sept. 30, 2010); *accord In re Allergan*, 537 F.Supp.3d 679, 737 (D.N.J. Mar. 19, 2021)).

CITATION TABLE F — CONSUMER PROTECTION CLAIMS

F(1) Jurisdictions in which consumer protection statutes expressly exempt matters where the subject matter of the claim is subject to regulatory oversight.

Alaska (Alaska Stat. § 45.50.481); **Colorado** (Colo. Rev. Stat. Ann. § 6-1-106 (1)); **Connecticut** (Conn. Gen. Stat. Ann. § 42-110c(a)(1)); **Georgia (FBPA)** (Ga. Code Ann. § 10-1-396(1)); **Georgia (UDTPA)** (Ga. Code Ann. § 10-1-374(1)); **Illinois (UDTPA)** (815 Ill. Comp. Stat. Ann. 510/4); **Maine (UDTPA)** (Me. Rev. Stat. tit. 10, § 1214.1(A)); **Massachusetts** (Mass. Gen. L. Ch. 93A § 3); **Michigan** (Mich. Comp. Laws § 445.904(1)); **Nebraska (CPA)** (Neb. Rev. Stat. Ann. § 59-1617); **New Mexico** (N.M. Stat. Ann. § 57-12-7); **Oklahoma** (Okla. Stat. Ann. tit. 15, § 754); **and Rhode Island** (R.I. Gen. Laws Ann. § 6-13.1-4).

F(2) Jurisdictions in which Plaintiffs are required to allege causation and/or reliance.

Alabama (Ala. Code § 8-19-10); **Arizona** (*Gray v. Capstone Fin.*, No. CV-21-01333, 2022 WL 2985647, at *5 (D. Ariz. July 28, 2022), *appeal filed* (9th Cir. Aug. 16, 2022)); **Arkansas** (Ark. Code § 4-88-113(f)(1)(A)); **California (UCL, CLRA, FAL)** (*Stewart v. Kodiak Cakes, LLC*, 537 F. Supp. 3d 1103, 1135 (S.D. Cal. 2021)); **Colorado** (*Hauschild GMBH & CO. KG v. FlackTek, Inc.*, No. 20-CV-02532, 2022 WL 392501, at *10 (D. Colo. Feb. 9, 2022)); **Connecticut** (Conn. Gen. Stat. § 42-110g(a)); **Georgia (FBPA)** (Ga. Code Ann. § 10-1-399); **Hawaii** (*Compton v. Countrywide Fin. Corp.*, 761 F.3d 1046, 1056 (9th Cir. 2014)); **Illinois (CFA)** (*Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 154–55 (Ill. 2002)); **Indiana** (Ind. Code § 24-5-0.5-4); **Kentucky** (*Mitchell v. Gen. Motors LLC*, No. 13-CV-498, 2014 WL 1319519, at *4 (W.D. Ky. Mar. 31, 2014)); **Louisiana (UTPCPL)** (La. Stat. Ann. § 51:1409); **Maryland** (*Healy v. BWW Law Grp., LLC*, No. 15-3688, 2017 WL 281997, at *32022 WL 29856474 (D. Md. Jan. 23, 2017)); **Massachusetts** (*Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 71 (1st Cir. 2020)); **Minnesota (PCFA)** (*Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 693 (Minn. 2014)); **Mississippi** (*Alexander v. Glob. Tel Link Corp.*, No. 17-CV-560, 2019 WL 3769642, at *4 (S.D. Miss. Mar. 29, 2019), *aff'd*, 816 F. App'x 939 (5th Cir. 2020)); **Missouri** (*Owen v. Gen. Motors Corp.*, 533 F.3d 913, 922 (8th Cir. 2008)); **Nevada** (*Motogolf.com, LLC v. Top Shelf Golf, LLC*, 528 F. Supp. 3d 1168, 1179 (D. Nev. 2021), *recons. denied*, No. 20-CV-00674, 2022 WL 834790 (D. Nev. Mar. 21, 2022)); **New Hampshire** (N.H. Rev. Stat. § 358:A–10); **New Jersey** (*Quality Eye Assocs., LLC v. ECL Grp., LLC*, No. CV 22-2489, 2022 WL 2916053, at *3 (D.N.J. July 25, 2022)); **New Mexico** (N.M. Stat. Ann. § 57-12-10(B)); **North Carolina** (*Kenney Props., Inc. v. Phila. Indem. Ins. Co.*, No. 21-CV-308-D, 2022 WL 2760007, at *9 (E.D.N.C. July 13, 2022), *appeal filed* (4th Cir. Aug. 11, 2022)); **Oklahoma** (*Brakebill v. Bank of Am. Corp.*, No. CIV-15-185, 2015 WL 5311281, at *2 (E.D. Okla. Sept. 11, 2015)); **Oregon** (*Colquitt v. Mfrs. & Traders Tr. Co.*, 144 F. Supp. 3d 1219, 1231 (D. Or. 2015)); **Pennsylvania** (*Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 776–77 (W.D. Pa. 2015) (Conti, J.)); **Rhode Island** (R.I. Gen. Laws Ann. § 6-13.1-5.2); **South Carolina** (S.C. Code Ann. § 39-5-140(a)); **South Dakota** (*Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 197 (S.D. 2007)); **Tennessee** (*Creative Lifting Servs., Inc. v. Steam Logistics, LLC*, No. 20-CV-337, 2022 WL 3040066, at *2 (E.D. Tenn. Aug. 1, 2022)); **Texas** (*Williamson v. Howard*, 554 S.W.3d 59, 70 (Tex. App. 2018)); **Utah (CSPA)** (Utah Code Ann. § 13-11-19 (4)(a)); **Vermont**

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(Vt. Stat. Ann. tit. 9, § 2461(b)); **Virginia** (*Gurwell v. Sea World Parks & Ent. LLC*, No. 20-CV-312, 2021 WL 4168503, at *7 (E.D. Va. Aug. 11, 2021)); **Washington** (*Kolbet v. Selene Fin. LP*, No. C19-0439, 2019 WL 2567352, at *8 (W.D. Wash. June 21, 2019)); **West Virginia** (*Wamsley v. Lifenet Transplant Servs. Inc.*, No. 10-CV-00990, 2011 WL 1230047, at *2 (S.D.W. Va. Mar. 31, 2011)); **Wisconsin** (*Blitz v. Monsanto Co.*, 317 F. Supp. 3d 1042, 1052 (W.D. Wis. 2018)); **and Wyoming** (Wyo. Stat. Ann. § 40-12-108(a)).

F(3) Jurisdictions in which consumer protection statute plaintiffs must allege scienter with specificity.

Alabama (*Sam v. Beaird*, 685 So. 2d 742, 744 (Ala. Civ. App. 1996)); **Arizona** (Ariz. Rev. Stat. § 44-1532); **Arkansas** (Ark. Code Ann. § 4-88-107(a)(1)); **Colorado** (Colo. Rev. Stat. § 6-1-105); **Illinois (CFA)** (*Hart v. Amazon.com, Inc.*, 191 F. Supp. 3d 809, 822 (N.D. Ill. 2016), *aff'd*, 845 F.3d 802 (7th Cir. 2017)); **Iowa** (Iowa Code § 714H.3(1)); **Kansas** (Kan. Stat. § 50-626(b)); **Kentucky** (*Scanlan v. Sunbeam Prods., Inc.*, 690 F. App'x 319, 323 (6th Cir. 2017)); **Maryland** (*Adams v. NVR Homes, Inc.*, 135 F. Supp. 2d 675, 693 (D. Md. 2012)); **Nevada** (Nev. Rev. Stat. §§ 4598.0915, 598.0923(2)); **New Mexico** (*U.S. v. Great Am. Ins. Co.*, 952 F. Supp. 2d 1259, 1267-68 (D.N.M. 2013)); **North Dakota** (N.D. Cent. Code § 51-15-02); **Oklahoma** (Okla. Stat. Ann. tit. 15, § 753); **Pennsylvania** (*Gilmour v. Bohmueller*, No. CIV.A. 04-2535, 2005 WL 241181, at *11 (E.D. Pa. Jan. 27, 2005)); **South Dakota** (S.D. Codified Laws § 37-24-6); **Utah (CSPA)** (*Martinez v. Best Buy Co.*, 283 P.3d 521, 523 (Utah Ct. App. 2012)); **Virginia** (*Hamilton v. Boddie-Noell Enters., Inc.*, 88 F. Supp. 3d 588, 591 (W.D. Va. 2015)); **Wisconsin** (*Eberts v. Goderstad*, 569 F.3d 757, 763 (7th Cir. 2009)); **and Wyoming** (Wyo. Stat. Ann. § 40-12-105).

F(4) Jurisdictions in which recovery for personal injury claims is precluded.

Alaska (*Donahue v. Ledgens, Inc.*, 331 P.3d 342, 354 (Alaska 2014)); **Florida (DUTPA)** (*Davis v. Bos. Sci. Corp.*, No. 17-CV-682, 2018 WL 2183885, at *8 (M.D. Fla. May 11, 2018)); **Hawaii** (*Heejoon Chung v. U.S. Bank, N.A.*, 250 F. Supp. 3d 658, 691 (D. Haw. 2017)); **Iowa** (*Willet v. Johnson & Johnson*, No. 112CV00034, 2019 WL 7500524, at *4 (S.D. Iowa Sept. 30, 2019)); **Maine (UTPA)** (*Benner v. Wells Fargo Bank, N.A.*, No. 16-CV-00467, 2018 WL 1548683, at *13 & n.18 (D. Me. Mar. 29, 2018)); **Nebraska (CPA)** (Neb. Rev. Stat. Ann. § 59-1609); **New Mexico** (*Pena v. Scrip, Inc.*, No. CV 11-1102 GBW/WDS, 2013 WL 12334164, at *7 (D.N.M. Mar. 22, 2013)); **Ohio** (*Kelley v. Insys Therapeutics, Inc.*, No. 18CV1774, 2019 WL 329600, at *7 (N.D. Ohio Jan. 25, 2019)); **Oregon** (*Parada v. MJ's Lab. Servs., Inc.*, No. 17-CV-00521, 2019 WL 4145224, at *7 (D. Or. Aug. 30, 2019)); **Pennsylvania** (*King v. Hyundai Motor Mfg. Am.*, No. 18-CV-450, 2019 WL 458477, at *3 (M.D. Pa. Jan. 3, 2019), *report & recommendation adopted*, 2019 WL 450217 (M.D. Pa. Feb. 5, 2019)); **South Carolina** (*Jones v. Ram Med., Inc.*, 807 F. Supp. 2d 501, 510 (D.S.C. 2011)); **Tennessee** (*Orr v. Ethicon, Inc.*, No. 20-CV-110, 2020 WL 9073528, at *3 (E.D. Tenn. Sept. 11, 2020)); **Texas** (*Thalia Huynh v. Wal-Mart Stores Texas, LLC*, No. CV 18-4257, 2019 WL 2931573, at *5 (S.D. Tex. June 17, 2019)); **and Washington** (*Carter v. Ethicon Inc.*, No. C20-5672, 2021 WL 1893749, at *3 (W.D. Wash. May 11, 2021)).

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F(5) Jurisdictions in which consumer protection statutes expressly prohibit private actions for damages.

Delaware (UDTPA) (Del. Code Ann. tit. 6, § 2533); **Georgia (UDTPA)** (Ga. Code Ann. § 10-1-373); **Illinois (UDTPA)** (815 Ill. Comp. Stat. Ann. 510/3); **Maine (UDTPA)** (Me. Rev. Stat. tit. 10, § 1213); *and* **Nebraska (UDTPA)** (Neb. Rev. Stat. Ann. § 87-303).

F(6) Jurisdictions in which private rights of action for consumer protection claims are afforded only to those who purchased goods or where there is privity between the parties.

Alabama (Ala. Code § 8-19-3); **Arizona** (*Sullivan v. Pulte Home Corp.*, 290 P.3d 446, 454 (Ariz. Ct. App. 2012), *vacated in part on other grounds*, 306 P.3d 1 (2013)); **District of Columbia** (D.C. Code Ann. § 28-3901(1)(1)-(2)); **Georgia (FBPA)** (*Lewis v. Ally Fin., Inc.*, No. 21-CV-3839, 2022 WL 1286587, at *10 (N.D. Ga. Feb. 9, 2022), *report and recommendation adopted*, 2022 WL 1286554 (N.D. Ga. Mar. 22, 2022)); **Idaho** (*Dreyer v. Idaho Dep't of Health & Welfare*, 455 F. Supp. 3d 938, 952 (D. Idaho 2020) (For CPA standing, “aggrieved party must have been in a contractual relationship with the party alleged to have acted unfairly or deceptively.”)); **Kentucky** (*Skinner v. Ethicon, Inc.*, No. CV 19-472, 2021 WL 640809, at *4 (E.D. Ky. Feb. 18, 2021)) (CPA “plainly contemplates an action by a purchaser against his immediate seller.”)); **Maine (UTPA)** (Me. Rev. Stat. Ann. tit. 5, § 213(1)); **Mississippi** (Miss. Code Ann. § 75-24-15(1)); **Missouri** (*Pleasant v. Noble Fin. Corp.*, 54 F. Supp. 3d 1071, 1078 (W.D. Mo. 2014) (To state an MPA cause of action, plaintiff must allege that he “purchased merchandise . . . from the defendants.”)); **New Mexico** (*Amco Ins. Co. v. SimplexGrinnell LP*, No. 14-CV-890, 2016 WL 4425095, at *8 (D.N.M. Feb. 29, 2016)); **Pennsylvania** (73 Pa. Cons. Stat. § 201-9.2(a)); **Rhode Island** (*Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 189 (D.R.I. 2000)); **Tennessee** (Tenn. Code Ann. ¶ 47-18-103); **Vermont** (Vt. Stat. Ann. tit. 9, § 2451a); *and* **West Virginia** (W. Va. Code § 46A-6-106(a)).

F(7) Jurisdictions in which claims concerning prescription medical devices are beyond the scope of the consumer protection statute.

Alabama (Ala. Code § 8-19-3(4) (applies to “good or services for personal, family, or household use”); *cf. Collins v. Davol, Inc.*, 56 F. Supp. 3d 1222, 1232 n.9 (N.D. Ala. 2014) (“[Medical] device is clearly inconsistent with the definition of ‘consumer good,’ i.e. ‘goods that are used or bought for use primarily for personal, family, or household purposes.’”)); **Alaska** (*Aloha Lumber Corp. v. Univ. of Alaska*, 994 P.2d 991, 1002 (Alaska 1999)); **California (CLRA)** (Cal. Civ. Code § 1761); **District of Columbia** (D.C. Code Ann. § 28-3901(a)(2)); **Georgia (FBPA)** (Ga. Code Ann. § 10-1-392(a)(10)); **Hawaii** (Haw. Rev. Stat. § 480-1); **Illinois (CFA)** (815 Ill. Comp. Stats. 505/1(e)); **Indiana** (Ind. Code Ann. § 24-5-0.5-2(a)(1)-(2)); **Kentucky** (Ky. Rev. Stat. Ann. § 367.220(1)); **Louisiana (UTPCPL)** (La. Rev. Stat. Ann. § 51:1402(3)); **Maine (UTPA)** (Me. Rev. Stat. Ann. tit. 5, § 213); *Herzog v. Arthrocare Corp.*, No. 02-76-P-C, 2003 WL 1785795, at *10 (D. Me. 2003) (“[UTPA] does not extend protection to individuals who pay the bill for a medical service provider’s acquisition of a medical device, even though that device is ‘used’ on them.”)); **Maryland** (*Pease v. Abbott Lab'ys, Inc.*, No. JKB-12-1844, 2013 WL 174478, at *2-3

CITATION TABLE F — CONSUMER PROTECTION CLAIMS

(D. Md. Jan. 16, 2013)); **Michigan** (Mich. Comp. Laws Ann. § 445.902(g)); **Mississippi** (Miss. Code Ann. § 75-24-15(1)); **Missouri** (Mo. Ann. Stat. § 407.025(1)); **Montana** (Mont. Code Ann. § 30-14-102(1)); **Ohio** (Ohio Rev. Code Ann. § 1345.01(A)); **Oregon** (Or. Rev. Stat. § 646.605(6)(a)); **Pennsylvania** (*In re Avandia Mktg., Sales & Prods. Liab. Litig.*, No. 07-MD-01871, 2013 WL 3486907 (E.D. Pa. July 10, 2013)); **Rhode Island** (R.I. Gen. Laws § 6-13.1-5.2(a)); **Vermont** (Vt. Stat. Ann. tit. 9, § 2451a(1)); *Otis-Wisher v. Medtronic, Inc.*, 616 F. App'x 433, 435 (2d Cir. 2015)); **Virginia** (*Liu v. Lowe's Home Improvement*, No. 20-CV-00056, 2022 WL 528863, at *4 (W.D. Va. Feb. 22, 2022)); **West Virginia** (*White v. Wyeth*, 705 S.E.2d 828, 838 (W. Va. 2010); *and Wyoming* (Wyo. Stat. Ann. § 40-12-102(a)(ii)).

F(8) Jurisdictions in which consumer protection statutes only create a cause of action for conduct that occurred within the state, in some cases, primarily and substantially within the state.

Arizona (*Thuney v. Lawyer's Title of Ariz.*, No. 18-CV-1513, 2019 WL 467653, at *7 (D. Ariz. Feb. 6, 2019) (“While this case may have some nexus to Arizona, the [CFA] only applies to acts committed in Arizona that violate the Act. Plaintiffs have not alleged any conduct that [defendant] committed in Arizona.”)); **Connecticut** (Conn. Gen. Stat. Ann. § 42-110a(4)); **Delaware (CFA)** (*Chudner v. TransUnion Interactive, Inc.*, No. 09-CV-00433, 2010 WL 11710658, at *1 (D. Del. Mar. 4, 2010) (CFA “only authorize[s] private causes of action for alleged fraudulent conduct that must have occurred in Delaware.”)); **District of Columbia** (D.C. Code § 28-3901(c); *Nelson v. Nationwide Mortg. Corp.*, 659 F. Supp. 611, 616-17 (D.D.C. 1987)); **Florida (DUTPA)** (*Millennium Commc'ns & Fulfilment, Inc. v. Off. of Att'y Gen.*, 761 So. 2d 1256, 1262 (Fla. Dist. Ct. App. 2000) (“[FDUTPA] seeks to prohibit unfair, deceptive and/or unconscionable practices which have transpired within the territorial boundaries of this state.”)); **Georgia (FBPA)** (Ga. Code Ann. § 10-1-391(a)); **Idaho** (Idaho Code § 48-602(2)); *In re Namenda Indirect Purchaser Antitrust Litig.*, No. 15-CV-6549, 2021 WL 2403727, at *33 (S.D.N.Y. June 11, 2021) (applying Idaho law)); **Illinois (UDTPA)** (*LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 809 F. Supp. 2d 857, 861–62 (N.D. Ill. 2011)); **Kansas** (Kan. Stat. Ann. § 50-638(a)); **Massachusetts** (*Monahan Prod. LLC v. Sam's E., Inc.*, 463 F. Supp. 3d 128, 152 (D. Mass. 2020) (referencing Mass. Gen. L. Ch. 93A §11)); **Minnesota (PCFA)** (*Johannessohn v. Polaris Indus., Inc.*, 450 F. Supp. 3d 931, 962 (D. Minn. 2020) (“Minnesota legislature [did not] intend[] the MCFA to apply extraterritorially.”), *aff'd*, 9 F.4th 981 (8th Cir. 2021)); **Missouri** (*Pinkney v. TBC Corp.*, No. 19-CV-02680, 2020 WL 1528544, at *5 (D. Kan. Mar. 31, 2020) (applying Missouri law), *recons. denied*, 2020 WL 2747210 (D. Kan. May 27, 2020)); **Nebraska (UDTPA)** (Neb. Rev. Stat. § 87-304(c)); **Nevada** (*MST Mgmt., LLC v. Chicago Doughnut Franchise Co., LLC*, No. 21-CV-00360, 2022 WL 1001495, at *4 (D. Nev. Feb. 9, 2022)); **New Hampshire** (N.H. Rev. Stat. § 358-A:2); **New York** (N.Y. Gen. Bus. Law § 349(a)); **Ohio** (Ohio Rev. Code Ann. § 1345.04; *Shorter v. Champion Home Builders Co.*, 776 F. Supp. 333, 339 (N.D. Ohio 1991)) (Consumer Sales Protection Act “is only applicable if the offending conduct took place within the territorial borders of the state of Ohio.”); **Oklahoma** (*Cont'l Res., Inc. v. Wolla Oilfield Servs., LLC*, 510 P.3d 175, 180 (Okla. 2022) (“The focus is on the location of the offending conduct, and such conduct must occur in this state.”)); **South Carolina** (*Callen v. Daimler AG*, No. 19-CV-1411, 2020 WL 10090879, at *20

CITATION TABLE F — CONSUMER PROTECTION CLAIMS

(N.D. Ga. June 17, 2020)); **Tennessee** (Tenn. Code Ann. § 47-18-102(2)); **and Texas** (Tex. Bus. & Com. Code Ann. § 17.45(6)).

F(9) Jurisdictions in which timely service of a compliant pre-suit notice is a condition precedent to filing a consumer protection claim suit.

Alabama (Ala. Code § 8-19-10(e)); **Alaska** (Alaska Stat. § 45.50.535(b) (requiring pre-suit notice where plaintiff seeks injunctive relief)); **California (CLRA)** (Cal. Civ. Code § 1782(a)); **Georgia (FBPA)** (Ga. Code Ann. § 10-1-399(b)); **Indiana** (Ind. Cod. §§ 24-5-0.5-5, 24-5-0.5-2(a)(5)-(8)); **Maine (UTPA)** (Me. Rev. Stat. Ann. tit. 5, § 213(1-A)); **Massachusetts** (Mass. Gen. L. Ch. 93A § 1-9); **Texas** (Tex. Bus. & Comm. Code Ann. § 17.505(a)); **Utah (TIA)** (Utah Code Ann. § 13-11a-4(5) (requiring pre-suit notice where plaintiff seeks injunctive relief)); **West Virginia** (W. Va. Code Ann. § 46A-5-108(a)); **and Wyoming** (Wyo. Stat. Ann. § 40-12-109).

CITATION TABLE G — NEGLIGENCE PER SE

G(1) Jurisdictions that do not recognize negligence per se as an independent cause of action.

Alabama (*Prickett v. BAC Home Loans*, 946 F. Supp. 2d 1236 (2013)); **Arizona** (*Udd v. City of Phoenix*, No. CV-18-01616-PHX-DWL, 2020 WL 1536326, at *26 (D. Ariz. Mar. 31, 2020)); **Arkansas** (*Cent. Okla. Pipeline, Inc. v. Hawk Field Servs., LLC*, 400 S.W.3d 701, 712 (Ark. 2012)); **California** (*Millard v. Biosources, Inc.*, 68 Cal. Rptr. 3d 177, 188 n.2 (Cal. Ct. App. 2007)); **Hawaii** (*Aana v. Pioneer Hi-Bred Int'l, Inc.*, 965 F. Supp. 2d 1157, 1175 (D. Haw. 2013)); **Illinois** (*Tolen v. Honeywell Int'l, Inc.*, No. 05-CV-4220-JPG, 2006 WL 3333754, at *4 (S.D. Ill. Nov. 16, 2006)); **Louisiana** (*Ducote v. Boleware*, 216 So. 3d 934, 944 (La. Ct. App. 2016)); **Maine** (*Elliott v. S.D. Warren Co.*, 134 F.3d 1, 5 (1st Cir. 1998)); **Maryland** (*Bray v. Marriott Int'l*, 158 F. Supp. 3d 441, 445 (D. Md. 2016)); **Massachusetts** (*Deutsche Lufthansa AG v. Mass. Port Auth.*, No.17-cv-11702-DJC, 2018 WL 3466938, at *2 (D. Mass. July 18, 2018)); **Michigan** (*Abnet v. Coca-Cola Co.*, 786 F. Supp. 2d 1341, 1345 (W.D. Mich. 2011)); **Minnesota** (*Elder v. Allstate Ins. Co.*, 341 F. Supp. 2d 1095, 1100 (D. Minn. 2004)); **Mississippi** (*Williams ex rel. Raymond v. Wal-Mart Stores East, L.P.*, 99 So. 3d 112, 116 (Miss. 2012)); **North Dakota** (*Mehl v. Canadian Pac. Ry., Ltd.*, 417 F. Supp. 2d 1104, 1118 (D.N.D. 2006)); **Nebraska** (*Scheele v. Rains*, 874 N.W.2d 867, 873 (Neb. 2016)); **Nevada** (*Garland v. Las Vegas Metro. Police Dep't*, No. 2:12-cv-00147-GMN-VCF, 2013 WL 1195647, at *5 (D. Nev. Mar. 21, 2013)); **New Mexico** (*Gatewood v. Estate of Thompson*, No. 19-573 GBW/CG, 2019 WL 4889161, at *2 (D.N.M. Oct. 3, 2019)); **Oregon** (*Hammick v. Jacobs*, No. 3:19-cv-00200-JR, 2020 WL 6135464, at *5 (D. Or. Oct. 19, 2020)); **Pennsylvania** (*Grove v. Port Auth. of Allegheny County*, 218 A.3d 877, 888–89 (Pa. 2019); *Congini by Congini v. Portersville Valve Co.*, 470 A.2d 515, 518 n.4 (Pa. 1983)); **Rhode Island** (*Kurczy v. St. Joseph Veterans Ass'n, Inc.*, 820 A.2d 929, 947 (R.I. 2003)); **Tennessee** (*Nelson v. Inman Homes, Inc.*, No. 1:12-cv-204, 2014 WL 2094327, at *3 (E.D. Tenn. Apr. 17, 2014)); **Texas** (*Johnson v. Enriquez*, 460 S.W.3d 669, 673 (Tex. App. 2015)); **Utah** (*Gaw v. State ex rel. Dep't of Transp.*, 798 P.2d 1130, 1135 (Utah Ct. App. 1990)); **Vermont** (*Merritt v. United States*, No. 5:18-cv-200, 2020 WL 13336978, at *8 (D. Vt. June 26, 2020)); **Virginia** (*Tingler v. Graystone Homes, Inc.*, 834 S.E.2d 244, 261 n.18 (Va. 2019)); **Washington** (*Gilliam v. Dep't of Social & Health Servs., Child Protective Servs.*, 950 P.2d 20, 28 (Wash. Ct. App. 1998)); **and Wisconsin** (*D.L. by Friederichs v. Huebner*, 329 N.W.2d 890, 917 (Wis. 1983)).

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2023, the foregoing document was electronically filed with the Clerk of the Court and served upon counsel of record through the Court's ECF system.

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE: PHILIPS RECALLED CPAP,
BI-LEVEL PAP, AND MECHANICAL
VENTILATOR PRODUCTS
LITIGATION

This Document Relates to:

Amended Master Long Form Complaint
For Personal Injuries And Damages, And
Demand For Jury Trial (ECF No. 834)

:
: Master Docket: No. 21-mc-1230-JFC
:
: MDL No. 3014
:
: (Oral Argument Requested)

**INDEX OF EXHIBITS TO MEMORANDUM IN LAW IN SUPPORT OF PHILIPS RS
NORTH AMERICA LLC'S MOTION TO DISMISS THE AMENDED MASTER LONG
FORM COMPLAINT FOR PERSONAL INJURIES AND DAMAGES
FOR FAILURE TO STATE A CLAIM**

- A. September 8, 2021 Plaintiff Letter
- B. October 8, 2021 Respironics Response to Plaintiff Letter
- C. May 16, 2022 Plaintiff Letter
- D. June 15, 2022 Respironics Response to Plaintiff Letter

EXHIBIT A



SHANON J. CARSON / MANAGING SHAREHOLDER
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September 8, 2021

**PRIVILEGED AND CONFIDENTIAL
FOR SETTLEMENT PURPOSES ONLY
PURSUANT TO FED. R. EVID. 408**

VIA EMAIL

Daniel S. Savrin
Morgan Lewis
One Federal Street
Boston, MA 02110-1726
Daniel.savrin@morganlewis.com

**Re: Philips' Defective and Recalled CPAP, BiPAP, Ventilators, and Other
Breathing Machines – NOTICE OF VIOLATIONS**

Dear Daniel:

As you are aware, our law firms have filed the Class Action Complaint attached hereto as Exhibit A captioned *Conley v. Philips Koninklijke, N.V.*, No. 1:21-cv-11328 (D. Mass.) against Defendants Philips Koninklijke, N.V., Philips North America, and Philips RS North America (collectively "Philips"), seeking damages and other relief related to Philips' recall of certain CPAP machines, BiPAP machines, and ventilators ("Recalled Products" as defined in the Class Action Complaint), due to the presence of a toxic and carcinogenic PE-PUR foam within the Recalled Products that degrades and can enter the airways of the user. We are sending this demand letter to comply with certain requirements under state law for various consumer protection laws and warranty laws. By sending this letter, we are not conceding that any of these demand requirements apply in this matter, as Philips has been on notice of nationwide class action claims **for over two months** but has not taken actions to remedy the harms caused by the Recalled Products.

This notice of claims is brought on behalf of all the plaintiffs in the Class Action Complaint as well as the individuals listed on Exhibit B who are a subset of Berger Montague's clients. Throughout this letter, any reference to "Plaintiffs" refers to these individuals on the Class Action Complaint and listed on Exhibit B.

The basis for the claims is fully set forth in the Class Action Complaint, but to briefly summarize, Plaintiffs are consumers who used the Recalled Devices and have out-of-pocket costs and other injuries in connection with their use of the Recalled Products,



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including costs associated with the purchase or rental of the Recalled Product, costs of purchasing Accessories (as defined in the Class Action Complaint) such as replacement masks, hoses, and other accessories, and costs of obtaining a replacement device. Moreover, Plaintiffs have all been exposed to toxic carcinogens that require ongoing medical monitoring and further medical costs. Plaintiffs allege that Philips has long been aware of the problems with the Recalled Products (since at least 2018) but did nothing until the recall in June 2021. Since the recall, Philips has not repaired the devices or provided replacements to all its consumers. Plaintiffs who cannot afford a replacement device are thus left with a Hobson's choice: either continue use of the device and risk continued exposure to carcinogens or cease using the device and risk other serious health problems.

I. Notice of Claims

This letter provides written notice of Plaintiffs' claims for violation of the following consumer protection laws. All claims are brought on behalf of Plaintiffs and all those similarly situated including the Class members alleged in the Complaint.

- Alabama Deceptive Trade Practices Act, Ala. Code. §§ 8-19-1, *et seq.*,
- Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Stat. §§ 45.50.471, *et seq.*,
- California Consumer Legal Remedies Act, Cal. Civ. Code. §§ 1750, *et seq.*
- Massachusetts General Laws Chapter 93A;
- Georgia Fair Business Practices Act, Ga. Code Ann. §§ 10-1-390, *et. seq.*
- Indiana Deceptive Consumer Sales Act, Ind. Code. §§ 24-5-0.5-1, *et seq.*
- Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, §§ 205A, *et seq.*
- Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*
- Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. Com. Code §§ 17.41, *et seq.*



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- West Virginia Code §§ 46A-6-101, *et seq.*
- Wyoming Consumer Protection Act, Wyo. Stat. Ann. §§ 40-12-101, *et seq.*

This letter also provides notice on behalf of Plaintiffs and those similarly situated of a breach of the applicable warranty laws where the Recalled Products have been sold or provided.

Plaintiffs, on behalf of themselves and those similarly situated, seek all available damages, including, without limitation, the return of the purchase price of their Recalled Products and all Accessories with interest from the time they were purchased; the reimbursement for any and all costs associated with obtaining a replacement device; costs associated with ongoing medical monitoring; all available damages and penalties (including treble damages and punitive damages); reasonable costs and attorneys' fees; and any other damages ordered by the courts. In addition, Plaintiff and the Class will seek appropriate injunctive and declaratory relief relating to the Recalled Products, including, without limitation, notice to the Class regarding the defect, and replacement or repair of the Recalled Products.

A. Alabama Deceptive Trade Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute deceptive acts or practices that violate Alabama Code § 8-19-5. Philips' violations include, but are not limited to, the following provisions:

- Ala. Code § 8-19-5(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;
- Ala. Code § 8-19-5(7): Representing that goods are of a particular standard, quality, or grade, if they are of another;
- Ala Code § 8-19-5(9): Advertising goods with intent not to sell them as advertised; and
- Ala Code § 8-19-5(27): Engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce.



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Philips has failed to abide by its consumer protection obligations to Plaintiff John Cook and others in Alabama, and has failed to adequately compensate Plaintiffs for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Alabama Subclass set forth in the Class Action Complaint within 15 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

We note that the pre-suit notice requirement of this statute does not apply if Philips does not "maintain a place of business or keep assets within" Alabama. Ala. Code. § 8-9-10(e). We are unaware of any place of business maintained by Philips or assets kept by Philips in Alabama.

B. Alaska Unfair Trade Practices and Consumer Protection Act Demand

Pursuant to Alaska Stat. § 45.50.535, Plaintiff Mark Welker and others from Alaska listed in Exhibit B intend to seek an injunction against Defendants for their failure to provide adequate notice of the recall, failure to timely provide replacement machines or reimburse others for the costs of replacement machines, failure to return the purchase price of the Recalled Products, and any other injunctive relief related to the recall as appropriate. Philips' actions described herein and in the attached Complaint constitute deceptive acts or practices that violate Alaska Stat. Ann. § 45.50.471. Philips' violations, include, but are not limited to, the following provisions:

- Alaska Stat. Ann. § 45.50.471(4): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that the person does not have;
- Alaska Stat. Ann. § 45.50.417(6): Representing that goods are of a particular standard, quality, or grade, if they are of another;
- Alaska Stat. Ann. § 45.50.417(8): Advertising goods with intent not to sell them as advertised; and
- Alaska Stat. Ann. § 45.50.417(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing,



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suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived, or damaged

In addition to an injunction, Plaintiff Welker and others from Alaska listed on Exhibit B, and the Alaska Subclass, will also be seeking the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

C. California Consumer Legal Remedies Act Demand

Philips has violated and continues to violate numerous subsections of the Consumer Legal Remedies Act, including, but not limited to, the following:

- Cal. Civ. Code § 1770(a)(5): Representing that goods have characteristics, uses, and benefits which they do not have;
- Cal. Civ. Code § 1770(a)(7): Representing that goods are of a particular standard, quality, or grade, if they are of another;
- Cal. Civ. Code § 1770(a)(9): Advertising goods with intent not to sell them as advertised; and

Cal. Civ. Code § 1770(a)(16): Representing that goods have been supplied in accordance with a previous representation when they have not.

Philips has failed to abide by its consumer protection obligations to Plaintiffs Bailey, DiJohn, others from California listed on Exhibit B, and the California Subclass, and has failed to provide adequate compensation for the damage caused to them by the Recalled Products. Plaintiffs demand full and appropriate relief for themselves and all members of the California Subclass within thirty (30) calendar days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory, treble damages, and punitive damages; and reasonable costs and attorneys' fees.

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D. Georgia Fair Business Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute unfair or deceptive acts or practices that violate Ga. Code Ann. § 10-1-393(a). Additionally Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of unfair or deceptive practices:

- Ga. Code Ann. § 10-1-393(b)(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;
- Ga. Code Ann. § 10-1-393(b)(7): Representing that goods are of a particular standard, quality, or grade, if they are of another; and
- Ga. Code Ann. § 10-1-393(b)(9): Advertising goods with intent not to sell them as advertised.

Philips has failed to abide by its consumer protection obligations to Plaintiffs Coggeshall, Stark, others from Georgia listed on Exhibit B, and the Georgia Subclass, and has failed to provide adequate compensation for the damages caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Georgia Subclass within 30 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

We note that the pre-suit notice requirement of this statute does not apply if Philips does not "maintain a place of business or keep assets within" Georgia. Ga. Code Ann. § 10-1-399(b). We are unaware of any place of business or assets kept by Philips in Georgia.

E. Indiana Deceptive Consumer Sales Act Demand

Philips' actions described herein and in the Class Action Complaint constitute unfair, abusive, or deceptive acts, omissions, or practices under Indiana Code § 24-5-0.5-3. Additionally, Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of unfair or deceptive trade practices:

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- Ind. Code. § 24-5-0.5-3(b)(1): That such subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have; and
- Ind. Code. § 24-5-0.5-3(b)(2): That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.

Philips has failed to abide by its consumer protection obligations to Plaintiff Schuckit, others from Indiana listed on Exhibit B, and the Indiana Subclass, and has failed to provide adequate compensation to Plaintiffs and the Class for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Subclass including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties, including statutory and treble damages, and reasonable costs and attorneys' fees.

We note that the sending of this notice is not required because Philips' deceptive acts are incurable and uncured, and this notice is being sent within six (6) months after the initial discovery of the deceptive act. Ind. Code. § 24-5-0.5-5.

F. Maine Unfair Trade Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute unfair or deceptive acts or practices that violate Me. Rev. Stat. Ann., tit. 5, § 207. Philips has failed to abide by its consumer protection obligations to Plaintiff Bean, others from Maine listed on Exhibit B, and the Maine Subclass, and has failed to provide adequate compensation to Plaintiffs and the Maine Subclass for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief all members of the Maine Subclass within 30 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.



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G. Massachusetts General Laws Chapter 93A Demand

In the Class Action Complaint, Plaintiff McClay has alleged that he sent a pre-suit letter on behalf of himself and a Class more than 30 days in advance of the filing the Class Action Complaint. Plaintiff McClay thus brings a class action claim under Mass. Gen. Laws 93A, § 9. This letter is thus being sent on behalf of Plaintiff Conley and other persons from Massachusetts listed on Exhibit B.

Philips' actions described herein and in the attached Complaint constitute unfair and deceptive business practices that violate Massachusetts General Laws Chapter 93A. Philips has violated c. 93A because, among other things, Philips knew or should have known that the defects were present in the Recalled Products, but knowingly and/or recklessly misrepresented to Plaintiff Conley and others that the Recalled Products were free from defects, were merchantable and fit for their ordinary purposes, and took no action to adequately warn Plaintiffs and the Massachusetts Subclass or appropriately remedy the defects. Instead, Philips concealed and failed to warn customers and potential customers that the carcinogenic PE-PUR foam in the in Recalled Products can degrade and enter the airways of the Recalled Machines resulting in users breathing in toxic particles. Accordingly, Plaintiff demands full and appropriate relief for himself and the members of the Massachusetts Subclass, including but not limited to actual and/or statutory damages per violation under c. 93A.

H. Mississippi Consumer Protection Act Demand

Philips' actions described herein and in the Class Action Complaint constitute unfair or deceptive trade practices that violate Miss. Code Ann. § 74-25-5(a). Additionally Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of unfair or deceptive trade practices:

- Miss. Code Ann. § 74-25-5(2)(e): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that h does not have;
- Miss. Code Ann. § 74-25-5(2)(f): Representing that goods are of a particular standard, quality, or grade, if they are of another; and
- Miss. Code Ann. § 74-25-5(2)(g): Advertising goods with intent not to sell them as advertised.



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Philips has failed to abide by its consumer protection obligations to Plaintiff Stafford, others from Mississippi listed on Exhibit B, and the Mississippi Subclass, and has failed to provide adequate compensation to Plaintiffs and the Mississippi Subclass for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Mississippi Subclass including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties, and reasonable costs and attorneys' fees.

Pursuant to Miss. Code Ann. § 74-24-15(2), Plaintiffs request that Philips engage an informal dispute settlement program approved by the Mississippi Attorney General. If Philips is interested in participating in such a program, please advise.

I. Texas Deceptive Trade Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute false, misleading, or deceptive acts or practices that violate Tex. Bus. & Com. Code § 17.46(a). Additionally Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of false, misleading, or deceptive practices:

- Tex. Bus. & Com. Code § 17.46(b)(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;
- Tex. Bus. & Com. Code § 17.46(b)(7): Representing that goods are of a particular standard, quality, or grade, if they are of another; and
- Tex. Bus. & Com. Code § 17.46(b)(7): Advertising goods with intent not to sell them as advertised.

These acts in violation of Section 17.46 are actionable pursuant to Tex. Bus. & Com. Code § 17.50 (a)(1) because they were relied upon by Plaintiffs to their detriment. Philips actions as described herein also constitute breaches of express and implied warranties and unconscionable actions or an unconscionable course of action that are actionable pursuant to Tex. Bus. & Com. Code § 17.50 (a)(2) & (3).



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Philips has failed to abide by its consumer protection obligations to Plaintiff Wohlfarth, others from Texas listed on Exhibit B, and the Texas Subclass, and has failed to provide adequate compensation to Plaintiffs and the Texas Subclass for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Texas Subclass within 60 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including treble damages; and reasonable costs and attorneys' fees.

J. West Virginia Consumer Protection Act Demand

Philips' actions described herein and in the Class Action Complaint constitute unfair or deceptive trade practices that violate W. Va. Code, § 46A-6-10. Plaintiff Bays and others from West Virginia listed on Exhibit B demand full and appropriate relief for all members of the West Virginia Subclass to be provided within 45 days of the receipt of this letter including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties, including statutory damages, and reasonable costs and attorneys' fees.

K. Wyoming Consumer Protection Act Demand.

Philips' actions described herein and in the attached Class Action Complaint are deceptive trade practices that violate Wyo. Code. Ann. § 40-12-105. Philips' violations, include, but are not limited to:

- Wyo. Code Ann. § 40-12-105(a)(i): Represents that merchandise is of a particular standard, grade, style or model, if it is not;
- Wyo. Code Ann. § 40-12-105(a)(x): Advertises merchandise with intent not to sell it as advertised; and
- Wyo. Code Ann. § 40-12-105(a)(xv): Engages in unfair or deceptive acts or practices.



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Philips has failed to abide by its consumer protection obligations to Plaintiff DiMaio, others from Wyoming listed on Exhibit B, and the Wyoming Subclass, and has failed to provide adequate compensation to Plaintiffs and the Wyoming Subclass for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Wyoming Subclass within 60 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device, all costs of ongoing medical monitoring, and all other available damages and penalties, and reasonable costs and attorneys' fees.

L. Breach of Warranties

This letter is also to provide you notice that Philips as breached its express or implied warranties as set forth herein and in the Class Action Complaint, in violation of the following laws:

Jurisdiction	Authority
Alabama	Ala. Code § 7-2-313, 7-2-314, <i>et seq.</i>
Alaska	Alaska. Stat. § 45.02.314, 45.02.725, <i>et seq.</i>
Arizona	Ariz. Rev. Stat. Ann. §§ 47-2313, § 47-2314, <i>et seq.</i>
Arkansas	Ark. Code Ann. §§ 4-2-314, <i>et seq.</i> ; Ark. Code Ann. § 4-2-313(1), <i>et seq.</i>
California	Cal. Comm. Code §§ 2313, 2314, <i>et seq.</i>
Colorado	Colo. Rev. Stat. §§ 4-2-313, 4-2-314, <i>et seq.</i>
Connecticut	Conn. Gen. Stat. Ann. § 42a-2-313, 42a-2-314 <i>et seq.</i>
Delaware	Del. Code Ann. tit. 6, §§ 2-313, 2-314, <i>et seq.</i> ;
District of Columbia	D.C. Code Ann. §§ 28:2-725, 28:2-314, <i>et seq.</i>
Florida	Fla. Stat. Ann. §§ 672.313, 672.314, <i>et seq.</i>
Georgia	Ga. Code Ann. §§ 11-2-313, 11-2-314, <i>et seq.</i> ;
Hawaii	Haw. Rev. Stat. §§ 490:2-313; 490:2-314, <i>et seq.</i>



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Idaho	Id. Code §§ 28-2-313, 28-2-314, <i>et seq.</i>
Illinois	Ill. Comp. Stat. Ann. Ch. 810, 5/2-313, 5/2-314, <i>et seq.</i>
Indiana	Indiana Code Ann. §§ 26-1-2-3131, 26-1-2-314, <i>et seq.</i>
Iowa	Iowa Code Ann. §§ 554.2318, 554.2314, <i>et seq.</i>
Kansas	Kan. Stat. Ann. §§ 84-2-313, 84-2-314, <i>et seq.</i>
Kentucky	Ky. Rev. Stat. Ann. §§ 355.2-313, 355.2-314, <i>et seq.</i>
Louisiana	La. Civ. Code Ann. art. 2520, <i>et seq.</i> (and is liable for redhibitory defects); La. Rev. Stat. Ann. § 9:2800.58, <i>et seq.</i>
Maine	Me. Rev. Stat. Ann. tit. 11, §§ 2-313, 2-314, <i>et seq.</i>
Maryland	Md. Code Ann., Com. Law §§ 2-313, 2-314, <i>et seq.</i>
Massachusetts	Mass. Gen. Laws Ann. Ch. 106, §§ 2-313, 2-314, <i>et seq.</i>
Michigan	Mich. Comp. Laws Ann. §§ 4440.2313, 440.2314, <i>et seq.</i>
Minnesota	Minn. Stat. Ann. §§ 336.2-313, 336.2-314, <i>et seq.</i>
Mississippi	Miss. Code Ann. §§ 75-2-313, 75-2-314, <i>et seq.</i>
Missouri	Mo. Rev. Stat. Ann. §§ 400.2-313, 400.2-314, <i>et seq.</i>
Montana	Mont. Code Ann. §§ 30-2-313, 30-2-314, <i>et seq.</i>
Nebraska	Neb. Rev. Stat. §§ 2-313, 2-314, <i>et seq.</i>
Nevada	Nev. Rev. Stat. §§ 104.2313, 104.2314, <i>et seq.</i> ;
New Hampshire	N.H. Rev. Stat. Ann. §§ 382-A:2-313, 382-A:2-314, <i>et seq.</i>
New Jersey	N.J. Stat. Ann. §§ 12A:2-313; 12A:2-314, <i>et seq.</i>
New Mexico	N.M. Stat. Ann. §§ 55-2-313(1); 55-2-314, <i>et seq.</i>
New York	N.Y. U.C.C. Law §§ 2-313, 2-314, <i>et seq.</i>



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North Carolina	N.C. Gen. Stat. Ann. §§ 25-2-313, 25-2-314, <i>et seq.</i>
North Dakota	N.D. Cent. Code §§ 41-02-30, 41-02-31, <i>et seq.</i>
Ohio	Ohio Rev. Code Ann. §§ 1302.26, 1302.27, <i>et seq.</i>
Oklahoma	Okla. Stat. Tit. 12A, §§ 2-313, 2-314 <i>et seq.</i>
Oregon	Or. Rev. Stat. §§ 72.3130, 72.3140, <i>et seq.</i>
Pennsylvania	13 Pa. Stat. Ann. §§ 2313, 2314 <i>et seq.</i>
Puerto Rico	P.R. Laws. Ann. Tit. 31, § 3841, <i>et seq.</i>
Rhode Island	R.I. Gen. Laws §§ 6A-2-313, 6A-2-314, <i>et seq.</i>
South Carolina	S.C. Code Ann. §§ 36-2-313, 36-2-314, <i>et seq.</i>
South Dakota	S.D. Codified Laws §§ 57-A-2-313; 57A-2-314, <i>et seq.</i>
Tennessee	Tenn. Code Ann. §§ 47-2-313, 47-2-314, <i>et seq.</i>
Texas	Tex. Bus. & Com. Code Aim. §§ 2.313, 2.314, <i>et seq.</i>
Utah	Utah Code Ann. §§ 70A-2-313, 70A-2-314, <i>et seq.</i>
Vermont	Vt. Stat. Ann. tit. 9A, §§ 2-313, 2-314, <i>et seq.</i>
Virginia	Va. Code §§ 8.2-313, 8.2-314, <i>et seq.</i> ;
Washington	RCW §§ 62A.2-313, 62A.2-314 <i>et seq.</i> ;
West Virginia	W. Va. Code §§ 46-2-313, 46-2-314, <i>et seq.</i>
Wisconsin	Wis. Stat. Ann. §§ 402.313, 402.314, <i>et seq.</i>
Wyoming	Wyo. Stat. Ann. §§ 34.1-2-313, 34.1-2-314, <i>et seq.</i>

We look forward to your response.



September 8, 2021
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Sincerely,

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EXHIBIT A

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

DANIEL F. CONLEY, ANGELA
SCUNZIANO, PAUL ROHAN, IMAN
JONES, BARTLEY WILSON, WALTER
COGGESHALL, YOLANDA STARK,
ALLEN SMOCK, ANDREW FISHER,
MIA COLEMAN, PAUL MIYAHIRA,
JULES LABONTE, CHRISTOPHER
GLAUB, LAURELANN PORTER,
DEANNA MELCHER, PAUL BAILEY,
CHRISTINE DIJOHN, JOHN COOK,
MATTHEW WARD, JOHN POLAND,
JOSE LOPEZ, CHAD WELLS,
WILLIAM VLAHOS, EUGENE
WOHLFARTH, CAMERON ROSE,
TAWNYA PORTER, LYNN ANN
KOENCK, DELORES BROWN,
FORREST STAFFORD, MURRAY
CRAIG, TONY JONES, ELAINE
LIZOTTE, ROBERT MCNULTY,
DAVID JOSEPH MARTIN, WILLIAM
WORMAN, ANTONIO PEREZ
BONANO, RACHAEL DIMAIO, LISA
BROWN, ROBERT MCCLAY,
ROBERT SHUCKIT, DONALD
BASEMORE, JOHN BURLISON,
DAVID GORRIS, MARK WELKER,
CHARLES PINCK, CHRIS BROWN,
ADAM HALE, CARLOS OLDIGS,
STEVE ABARR, PHILIP BEAN, JULIE
LONGWAY, JOSEPH RYAN, HEATH
BYERS, DIANE LAMONTAGNE,
DAVID BAYS, BENEDICT NAGY, JR.,
DUANE ALT, CARL GOLD, MYRON
FIELDS, JO DAWN WARD, GARY
JACOBS, ADAM MCLEAN, VICKI
CHAMBERS, JIMMY ARRIAGA,
PAUL DUNN, AND HARRIS JENKINS,
individually and on behalf of all others
similarly situated,

Plaintiffs,

Civil Action No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

v.

KONINKLIJKE PHILIPS N.V., PHILIPS
NORTH AMERICA LLC, and PHILIPS
RS NORTH AMERICA LLC,

Defendants.

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CLASS ACTION COMPLAINT

Plaintiffs Daniel F. Conley, Angela Scunziano, Paul Rohan, Iman Jones, Bartley Wilson, Walter Coggeshall, Yolanda Stark, Allen Smock, Andrew Fisher, Mia Coleman, Paul Miyahira, Jules Labonte, Christopher Glaub, Laurelann Porter, Deanna Melcher, Paul Bailey, Christine DiJohn, John Cook, Matthew Ward, John Poland, Jose Lopez, Chad Wells, Williams Vlahos, Eugene Wohlfarth, Cameron Rose, Tawnya Porter, Lynn Ann Koenck, Delores Brown, Forrest Stafford, Murray Craig, Tony Jones, Elaine Lizotte, Robert McNulty, David Joseph Martin, William Worman, Antonio Perez Bonano, Rachael DiMaio, Lisa Brown, Robert McClay, Robert Shuckit, Donald Basemore, John Burlison, David Gorris, Mark Welker, Charles Pinck, Chris Brown, Adam Hale, Carlos Oldigs, Steve Abarr, Philip Bean, Julie Longway, Joseph Ryan, Heath Byers, Diane Lamontagne, David Bays, Benedict Nagy, Jr., Duane Alt, Carl Gold, Jo Dawn Ward, Myron Fields, Gary Jacobs, Adam Mclean, Vicki Chambers, Jimmy Arriaga, Paul Dunn, and Harris Jenkins, individually and on behalf of all others similarly situated, through their undersigned counsel, allege as follows.

I. NATURE OF THE ACTION

1. Plaintiffs collectively are residents of the following **51** United States jurisdictions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Washington, D.C., West Virginia, Wisconsin, and Wyoming.

2. Defendants Koninklijke Philips N.V., Philips North America LLC, and Philips RS North America LLC (collectively, “Philips”) manufacture and sell a variety of products that are intended to help people breathe. These include Continuous Positive Airway Pressure (“CPAP”) and Bilevel Positive Airway Pressure (“BiPAP”) machines, which are commonly used to treat sleep apnea, and ventilators, which treat respiratory failure. In general, all of these devices blow air into patients’ airways. CPAP and BiPAP machines are intended for daily use while sleeping, and ventilators are used continuously while needed. Without these devices, patients may experience severe symptoms including heart attack, stroke, and death by asphyxiation.

3. On June 14, 2021, Philips announced a recall of millions of its CPAP/BiPAP machines and ventilators. These products contain polyester-based polyurethane (“PE-PUR”) foam for sound abatement. Philips announced that the foam may break down and be inhaled or ingested, or may emit volatile organic compounds (“VOCs”) that may be inhaled, resulting in adverse effects to organs or cancer. Philips stated that the potential risks of exposure due to such chemical emissions include “headache/dizziness, irritation (eyes, nose respiratory tract, skin), hypersensitivity, nausea, vomiting, toxic and carcinogenic effects. Philips’s announcement to doctors advised that these hazards could result in “serious injury which can be life-threatening or cause permanent impairment.”

4. On July 22, 2021 the U.S. Food and Drug Administration (“FDA”) confirmed the severity of the problem, and classified the recall of Philips’ breathing devices at issue as a Class I recall, or “the most serious type of recall,” meaning use of the devices “may cause serious injuries or death.”¹

¹ <https://www.fda.gov/medical-devices/medical-device-recalls/philips-respironics-recalls-certain-continuous-and-non-continuous-ventilators-including-cpap-and>.

5. In truth, Philips knew about these very serious risks long before the recall. Patients who use the affected devices have complained about black particles in their machines for many years. And while Philips notified its shareholders about the defect in late April 2021, it did not recall its machines until June 14, 2021.

6. Philips' recall is a "recall" in name only. Philips has failed its customers since providing its late notice of the problems. For example, Philips has not offered its customers a refund for their purchase of the recalled devices so that they can purchase an alternative breathing machine. Nor has Philips actually replaced or repaired any of the affected devices. Although patients need to use their devices every day, Philips has no concrete timeline for replacing any devices and may not provide replacements or repairs for a year or more.

7. In fact, it appears that Philips timed its recall to coincide with its launch of a next generation of the affected products, which Philips claims does not suffer from the same foam issues. Thus, the only safe option that Philips currently offers to its customers—many of whom need a BiPAP/CPAP machine to sleep—is to purchase, at full price, Philips's new, next-generation device, thus profiting Philips further.

8. Because of the increased demand and shortage of microchips, replacement machines are very difficult to find and only available at inflated prices. Many users have thus been forced by Philips into a Hobson's choice—continue using Philips' recalled machines exposing themselves to a risk of serious injury or death, or stop using Philips' recalled machines exposing themselves to a risk of serious injury or death.

9. Each of the Plaintiffs acquired a device that Philips has now recalled. They would not have obtained the device at the price that they paid, or at all, if they had known that the PE-PUR foam in the device could cause serious injury or death.

10. Plaintiffs, on behalf of themselves and other similarly situated individuals who also paid for the defective devices, seek to recover damages from Philips based on strict liability, negligence, breach of express warranty, breach of implied warranty, the Magnuson Moss Warranty Act, unjust enrichment, and applicable state consumer protection and deceptive trade practices statutes. Plaintiffs also seek medical monitoring damages for users of devices.

II. THE PARTIES

A. PLAINTIFFS²

11. Plaintiff Daniel F. Conley resides in West Roxbury, Massachusetts. From 1994 to 2002, Plaintiff Conley served on the Boston City Council. From 2002-2018, Plaintiff Conley served as the District Attorney for Suffolk County, Massachusetts, and was elected to four consecutive terms. In or around April 2020, Daniel Conley acquired a DreamStation CPAP to treat his sleep apnea. Plaintiff Conley would not have obtained the device if he had known it was defective. Plaintiff Conley wants a refund, replacement with a non-defective device,³ costs for ongoing medical monitoring, and all other appropriate damages for all the injuries he suffered as a result of the defective device. In particular, as a four-term District Attorney of Suffolk County, Massachusetts, Plaintiff Conley's participation as a named Plaintiff and class representative in this litigation is meaningful and significant, as he has handled, overseen, and managed complex

² Each of the Named Plaintiffs is also a proposed Class Representative for the state law subclass in which they reside.

³ Any time reference is made in this Class Action Complaint to a refund, it also refers to a refund of any related accessories purchased by the Plaintiff or Class member that can no longer be used, and any time reference is made in this Class Action Complaint to costs of replacement of a recalled breathing device, it also refers to the costs of any related accessories that need to be purchased by the Plaintiff or Class Member accompanying the replacement device. The term "accessories" as used in this Class Action Complaint includes, for example, masks, filters, cushions, tubes, hoses, power cords, converters, and humidifiers.

litigation for decades, and the Court can be assured that along with his co-Plaintiffs, he will well represent the proposed Class members in this litigation.

12. Plaintiff John Cook resides in Attala, Alabama. John Cook acquired a Philips DreamStation to treat sleep apnea. Plaintiff Cook is experiencing headaches, fatigue, coughing, trouble breathing, and sneezing. Plaintiff Cook would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

13. Plaintiff Mark Welker resides in Anchorage, Alaska. In 2021, Plaintiff Welker acquired two Philips DreamStation machines to treat sleep apnea. Plaintiff Welker would not have obtained the devices if he had known they were defective. Plaintiff Welker wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

14. Plaintiff Laurelann Porter resides in Mesa, Arizona. In or around 2019, Plaintiff Porter obtained a Philips DreamStation to treat sleep apnea. Laurelann Porter is experiencing chronic pain and chronic fatigue, trouble sleeping, shortness of breath, and a dry cough. Plaintiff Porter would not have acquired the device if she had known it was defective. Laurelann Porter wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device .

15. Plaintiff Deanna Melcher resides in Hazen, Arkansas. She obtained a DreamStation in March 2020 to treat moderate to severe sleep apnea. Since using her DreamStation, she has suffered hoarseness, frequent sore throat, bronchitis, and upper respiratory irritation. She would not have acquired the device if she had known it was defective. She wants a refund, replacement

with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

16. Plaintiff Paul Bailey resides in Aptos, California. Mr. Bailey acquired a DreamStation CPAP machine in 2018 to treat sleep apnea. Mr. Bailey, like all the Plaintiffs, is very worried about future health issues that may arise as a result of the use of his DreamStation. He would not have obtained the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

17. Plaintiff Christine DiJohn resides in Hemet, California. She obtained a DreamStation BiPAP machine in 2018 to treat sleep apnea. Since using her device, she has had numerous asthma attacks which have led to multiple Emergency Room and doctor visits. She has had to be admitted to the hospital several times since using her device, where she has been treated with multiple high-dose steroid injections, breathing treatments, and oxygen supplementation. Her hospital admissions have each lasted at least three days. She experiences daily acute, severe headaches, nasal irritation, shortness of breath, heart palpitations, higher blood pressure, swollen tonsils and throat, and severe coughing. She has been having difficulty sleeping and is experiencing fatigue and drowsiness. This is interfering with her daily activities. She would not have acquired the device if she had known it was defective. She wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

18. Plaintiff Bartley Wilson resides in Monument, Colorado. In 2019, Bartley Wilson obtained a Philips DreamStation to treat sleep apnea. As a result of the machine, Plaintiff Wilson is experiencing coughing. Bartley Wilson would not have acquired the device if he had known it

was defective. Bartley Wilson wants a refund, replacement with a non-defective device, and costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

19. Plaintiff Paul Rohan resides in Westport, Connecticut. In or around May 2019, Plaintiff Rohan obtained a Philips DreamStation to treat sleep apnea. Plaintiff Rohan would not have acquired the device if he had known it was defective. In response to the recall, Plaintiff Rohan purchased a replacement machine for approximately \$883. Paul Rohan wants replacement with a non-defective device, as with all of the Plaintiffs the economic losses associated with any costs spent on a replacement device and accessories, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

20. Plaintiff Jimmy Arriaga is a resident of Wilmington, Delaware. In January 2021, he acquired a DreamStation CPAP machine to treat sleep apnea and has purchased a replacement mask. He would not have acquired the device had he known it was defective. He wants a refund, as with all of the Plaintiffs the economic losses associated with any costs spent on a replacement device and accessories, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

21. Plaintiff Charles Pinck resides in Washington, D.C. In or around June 2020, Plaintiff acquired a Philips DreamStation to treat sleep apnea. Plaintiff Pinck has experienced tinnitus, congestion, and sinus infections. Plaintiff Pinck would not have obtained the device if he had known it was defective. Plaintiff Pinck wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

22. Plaintiff Iman Jones resides in Jacksonville, Florida. She acquired a DreamStation CPAP to treat sleep apnea. She would not have obtained the device if she had known it was defective. She wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

23. Plaintiff Walter Coggeshall resides in McDonough, Georgia. He obtained a DreamStation AutoCPAP to treat sleep apnea. Since using his device, he has suffered severe nasal congestion, and in 2020, experienced that he could not breathe through his nose at all. In November 2020, Mr. Coggeshall had to have sinus surgery to be able to breathe through his nose again. He would not have acquired the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

24. Plaintiff Yolanda Stark resides in Atlanta, Georgia. She obtained a DreamStation to treat sleep apnea. Since using her device, she has been experiencing chest pains and has been admitted to the hospital on one occasion as a result. She would not have acquired the device if she had known it was defective. She wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

25. Plaintiff Chris Brown resides in Kapolei, Hawaii. Plaintiff Brown obtained a DreamStation CPAP to treat sleep apnea. Plaintiff Brown would not have acquired the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

26. Plaintiff Adam Hale resides in Pocatello, Idaho. He obtained a Dream Station ASV to treat apnea. He would not have acquired the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

27. Plaintiff Allen Smock resides in Palos Hills, Illinois. He obtained a DreamStation CPAP with humidifier to treat sleep apnea. Since using his device, Mr. Smock has been experiencing severe congestion. The device requires frequent refills of the reservoir and emits a burning smell. This is causing him to lose sleep. Like all of the Plaintiffs, he is concerned about the long term health effects that may arise as a result of his using the device. He would not have acquired the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

28. Plaintiff Carlos Oldigs resides in Winnebago County, Illinois. Plaintiff Oldigs acquired a DreamStation BiPAP ASV device for sleep apnea in 2018, and to date has paid \$2,705.83 for his device. Plaintiff, like many of the Plaintiffs, has paid out of pocket for replacement filters, masks, and cushions related to his device. Plaintiff Oldigs would not have obtained the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

29. Plaintiff Robert Schuckit resides in Carmel, Indiana. Mr. Schuckit obtained a DreamStation Auto CPAP with humidifier, and a cellular modem, model no. DSX500H11C, serial no. J192858140274, to treat his sleep apnea. Mr. Schuckit would not have obtained the device if he had known it was defective. Mr. Schuckit wants a refund, replacement with a non-defective

device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

30. Plaintiff Steve Abarr resides in Johnston, Iowa. Plaintiff Abarr has obtained a SyatemOne and DreamStation BiPAP machines to treat sleep apnea. Plaintiff Abarr has been diagnosed with severe chronic asthma. Plaintiff would not have acquired the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

31. Plaintiff Andrew Fisher resides in Overland Park, Kansas. He obtained a Dream Station Auto CPAP, Model Number DNX500H11C, Serial Number J252878809174, to treat sleep apnea. He has been experiencing sinus issues since using his device. He would not have acquired the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

32. Plaintiff Mia Coleman resides in Louisville, Kentucky. She obtained a DreamStation CPAP with humidifier to treat sleep apnea. She would not have acquired the device if she had known it was defective. She wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

33. Plaintiff Paul Miyahira resides in West Monroe, Louisiana. He obtained a DreamStation to treat sleep apnea. He has been experiencing issues with his breathing since using the device. He would not have acquired the device if he had known it was defective. He wants a

refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

34. Plaintiff Philip Bean resides in Yarmouth, Maine. Plaintiff Bean acquired a DreamStation CPAP to treat sleep apnea. Plaintiff Bean has experienced a recurrent cough. Plaintiff Bean would not have obtained the device if he had known it was defective. Plaintiff Bean wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

35. Plaintiff Jules Labonte resides in Silver Spring, Maryland. Plaintiff acquired a DreamStation BiPAP, Serial Number J234305865BC7, in 2019 to treat severe sleep apnea. Since using his device, Mr. Labonte has suffered from respiratory irritations including consistent and chronic coughing and throat soreness. He would often notice a weird taste in his mouth while using his device. He would not have obtained the device if he had known it was defective. He wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

36. Plaintiff Robert McClay resides in Bridgewater, Massachusetts. Plaintiff McClay acquired a Philips DreamStation ASV BiPAP machine, Model No. DSX700S11, Serial No. J26177200E221, to treat his sleep apnea in September 2020. Previously, in 2014, Mr. McClay purchased a SystemOne - Model No. DS6TFLG, Serial No. P09266338 0C60. Plaintiff McClay would not have obtained the devices if he had known they were defective. Plaintiff McClay sent Defendants a demand letter seeking remedies under Mass. Gen. Laws Chapter 93A more than 30 days ago. He seeks a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

37. Plaintiff Lisa Brown resides in Jackson, Michigan. Plaintiff Brown obtained a DreamStation Auto CPAP to treat sleep apnea. Plaintiff Brown would not have acquired the device if she had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

38. Plaintiff Julie Longway resides in Lowell, Michigan. Plaintiff obtained a Philips Dream Station to treat severe sleep apnea. Plaintiff would not have acquired the device if she had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

39. Plaintiff Tawnya Porter resides in International Falls, Minnesota. Plaintiff Porter obtained a Philips SystemOne to treat sleep apnea. Plaintiff would not have acquired the device if she had known it was defective. Plaintiff Porter wants a refund, a replacement device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

40. Plaintiff Forrest Stafford resides in Coila, Mississippi. In 2018, Plaintiff Stafford obtained a DreamStation CPAP to treat sleep apnea. Plaintiff has since developed sinus issues, tinnitus, and headaches. Plaintiff Stafford would not have acquired the device if he had known it was defective. Plaintiff Stafford wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

41. Plaintiff Delores Brown resides in Kansas City, Missouri. In 2020, Plaintiff Brown obtained a DreamStation Auto CPAP to treat sleep apnea. Plaintiff Brown has since developed a

consistent cough. Plaintiff Brown would not have acquired the device if she had known it was defective. Plaintiff Brown wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

42. Plaintiff Donald Basemore is a retired veteran who resides in an assisted living facility in St Louis, Missouri. He was diagnosed with sleep apnea and obtained a DreamStation CPAP machine through the Veterans Administration. Like all the Plaintiffs, he would not have accepted this product if he had known it was defective, contained a carcinogenic byproduct, and would be subject to a recall for containing defective materials. Plaintiff Basemore wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

43. Plaintiff William Worman resides in Broadus, Montana. In or around October 2020, Plaintiff acquired a DreamStation Machine to treat sleep apnea. Plaintiff would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

44. Plaintiff Christopher Glaub resides in Lincoln, Nebraska. Christopher Glaub acquired a Philips REMStar Pro to treat sleep apnea and since has experienced shortness of breath. Plaintiff Glaub would not have obtained the device if he had known it was defective. Plaintiff Glaub wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

45. Plaintiff John Poland resides in Las Vegas, Nevada. In or around August 2018, Plaintiff acquired a DreamStation to treat sleep apnea, and since the has experienced headaches, scarring of the lungs, dizziness, fatigue, hypertension, coughing, loss of enjoyment of life, and trouble breathing. Plaintiff Poland would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

46. Plaintiff Robert McNulty resides in Reno, Nevada. In or around July 2020, Plaintiff McNulty acquired a DreamStation CPAP Machine to treat sleep apnea. Plaintiff McNulty would not have obtained the device if he had known it was defective. Plaintiff McNulty wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

47. Plaintiff John Burlison resides in Henderson, Nevada. He is a retired college dean now working as a real estate broker. He was diagnosed with obstructive sleep apnea in late 2019 and purchased a DreamStation in early 2020. Like all of the Plaintiffs, he would not have purchased this product if he had known it was defective, contained a carcinogenic byproduct, and would be subject to a recall for containing defective materials. Upon learning of the recall, and after consulting with his physician, Mr. Burlison stopped using the DreamStation and purchased a replacement CPAP machine for approximately \$1,400.00. His health insurance company would not pay for any part of the replacement machine, Plaintiff Burlison wants a refund, economic losses associated with the replacement of his defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

48. Plaintiff William Vlahos resides in Salem, New Hampshire. In or around October 2018, Plaintiff Vlahos acquired a Philips DreamStation CPAP to treat sleep apnea. Plaintiff Vlahos would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

49. Plaintiff Elaine Lizotte resides in Hudson, New Hampshire. In or around June 2018 Elaine Lizotte acquired a DreamStation CPAP machine to treat sleep apnea. Plaintiff Lizotte would not have obtained the device if she had known it was defective. In July 2021, Plaintiff Lizotte purchased a machine from another manufacturer costing over \$800. Plaintiff Lizotte wants a refund, economic losses associated with the replacement of the defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

50. Plaintiff Joseph Ryan resides in West Berlin, New Jersey. In or around July 2018, Plaintiff Ryan acquired a DreamStation CPAP to treat sleep apnea. Plaintiff Ryan would not have obtained the device if he had known it was defective. Plaintiff recently purchased a replacement machine. Plaintiff Ryan wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

51. Plaintiff Gary Jacobs resides in Marlton, New Jersey. In 2018, Plaintiff Jacobs acquired a DreamStation CPAP to treat sleep apnea, and like many of the Plaintiffs, purchased masks and filters while using the machine. Plaintiff Jacobs would not have obtained the device if he had known it was defective. Plaintiff Jacobs wants a refund, replacement with a non-defective

device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

52. Plaintiff Jo Dawn Ward resides in Edgeworth, New Mexico. Plaintiff Ward obtained a DreamStation ASV, and since then has experienced and suffered from headaches, nausea, vomiting, and a lump in her throat. Plaintiff would not have acquired the device if she had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

53. Plaintiff Myron Fields resides in Aztec, New Mexico. In or around April 2019, he acquired a DreamStation to treat apnea. He would not have obtained the device if he had known it was defective. Plaintiff Fields wants a refund, replacement with a non-defective device, and costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

54. Plaintiff Carl Gold resides in Highland Mills, New York. In or around August 2020, Plaintiff Gold acquired a Phillips DreamStation to treat sleep apnea, and since then has experienced headaches, coughing, and trouble sleeping. Plaintiff would not have acquired the device if he had known it was defective. Plaintiff Gold purchased a replacement device from a different manufacturer, paying approximately \$912.00. Plaintiff's insurance refused to cover the cost of the replacement machine. Plaintiff Gold wants a refund, economic losses related to the replacement of his defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

55. Plaintiff Angela Scunziano resides in Smithtown, New York. In 2020, Angela Scunziano acquired a DreamStation to treat sleep apnea and since then has experienced dry mouth

and throat, coughing, dry and teary eyes, stomach aches, nausea, vomiting, frequent and recurring headaches, and irritation in her throat and sinuses. Plaintiff Scunziano would not have obtained the device if she had known it was defective. Plaintiff Scunziano wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

56. Plaintiff Tony Jones resides in Reidsville, North Carolina. In or around July 2014, Plaintiff Jones obtained a RemStar machine to treat sleep apnea. Plaintiff Jones would not have acquired the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

57. Plaintiff Heath Byers resides in Dickinson, North Dakota. Plaintiff Byers acquired a System One device to treat sleep apnea. Plaintiff Byers would not have obtained and used the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

58. Plaintiff Matthew Ward resides in Hilliard, Ohio. Plaintiff obtained a Philips DreamStation to treat sleep apnea and since then has experienced fatigue, headaches, congestion, trouble breathing, and inflamed sinuses. Plaintiff Ward would not have acquired the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

59. Plaintiff Chad Wells resides in Wanette, Oklahoma. Chad Wells acquired a Philips SystemOne BiPAP to treat sleep apnea and since then has experienced asthma and wheezing.

Plaintiff Wells would not have obtained the device if he had known it was defective. Plaintiff Wells wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

60. Plaintiff Adam Mclean resides in Seaside, Oregon. In or around June 2021, Adam Mclean purchased a DreamStation BiPAP to treat sleep apnea. Plaintiff Mclean would not have purchased the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, and costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

61. Plaintiff Lynn Ann Koenck resides in Pottstown, Pennsylvania. In or around October 2019, Plaintiff Koenck acquired a Philips DreamStation CPAP to treat sleep apnea. Plaintiff Koenck would not have obtained the device if she had known it was defective. Plaintiff Koenck wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

62. Plaintiff Antonio Perez Bonano resides in San Juan, Puerto Rico. In or around April 2019, Plaintiff Bonano acquired a DreamStation Auto CPAP to treat sleep apnea and since then has experienced headaches, dry mouth, cough, upper airway irritation, and eye irritation. Plaintiff Bonano would not have obtained the device if he had known it was defective. Plaintiff Bonano wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

63. Plaintiff Diane Lamontagne resides in Cumberland, Rhode Island. Plaintiff Lamontagne acquired a DreamStation CPAP to treat obstructive sleep apnea and since then has

suffered from several sinus infections. Plaintiff would not have acquired the device if she had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

64. Plaintiff Harris Jenkins resides in Moncks Corner, South Carolina. Plaintiff obtained a RemStar Plus in 2018 and is currently suffering from headaches and a racing heartbeat. Plaintiff Jenkins would not have purchased the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

65. Plaintiff Vicki Chambers resides in Bluffton, South Carolina. Plaintiff Chambers acquired a DreamStation BiPAP machine to treat sleep apnea and since then has experienced bronco spasms and could not inhale or exhale with the machine. Plaintiff Chambers also noticed an odor that smelled like a burnt chemical in the machine. Plaintiff Chambers would not have obtained the device if she had known it was defective. Plaintiff Chambers wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

66. Plaintiff Murray Craig resides in Camden, Tennessee. In or around June 2018, Murray Craig acquired a DreamStation CPAP to treat sleep apnea and since then has suffered from headaches, dizziness, nausea, and coughing. Plaintiff Craig would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

67. Plaintiff Eugene Wohlfarth resides in Lockhart, Texas. Plaintiff Wohlfarth acquired a Philips DreamStation CPAP to treat obstructive sleep apnea. Plaintiff would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

68. Plaintiff Benedict Nagy, Jr. resides in Enterprise, Utah. Plaintiff Nagy acquired a Philips SystemOne to treat sleep apnea (along with various accessories like masks and hoses), and since then has suffered from sinus infections, nasal polyps, and difficulty breathing. Plaintiff would not have obtained the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

69. Plaintiff David Joseph Martin resides in Island Pond, Vermont. Plaintiff Martin acquired a DreamStation CPAP to treat sleep apnea and later developed headaches, nosebleeds, and congestion from using the CPAP. Plaintiff Martin would not have obtained the device if he had known it was defective. Plaintiff Martin wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

70. Plaintiff Cameron Rose resides in Richmond, Virginia. In 2018, Plaintiff Rose acquired a Philips DreamStation CPAP to treat sleep apnea. Plaintiff Rose would not have obtained the device if he had known it was defective. Plaintiff Rose wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

71. Plaintiff David Gorris is disabled and resides in Richmond, Virginia. In 2020, he was diagnosed with obstructive sleep apnea and acquired a DreamStation. Like all the Plaintiffs, he would not have obtained this product if he had known it was defective, contained a carcinogenic byproduct, and would be subject to a recall for containing defective materials. Plaintiff Gorris wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

72. Plaintiff Jose Lopez resides in Vancouver, Washington. In or around October 2019, Jose Lopez acquired a Philips DreamStation AutoCPAP to treat sleep apnea, and since then has suffered from a cough after using the recalled device. Plaintiff Lopez would not have obtained the device if Plaintiff Lopez had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

73. Plaintiff David Bays resides in Alum Creek, West Virginia. In 2020, Plaintiff Bays obtained a DreamStation CPAP to treat sleep apnea. Plaintiff would not have acquired the device if he had known it was defective. Plaintiff wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

74. Plaintiff Paul Dunn resides in Charleston, West Virginia. Plaintiff Dunn purchased a Philips Dreamstation CPAP machine to treat sleep apnea and other breathing difficulties. Plaintiff Dunn would not have purchased the device if he had known it was defective. Plaintiff Dunn sought a replacement machine from Philips and was told he would have to pay \$300 for a loaned machine, and that he could no longer use his existing machine. Plaintiff Dunn paid Philips \$300 for a replacement machine. Plaintiff Dunn wants a refund, all economic losses related to the

replacement of his defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

75. Plaintiff Duane Alt resides in Prairie Du Sac, Wisconsin. Plaintiff Alt obtained a SystemOne CPAP to treat sleep apnea and since then has experienced headaches. Plaintiff Alt would not have acquired the device if he had known it was defective. Plaintiff Alt wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

76. Plaintiff Rachael DiMaio resides in Cheyenne, Wyoming. She acquired a SystemOne CPAP machine and in 2020 obtained a DreamStation CPAP to treat sleep apnea. Plaintiff DiMaio would not have obtained the devices had she known they were defective. She wants a refund, replacement with a non-defective device, costs for ongoing medical monitoring, and all other appropriate damages for all the injuries suffered as a result of the defective device.

B. DEFENDANTS

77. Koninklijke Philips N.V. is a Dutch multinational company headquartered in Amsterdam, Netherlands, and is the parent company of Philips North America LLC and Philips RS North America LLC.

78. Defendant Philips North America LLC is a Delaware company with its principal place of business in Cambridge, Massachusetts.

79. Defendant Philips RS North America LLC (formerly Respironics, Inc.) is a Delaware company headquartered in Pittsburgh, Pennsylvania.

80. At all relevant times, each Defendant acted in all aspects as the agent and alter ego of each other, and all references to “Philips,” “Defendant,” or “Defendants” herein refers to each and every Defendant individually and collectively.

III. JURISDICTION AND VENUE

81. This Court has subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, because the matter in controversy exceeds \$5 million, exclusive of interest and costs, and is a class action in which Plaintiff and some members of the Class are citizens of states different than Defendants. *See* 28 U.S.C. § 1332(d)(2)(A).

82. Venue is proper in this District because Philips North America LLC is headquartered in this District and because a substantial part of the events or omissions giving rise to the claim occurred in this District.

IV. FACTUAL ALLEGATIONS

A. CPAP AND BIPAP MACHINES AND VENTILATORS TREAT SERIOUS CONDITIONS.

83. Sleep apnea is a sleeping disorder in which breathing is disturbed temporarily during sleep. Breathing may stop or become very shallow. These disturbances are called “apneas.”

84. According to the Mayo Clinic, the main types of sleep apnea are obstructive sleep apnea, central sleep apnea, and complex sleep apnea syndrome (also known as treatment-emergent central sleep apnea).

85. Obstructive sleep apnea is the most common type. It occurs when the muscles in the back of the throat relax during inhalation, which causes the airway to narrow or close and prevent sufficient air from passing through. This in turn lowers the oxygen level in the blood, which causes the brain to briefly wake the body from sleep to reopen the airway. This reawakening may be so brief that the patient does not remember it, and it may be associated with snorting, choking, or gasping. It can happen anywhere from a few times per hour to once every few minutes, all night, and can prevent the patient from reaching the deep, restful phases of sleep.

86. Central sleep apnea occurs when the brain fails to transmit signals to the breathing muscles. As a result, the body stops breathing temporarily, which can cause waking with shortness of breath or difficulty getting to sleep or staying asleep.

87. Complex sleep apnea syndrome occurs when a patient has both obstructive sleep apnea and central sleep apnea.

88. Sleep apnea is a serious medical condition that can cause daytime fatigue, high blood pressure or heart problems, stroke, type 2 diabetes, metabolic syndrome, complications with medications and surgery, liver problems, snoring or other noises during sleep, and other medical ailments.

89. CPAP therapy is a common treatment for sleep apnea. In CPAP therapy, a machine delivers a flow of air through a mask over the nose or mouth, which increases air pressure in the throat so that the airway does not collapse during inhalation. CPAP therapy assists breathing during sleep and can successfully treat sleep apnea.

90. Other therapies to treat sleep apnea include BiPAP and Automatic Positive Airway Pressure (APAP). BiPAP machines use two different pressures, one for inhaling and one for exhaling. APAP machines adjust pressure automatically throughout the night to the patient's pressure needs, for example, in response to changed sleeping positions or different sleep stages. Not every therapy is appropriate for every patient. Many patients respond well to one treatment and not others.

91. Patients usually place the CPAP, BiPAP, or APAP machines on a nearby nightstand or shelf. A hose connects the unit to the mask, which is worn over the nose or mouth during sleep.

92. Patients who use CPAP or BiPAP machines typically must use them every day when they sleep. Symptoms may return quickly if therapy is discontinued.

93. Respiratory failure is a condition in which a patient has difficulty breathing or getting enough oxygen into the blood. Many underlying conditions can cause respiratory failure, including physical trauma, sepsis, pneumonia, COVID-19, and drug overdose. Respiratory failure can be fatal.

94. Mechanical ventilators, usually called “ventilators,” are often used to treat respiratory failure. Ventilators push air into and out of the patient’s lungs like a bellows, typically through a tube that is connected to the machine on one end and is inserted through the patient’s nose or mouth into the trachea on the other end. Patients are usually sedated while on ventilation because it can otherwise cause intense pain.

95. Ventilators can also be used in other circumstances, such as during surgery when general anesthesia may interrupt normal breathing. Ventilators intended for home use also exist.

96. The COVID-19 crisis has led to a significant increase in the demand for ventilators because severe COVID-19 can cause sufficient damage to the lungs that patients have difficulty breathing on their own and thus require a ventilator.

B. PHILIPS SELLS CPAP AND BIPAP MACHINES AND VENTILATORS CONTAINING PE-PUR FOAM.

97. Philips manufactures and sells CPAP machines, BiPAP machines, and ventilators, among other products. According to Philips’s 2020 Annual Report,⁴ Sleep & Respiratory Care constituted 49% of Philips’s total sales in its Connected Care line of business, which in turn accounted for 28% of Philips’s overall sales of about €19.535 billion. Philips has sold millions of CPAP and BiPAP machines and ventilators in the United States.

⁴<https://www.results.philips.com/publications/ar20/downloads/pdf/en/PhilipsFullAnnualReport2020-English.pdf?v=20210531142942>.

98. Philips's flagship CPAP/BiPAP machine product family is the DreamStation family, including the original DreamStation, launched in October 2015, and the DreamStation Go (a travel version). Philips sells DreamStation products through its subsidiary, Respireonics, which Philips acquired in 2008 and is now known as Philips RS North America LLC. The user manual for the DreamStation products is marked with a copyright notice indicating that Koninklijke Philips, N.V. owns the copyright to the manual.

99. Philips markets the recalled DreamStation products under an approval from the FDA. Philips submitted premarket notification of intent to market medical devices under Section 510(k) of the Federal Food, Drug, and Cosmetic Act. Based on Philips's submission, the FDA "determined the device is substantially equivalent (for the indications for use stated in the enclosure) to legally marketed predicate devices marketed in interstate commerce prior to May 28, 1976, the enactment date of the Medical Device Amendments, or to devices that have been reclassified in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act (Act) that do not require approval of a premarket approval application (PMA)."

100. Under this regulatory framework, the devices did not have to undergo a detailed review for safety and efficacy.

101. The FDA classifies medical devices as Class I, II, or III, based on the risk to the patient, the intended use, and the indications for use. Class I devices are the lowest risk and Class III devices are the highest risk. The FDA classified the DreamStation products as Class II devices. Other recalled products (listed below) are Class II or Class III devices.

102. Many of Philips's CPAP and BiPAP machines and ventilators contain PE-PUR foam for sound abatement. Polyurethane is an organic polymer in which urethane groups connect the molecular units, and it is usually formed by reacting a diisocyanate or triisocyanate with a

polyol. Under certain circumstances, polyurethane may break down into a diisocyanate or triisocyanate as well.

103. The two main types of polyurethane are polyester and polyether. Polyester polyurethane has much better shock absorption and vibration dampening properties and is commonly used for soundproofing or sound dampening.

104. The recalled devices contain polyester polyurethane foam for sound dampening.

105. In the DreamStation, for example, there is a channel that surrounds the central fan in the device. This channel is stuffed with PE-PUR foam to absorb the noise from the device while the patient is sleeping. Air passes through this channel, and thus through the PE-PUR foam, before it enters the fan and is pumped into the patient's airway.

106. Philips advertises itself as a trusted brand and "global leader in the sleep and respiratory markets."⁵ Its branding promises consumers that they will "[b]reath easier, sleep more naturally[.]"⁶ Philips further assures consumers that its "sleep therapy systems are designed with the needs of care practitioners and patients in mind," and that its "quality systems reflect [Philips'] commitment to providing exceptional therapy," among other things. And it has long advertised its CPAP and BiPAP Machines as "clinically proven" treatment for sleep disorders.⁷

107. Philips boasts that it has the "most prescribed CPAP systems by U.S. sleep physicians."⁸ The machines routinely cost from seven or eight hundred dollars to thousands of dollars per machine.

⁵ See http://www.respironics.com/us_en.

⁶ http://www.respironics.com/product_library.

⁷ <https://www.usa.philips.com/healthcare/solutions/sleep>.

⁸ See <https://www.usa.philips.com/healthcare/solutions/sleep/sleep-therapy> (citing 2016 Philips survey).

C. PHILIPS RECALLED ITS PE-PUR FOAM-CONTAINING MACHINES DUE TO SERIOUS HEALTH HAZARDS THAT THEY CAUSE.

108. On April 13, 2021, Philips announced that it was launching the DreamStation 2, a next-generation machine in its DreamStation product family.

109. Less than two weeks later, on April 26, 2021, Philips announced that its previous generation products posed serious health risks to users and, in the same release, started trying to convince consumers to purchase its latest generation device:

Philips has determined from user reports and testing that there are possible risks to users related to the sound abatement foam used in certain of Philips' sleep and respiratory care devices currently in use. The risks include that the foam may degrade under certain circumstances, influenced by factors including use of unapproved cleaning methods, such as ozone,* and certain environmental conditions involving high humidity and temperature. The majority of the affected devices are in the first-generation DreamStation product family. Philips' recently launched next-generation CPAP platform, DreamStation 2, is not affected. Philips is in the process of engaging with the relevant regulatory agencies regarding this matter and initiating appropriate actions to mitigate these possible risks. Given the estimated scope of the intended precautionary actions on the installed base, Philips has taken a provision of EUR 250 million.

110. On June 14, 2021, Philips issued a further announcement, stating:

To date, Philips has produced millions of Bi-Level PAP, CPAP and mechanical ventilator devices using the PE-PUR sound abatement foam. Despite a low complaint rate (0.03% in 2020), Philips determined based on testing that there are possible risks to users related to this type of foam. The risks include that the PE-PUR foam may degrade into particles which may enter the device's air pathway and be ingested or inhaled by the user, and the foam may off-gas certain chemicals. The foam degradation may be exacerbated by use of unapproved cleaning methods, such as ozone,** and high heat and high humidity environments may also contribute to foam degradation.

Therefore, Philips has decided to voluntarily issue a recall notification* to inform patients and customers of potential impacts on patient health and clinical use related to this issue, as well as instructions on actions to be taken.

111. Philips stated that "[t]he majority of the affected devices within the advised 5-year service life are in the first-generation DreamStation product family." Philips elaborated:

Based on the latest analysis of potential health risks and out of an abundance of caution, the recall notification advises patients and customers to take the following actions:

For patients using affected BiLevel PAP and CPAP devices: Discontinue use of your device and work with your physician or Durable Medical Equipment (DME) provider to determine the most appropriate options for continued treatment. To continue use of your device due to lack of alternatives, consult with your physician to determine if the benefit of continuing therapy with your device outweighs the risks identified in the recall notification.

For patients using affected life-sustaining mechanical ventilator devices: Do not stop or alter your prescribed therapy until you have talked to your physician. Philips recognizes that alternate ventilator options for therapy may not exist or may be severely limited for patients who require a ventilator for life-sustaining therapy, or in cases where therapy disruption is unacceptable. In these situations, and at the discretion of the treating clinical team, the benefit of continued usage of these ventilator devices may outweigh the risks identified in the recall notification.

Possible health risks

The company continues to monitor reports of potential safety issues as required by medical device regulations and laws in the markets in which it operates. To date, there have been no reports of death as a result of these issues. Philips has received reports of possible patient impact due to foam degradation. The potential risks of particulate exposure include headache, irritation, inflammation, respiratory issues, and possible toxic and carcinogenic effects. The potential risks of chemical exposure due to off-gassing include headache, irritation, hypersensitivity, nausea/vomiting, and possible toxic and carcinogenic effects. Philips has received no reports regarding patient impact related to chemical emissions.

112. The recalled products (“Recalled Products”) are:

- E30
- DreamStation ASV
- DreamStation ST, AVAPS
- SystemOne ASV4
- C Series ASV, S/T, AVAPs
- OmniLab Advanced Plus
- SystemOne (Q Series)

- DreamStation CPAP, Auto CPAP, BiPAP
- DreamStation Go CPAP, APAP
- Dorma 400, 500 CPAP
- REMStar SE Auto CPAP
- Trilogy 100 and 200
- Garbin Plus, Aeris, LifeVent
- A-Series BiPAP Hybrid A30
- A-Series BiPAP V30 Auto
- A-Series BiPAP A40
- A-Series BiPAP A30

113. The recall notice stated that “Philips has produced millions of Bi-Level PAP, CPAP and mechanical ventilator devices using the PE-PUR sound abatement foam.”

114. Philips explained: “Based on Philips [*sic*] analysis, the root cause of this issue is related to the sound abatement foam currently used in specific identified products of the Sleep & Respiratory Care portfolio.”

115. On the same day, Philips provided additional information in an announcement entitled “Clinical information for physicians,” that explained that the foam breakdown “may lead to patient harm and impact clinical care.” It adds:

While there have been limited reports of headache, upper airway irritation, cough, chest pressure and sinus infection that may have been associated with the foam, based on lab testing and evaluations, it may be possible that these potential health risks could result in a wide range of potential patient impact, from transient potential injuries, symptoms and complications, as well as possibly serious injury which can be life-threatening or cause permanent impairment, or require medical intervention to preclude permanent impairment.

116. The announcement detailed two types of hazards from the foam in the devices.

First, the announcement described dangers due to foam degradation exposure:

Potential Hazard: Philips has determined from user reports and lab testing that under certain circumstances the foam may degrade into particles which may enter the device's air pathway and be ingested or inhaled by the user of its Continuous Positive Airway Pressure (CPAP), BiLevel Positive Airway Pressure (BiLevel PAP) and Mechanical Ventilator devices. The foam degradation may be exacerbated by environmental conditions of higher temperatures and humidity in certain regions. Unauthorized cleaning methods such as ozone may accelerate potential degradation.

The absence of visible particles does not mean that foam breakdown has not already begun. Lab analysis of the degraded foam reveals the presence of potentially harmful chemicals including:

- Toluene Diamine
- Toluene Diisocyanate
- Diethylene glycol

117. Millions of patients across the United States, including all of the Named Plaintiffs, used and trusted the Recalled Products on a nightly basis while they slept. Philips has now revealed that the PE-PUR foam in their breathing machines degraded in Defendants' devices and the poisonous particles were aspirated by these patients.

118. The fact that the patients breathed in toxic and poisonous chemicals is not reasonably in dispute. According to the Report on Carcinogens, Fourteenth Edition, by the National Toxicology Program in the United State Department of Health and Human Services, toluene diisocyanates are reasonably anticipated to be human carcinogens based on sufficient evidence of carcinogenicity from studies in experimental animals. Administration of commercial-grade toluene diisocyanate (analyzed as 85% 2,4 isomer and 15% 2,6 isomer) by stomach tube caused liver tumors (hepatocellular adenoma) in female rats and mice, benign tumors of the mammary gland (fibroadenoma) and pancreas (islet-cell adenoma) in female rats, and benign

tumors of the pancreas (acinar-cell adenoma) in male rats. It also increased the combined incidences of benign and malignant tumors of subcutaneous tissue (fibroma and fibrosarcoma) in rats of both sexes and of the blood vessels (hemangioma and hemangiosarcoma) in female mice.

119. The Report also notes that toluene diisocyanates are used primarily to manufacture flexible polyurethane foams for use in furniture, bedding, and automotive and airline seats. The foam in Philips's recalled products is flexible polyurethane foam.

120. The European Union considers toluene diisocyanate "highly toxic" and has concluded that toluene diamine "cannot be considered safe for use" even as a hair dye, let alone breathed into the lungs on a nightly basis for many hours each night.

121. Philips disclosed that it "has received several complaints regarding the presence of black debris/particles within the airpath circuit (extending from the device outlet, humidifier, tubing, and mask)." The PE-PUR foam is black, and when it breaks down, it can release black particles.

122. The second hazard is the possibility of VOCs, that is, chemical emissions from the PE-PUR foam. Philips explained:

Potential Hazard: Lab testing performed for and by Philips has also identified the presence of VOCs which may be emitted from the sound abatement foam component of affected device(s). VOCs are emitted as gases from the foam included in the CPAP, BiLevel PAP and MV devices and may have short- and long-term adverse health effects.

Standard testing identified two compounds of concern (COC) may be emitted from the foam that are outside of safety thresholds. The compounds identified are the following:

- Dimethyl Diazine
- Phenol, 2,6-bis (1,1-dimethylethyl)-4-(1-methylpropyl)-

123. Philips admitted that the risks of these VOCs include: "irritation and airway inflammation, and this may be particularly important for patients with underlying lung diseases or

reduced cardiopulmonary reserve” and may lead to the following symptoms: “headache/dizziness, irritation (eyes, nose, respiratory tract, skin), hypersensitivity, nausea/vomiting, toxic and carcinogenic effects,” as well as “adverse effects to other organs such as kidney and liver.”

124. Corroborating the dangerous nature of the Recalled Products, on July 22, 2021, the FDA upgraded Philips’s recall of the Recalled Devices to its most serious classification, Class I, which according to the FDA means: “A situation in which there is a reasonable probability that the use of or exposure to a violative product will cause serious adverse health consequences or death.”

125. As noted herein, Philips has admitted that the Recalled Products are defective and unsafe. The Recalled Products are therefore worthless and certainly have a far lesser value (zero) than what customers paid and would not have been purchased by patients if they were informed of the defect at the time of sale.

126. The purity of the air coming from a breathing device to a patient is highly important and material to a typical patient. Philips advertises the filtration systems in its devices, for example, noting them on a diagram in its DreamStation Family Brochure.⁹ Philips’s filtration system, however, does not filter out the particles and VOCs described above.

127. Plaintiffs and the Class have suffered injuries as a result of their purchase of the Recalled Products, including substantial economic losses related to their purchase of the Recalled Products and accessories, and replacement machines and accessories, personal injuries, exposure

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https://www.documents.philips.com/assets/20180205/15ef65ad106d4ddc88fca87e0134dc60.pdf?_gl=1*1l6jo9f*_ga*MTM1OTI5NDM5Ny4xNjIzODE3MzMz*_ga_2NMXNNS6LE*MTYyNjIyMDEyNC4yMi4xLjE2MjY5MTQyNTkuMjc.&_ga=2.220564312.1106063144.1626914226-1359294397.1623817333.

to the toxic foam, and the accompanying need for medical monitoring costs, and losses from not being able to use their machines, including wage loss and other consequential damages.

D. PHILIPS HAS KNOWN ABOUT THE PE-PUR FOAM PROBLEMS FOR YEARS.

128. Although Philips did not disclose these health risks until June 2021, Philips knew about these health risks well beforehand. As discussed above, when Philips announced the recall, Philips also announced that it had received “several complaints” regarding black particles or debris in the airpath circuit. The DreamStation has been on the market since 2015, and several of the affected models have been on the market even longer.

129. Nick Dunn, who runs the YouTube channel “CPAP Reviews,” reported as soon as the recall was announced that he had known about the foam issues for several years because he monitors message boards and social media about CPAP machines. It can be reasonably assumed that Philips, like most companies, closely monitored the Internet concerning its products, and heard about foam breakdown and black particles in the machines soon after launch, if not earlier. It can also be reasonably assumed that Philips conducted its own internal studies of its breathing machines and conducted tests and analysis of them that revealed the problems.

130. Message boards still contain many posts about black particles inside or on the filters of the DreamStation and other recalled devices. The following list is provided for illustration.

131. In 2018, the user “trickyneedsleep” reported on apneaboard.com that, using the DreamStation Auto, the filters turned black within three days of use.

132. In 2019, the user “WSHenry” reported on apneaboard.com in a thread entitled “DreamStation Filter Contamination” that “both the pollen and ultra-fine filters in my machine were clogged with black (Carbon?) particles. I also noted that water chamber was completely dry. There were odd odors noted, and the water chamber was undamaged.” He explained that he had

recently cleaned the filters and that “[t]here was only a small amount of dust on the furniture, and the machine and tubing is clean. I do not burn candles nearby, and the furnace is off. I do have the window slightly opened, as is the case nearly year-round.” He asked: “Is it possible the contamination is from the blower?”

133. In 2019, the user “Skogcat1” reported on apneaboard.com in a thread entitled “Black sticky dust in CPAP machine” that, when using the REMStar Auto, there were “sticky black dust particles” in the humidifier chamber.

134. In September 2020, Carol Nickerson posted on Facebook that she found a black mold-like substance in the water reservoir of her Philips DreamStation. She reported that she cleaned the tubing, mask, and reservoir every week and emptied the reservoir daily, and that she lived in a low-humidity environment in Arizona.

135. In June 2021, shortly after the recall was announced, on a Reddit thread entitled “Dreamstation Foam,” user “BOSSHOG999” posted: “I was wondering what the hell those black particles were in my tube.”

136. Many of the reports of black particles, dust, or mold in the machines are likely due to the breakdown and disintegration of the defective and poisonous PE-PUR foam in the machines, and it is implausible that Philips, the manufacturer and seller of the machines, was not aware of the complaints and reports.

137. Also, every Philips breathing assistance device since 2009 uses PE-PUR foam, but the DreamStation 2 does not. The implication is clear, and strongly demonstrates that Philips knew that PE-PUR foam was dangerous when it was designing the DreamStation 2, and designed a new product that did not use it.

138. Discovery in this case will pinpoint the exact time when Philips first learned of the potential problems with the poisonous PE-PUR foam that it used in its breathing machines. For example, Philips knew about the foam problems from its own testing of its own products. Companies that manufacture medical devices certainly perform some testing on the devices before they market them to the public, even if the device is not of the type for which the FDA requires a full demonstration of safety and efficacy.

139. Philips advertises the results of various tests of its products, demonstrating that it tested them in some ways before marketing. For example, Philips advertises that the DreamStation is 63% quieter than a competing product, the ResMed AirSense 10, and is barely louder than a whisper.¹⁰ This relative quietness is in part due to the noise-reducing PE-PUR foam. It is likely that Philips performed many other tests on the PE-PUR foam and uncovered the problems that led to the recall long before the recall.

E. PHILIPS HAS NOT REPLACED THE RECALLED DEVICES AND DOES NOT PLAN TO DO SO IN THE NEAR FUTURE.

140. Philips's CEO, Frans van Houten, stated in the recall announcement: "We deeply regret any concern and inconvenience that patients using the affected devices will experience because of the proactive measures we are announcing today to ensure patient safety."

141. But Philips's "recall" is a "recall" in name only, and does not actually provide patients with new CPAP, BiPAP, or ventilator devices. As Philips's June 14, 2021 announcement explains:

Repair and replacement program

Philips is providing the relevant regulatory agencies with required information related to the launch and implementation of the projected correction. The company will replace the current sound abatement foam with a new material and has already

¹⁰

<https://www.documents.philips.com/assets/20170523/62e4f43a1349489ba3cca77c0169c6ef.pdf>.

begun the preparations, which include obtaining the relevant regulatory clearances. Philips aims to address all affected devices in scope of this correction as expeditiously as possible.

As part of the program, the first-generation DreamStation product families will be modified with a different sound abatement foam and shipped upon receipt of the required regulatory clearances. Philips' recently launched next-generation CPAP platform, DreamStation 2, is not affected by the issue. To support the program, Philips is increasing the production of its DreamStation 2 CPAP devices, that are available in the US and selected countries in Europe.

142. In reality, patients may register their device with Philips for the recall, but Philips is not currently replacing the defective PE-PUR foam. Nor has Philips provided a timeframe during which it anticipates replacing the defective PE-PUR foam, and it may take a year or more to provide replacements or repairs.

143. Additionally, due to the design of the devices, it is prohibitively difficult for patients to remove or replace the PE-PUR foam themselves. Nor is replacement foam readily available for self-service repairs.

144. But patients need to use their breathing machines every day or else their symptoms—which can be severe and life-altering—may return.

145. As a result, the recall leaves patients without safe, free options. Instead, patients may simply be forced to buy Philips's next-generation product or a competitor's product—at full price, and indeed, thousands of patients, including some of the Named Plaintiffs, have already done so.

146. Thus, Philips intends to, and is, simply profiting from its so-called “recall” by selling more of its next generation product, the DreamStation 2, to affected patients. It appears that Philips intentionally timed the “recall” to coincide with the launch of the DreamStation 2.

147. In its recall announcement, Philips estimated that “the full year comparable sales growth and Adjusted EBITA margin guidance provided on April 26, 2021 remains unchanged.” In other words, Philips was stating that it did not expect the recall to impact its bottom line at all.

148. Philips has advised that users should use in-hose filters as a stopgap measure and many users have purchased such filters. There is no proof that the filters are effective, and, according to the FDA, the filters “will not help to reduce exposure to certain chemicals that may be released from the PE-PUR foam.” The filters have to be replaced every couple weeks.

V. CLASS ALLEGATIONS

149. Plaintiffs bring this action individually and as a class action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2) and/or 23(b)(3). Specifically, the Class and Subclasses consists of the following:

1. **Nationwide Class:** All persons or entities that purchased a Recalled Product not for resale in the United States.
2. **Alabama Subclass:** All persons or entities that purchased a Recalled Product not for resale in Alabama.
3. **Alaska Subclass:** All persons or entities that purchased a Recalled Product not for resale in Alaska.
4. **Arizona Subclass:** All persons or entities that purchased a Recalled Product not for resale in Arizona.
5. **Arkansas Subclass:** All persons or entities that purchased a Recalled Product not for resale in Arkansas.
6. **California Subclass:** All persons or entities that purchased a Recalled Product not for resale in California.
7. **Colorado Subclass:** All persons or entities that purchased a Recalled Product not for resale in Colorado.
8. **Connecticut Subclass:** All persons or entities that purchased a Recalled Product not for resale in Connecticut.

9. **Delaware Subclass:** All persons or entities that purchased a Recalled Product not for resale in Delaware.

10. **District of Columbia Subclass:** All persons or entities that purchased a Recalled Product not for resale in the District of Columbia.

11. **Florida Subclass:** All persons or entities that purchased a Recalled Product not for resale in Florida.

12. **Georgia Subclass:** All persons or entities that purchased a Recalled Product not for resale in Georgia.

13. **Hawaii Subclass:** All persons or entities that purchased a Recalled Product not for resale in Hawaii.

14. **Idaho Subclass:** All persons or entities that purchased a Recalled Product not for resale in Idaho.

15. **Illinois Subclass:** All persons or entities that purchased a Recalled Product not for resale in Illinois.

16. **Indiana Subclass:** All persons or entities that purchased a Recalled Product not for resale in Indiana.

17. **Iowa Subclass:** All persons or entities that purchased a Recalled Product not for resale in Iowa.

18. **Kansas Subclass:** All persons or entities that purchased a Recalled Product not for resale in Kansas.

19. **Kentucky Subclass:** All persons or entities that purchased a Recalled Product not for resale in Kentucky.

20. **Louisiana Subclass:** All persons or entities that purchased a Recalled Product not for resale in Louisiana.

21. **Maine Subclass:** All persons or entities that purchased a Recalled Product not for resale in Maine.

22. **Maryland Subclass:** All persons or entities that purchased a Recalled Product not for resale in Maryland.

23. **Massachusetts Subclass:** All persons or entities that purchased a Recalled Product not for resale in Massachusetts.

24. **Michigan Subclass:** All persons or entities that purchased a Recalled Product not for resale in Michigan.

25. **Minnesota Subclass:** All persons or entities that purchased a Recalled Product not for resale in Minnesota.

26. **Mississippi Subclass:** All persons or entities that purchased a Recalled Product not for resale in Mississippi.

27. **Missouri Subclass:** All persons or entities that purchased a Recalled Product not for resale in Missouri.

28. **Montana Subclass:** All persons or entities that purchased a Recalled Product not for resale in Montana.

29. **Nebraska Subclass:** All persons or entities that purchased a Recalled Product not for resale in Nebraska.

30. **Nevada Subclass:** All persons or entities that purchased a Recalled Product not for resale in Nevada.

31. **New Hampshire Subclass:** All persons or entities that purchased a Recalled Product not for resale in New Hampshire.

32. **New Jersey:** All persons or entities that purchased a Recalled Product not for resale in New Jersey.

33. **New Mexico Subclass:** All persons or entities that purchased a Recalled Product not for resale in New Mexico.

34. **New York Subclass:** All persons or entities that purchased a Recalled Product not for resale in New York.

35. **North Carolina Subclass:** All persons or entities that purchased a Recalled Product not for resale in North Carolina.

36. **North Dakota Subclass:** All persons or entities that purchased a Recalled Product not for resale in North Dakota.

37. **Ohio Subclass:** All persons or entities that purchased a Recalled Product not for resale in Ohio.

38. **Oklahoma Subclass:** All persons or entities that purchased a Recalled Product not for resale in Oklahoma.

39. **Oregon Subclass:** All persons or entities that purchased a Recalled Product not for resale in Oregon.

40. **Pennsylvania Subclass:** All persons or entities that purchased a Recalled Product not for resale in Pennsylvania.

41. **Puerto Rico Subclass:** All persons or entities that purchased a Recalled Product not for resale in Puerto Rico.

42. **Rhode Island Subclass:** All persons or entities that purchased a Recalled Product not for resale in Rhode Island.

43. **South Carolina Subclass:** All persons or entities that purchased a Recalled Product not for resale in South Carolina.

44. **Tennessee Subclass:** All persons or entities that purchased a Recalled Product not for resale in Tennessee.

45. **Texas Subclass:** All persons or entities that purchased a Recalled Product not for resale in Texas.

46. **Utah Subclass:** All persons or entities that purchased a Recalled Product not for resale in Utah.

47. **Vermont Subclass:** All persons or entities that purchased a Recalled Product not for resale in Vermont.

48. **Virginia Subclass:** All persons or entities that purchased a Recalled Product not for resale in Virginia.

49. **Washington Subclass:** All persons or entities that purchased a Recalled Product not for resale in Washington.

50. **West Virginia Subclass:** All persons or entities that purchased a Recalled Product not for resale in West Virginia.

51. **Wisconsin Subclass:** All persons or entities that purchased a Recalled Product not for resale in Wisconsin.

52. **Wyoming Subclass:** All persons or entities that purchased a Recalled Product not for resale in Wyoming.

150. The Nationwide Class and Subclasses are collectively referred to herein as the “Class.” Excluded from the Class are Defendants and their employees, officers, and directors; and the Judge(s) assigned to this case.

151. Plaintiffs reserve the right to redefine, modify, or narrow the Class definitions prior to class certification based upon discovery or otherwise.

152. The rights of each member of the Class were violated in a similar fashion based upon Defendants’ uniform actions.

153. This action has been brought and may be properly maintained as a class action for the following reasons:

a. Numerosity: Members of the Class are so numerous that their individual joinder is impracticable. The Nationwide Class contains millions of individuals and each Subclass contains thousands of individuals who purchased a Recalled Product not for resale. The Class is therefore sufficiently numerous to make joinder impracticable, if not impossible. The precise number of Class members is unknown to Plaintiffs at this time but the Class members are readily ascertainable and can be identified by Defendants’ records or records of third parties such as durable medical equipment (“DME”) providers.

b. Existence and Predominance of Common Questions of Fact and Law: Common questions of law and fact exist as to all members of the Class. These questions predominate over any questions affecting only individual Class members. These common legal and factual questions include, without limitation:

- i. Whether Defendants manufactured and sold a defective product;
- ii. Whether Defendants were negligent in selling the Recalled Products;
- iii. Whether Defendants failed to warn consumers regarding the risks of the Recalled Products;

- iv. Whether Defendants violated express or implied warranties in selling the Recalled Products;
- v. Whether Defendants' practices constitute unfair or deceptive acts or practices under state consumer protection statutes;
- vi. Whether Defendants were unjustly enriched by the sale of Recalled Products;
- vii. The appropriate nature of class-wide equitable relief; and
- viii. The appropriate measurement of restitution and/or measure of damages to Plaintiffs and members of the Class.

These and other questions of law or fact which are common to the members of the Class predominate over any questions affecting only individual members of the Class.

c. Typicality: Plaintiffs' claims are typical of the claims of all members of the Class who purchased the Recalled Products for personal use.

d. Adequacy: Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the Class that they seek to represent; they have retained counsel competent and highly experienced in complex class action litigation, and they intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiffs and their counsel.

e. Superiority: A class action is superior to other available means of fair and efficient adjudication of the claims of Plaintiffs and the Class. The injury suffered by each Class member is relatively small in comparison to the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct. It would be virtually impossible for members of the Class to individually and effectively redress the wrongs done to them in particular with respect to their economic losses and medical monitoring. Even if the members of the Class could afford such individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments.

Individualized litigation also increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, an economy of scale, and comprehensive supervision by a single court.

VI. EQUITABLE TOLLING OF STATUTES OF LIMITATIONS

154. The running of any statute of limitations has been equitably tolled by reason of Defendants' fraudulent concealment and/or omissions of critical safety information. Through its affirmative misrepresentations and omissions, Philips actively concealed from Plaintiffs and their physicians the true risks associated with the Recalled Products.

155. As a result of Defendants' actions, Plaintiffs were unaware, and could not have reasonably known or learned through reasonable diligence, that they had been exposed to the risks and harms set forth herein and that those risks and harms were the direct and proximate result of Defendants' acts and omissions.

VII. CAUSES OF ACTION

COUNT 1

STRICT LIABILITY-FAILURE TO WARN

On behalf of the Nationwide Class and all Subclasses

156. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

157. Under applicable state law, Defendants had a duty to warn Plaintiff and the Class members regarding the defect and true risks associated with the Recalled Products.

158. Defendants failed to provide adequate warnings regarding the risks of the PE-PUR foam.

159. Defendants had information regarding the true risks but failed to warn Plaintiffs, Class members, and their physicians of the serious health risks caused by use of the Recalled Products.

160. Despite Defendants' obligation to warn of the serious health risks caused by use of the Recalled Products, Philips instead chose to actively conceal this knowledge.

161. Plaintiffs and Class members would not have purchased the Recalled Products had they known of the defect and risks of purchasing the Recalled Products.

162. The defects described in this Class Action Complaint proximately caused Plaintiffs' and Class members' injuries as alleged herein, including, without limitation, economic losses and exposure to materials with toxic and carcinogenic effects resulting in the need for long-term medical monitoring.

163. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT 2
DESIGN DEFECT STRICT LIABILITY
On behalf of the Nationwide Class and all Subclasses

164. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

165. The design of the Recalled Products by Philips, including but not limited to the design and use of the PE-PUR foam and the placement of the PE-PUR foam within the Recalled Products, was defective and unreasonably dangerous, causing degradation and inhalation of the PE-PUR foam, and resulting in exposure to materials with toxic and carcinogenic effects.

166. Under applicable state law, Defendants had a duty to design the Recalled Products in a manner reasonably fit, suitable, and safe for their intended purposes. The design of the Recalled Products and the use of the PE-PUR foam rendered the Recalled Products not reasonably fit, suitable, or safe for their intended purpose.

167. The dangers of the Recalled Products outweighed the benefits and rendered the products unreasonably dangerous. Indeed, there are alternative breathing machines that do not use a similarly toxic foam that is subject to degradation, inhalation, and ingestion, such as competitors' machines and Defendants' next-generation Dreamstation machines.

168. Safer, alternative machines from other manufactures were available that did not suffer from the defects as set forth herein and did not have an unreasonable risk of harm as with the Recalled Products and their unsafe and defective PE-PUR foam.

169. The risk benefit profile of the Recalled Products was unreasonable, and the products should have had stronger and clearer warnings or should not have been sold in the market.

170. The Recalled Products did not perform as an ordinary consumer would expect.

171. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT 3
NEGLIGENT FAILURE TO WARN
On behalf of the Nationwide Class and all Subclasses

172. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

173. Under applicable state law, Defendants owed Plaintiffs and Class Members a duty of care and to warn of any risks associated with the Recalled Products. Defendants knew or should have known of the true risks but failed to warn Plaintiffs, Class members, and their doctors.

174. Defendants' negligent breach of duty caused Plaintiffs and Class members economic damages and exposure to materials with toxic and carcinogenic effects, resulting in the need for long-term medical monitoring, and other injuries in the form of headaches, irritation, inflammation, respiratory issues, and other ailments.

175. Plaintiffs and Class members would not have purchased the Recalled Products had they known of the serious risks associated with purchasing the Recalled Products.

176. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT 4
NEGLIGENT DESIGN DEFECT
On behalf of the Nationwide Class and all Subclasses

177. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

178. Defendants negligently designed the Recalled Products. Under applicable state law, Philips owed Plaintiffs and the Class a duty to design the Recalled Products in a reasonable manner. The design of the Recalled Products, including but not limited to design and use of the PE-PUR foam and the placement of the PE-PUR foam within the Recalled Products, was defective and unreasonably dangerous, causing degradation and inhalation of the foam, and exposure to materials with toxic and carcinogenic effects.

179. The design of the Recalled Products and the use of the PE-PUR foam rendered the Recalled Products not reasonably fit, suitable, or safe for their intended purpose.

180. The dangers of the Recalled Products outweighed the benefits and rendered the products unreasonably dangerous. Indeed, there are other breaching machines available in the market that do not use a similarly toxic foam that is subject to degradation, inhalation, and ingestion of toxic substances, such as competitors' breathing machines and Defendants' next-generation Dreamstation machines.

181. Safer, alternative machines from other manufactures were available that did not have an unreasonable risk of harm as with the Recalled Products and their unsafe PE-PUR foam.

182. The risk benefit profile of the Recalled Products was unreasonable, and the products should have had stronger and clearer warnings or should not have been sold in the market.

183. The Recalled Products did not perform as an ordinary consumer would expect.

184. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT 5
NEGLIGENT RECALL
On behalf of the Nationwide Class and all Subclasses

185. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

186. In issuing a voluntary recall, Philips assumed duties to Plaintiff and the Class to exercise reasonable care in issuing and implementing the recall.

187. Philips breached its duties by failing to adequately warn Plaintiffs and the Class of the dangers associated with the use of the Recalled Products by refusing to promptly refund, repair, or replace the Recalled Products.

188. As a direct result of Defendants' breach of duty, Plaintiffs and the Class have suffered harm in an amount to be determined at trial.

COUNT 6
BREACH OF EXPRESS WARRANTY
On behalf of the Nationwide Class and all Subclasses

189. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

190. Defendants warranted the Recalled Products "shall be free from defects of workmanship and materials and will perform in accordance with the product specifications for a period of two (2) years from the date of sale."

191. Defendants breached this express warranty in connection with the sale and distribution of Recalled Products. At the point of sale, the Recalled Products, while appearing normal, contained defects as set forth herein, rendering them unsuitable and unsafe for personal use.

192. Had Plaintiffs and the Class known the Recalled Products were unsafe for use, they would not have purchased them.

193. Defendants have breached their warranty and refused to provide appropriate warranty relief notwithstanding the risks of using the Recalled Products. Plaintiff and the Class reasonably expected, at the time of purchase, that the Recalled Products were safe for their ordinary and intended use.

194. As a direct and proximate result of Defendants' breach of their express warranty, Plaintiffs and the Class have sustained damages in an amount to be determined at trial.

COUNT 7
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY
On behalf of the Nationwide Class and all Subclasses

195. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

196. By operation of law, Defendants, as manufacturers of the Recalled Products and as the providers of a limited warranty for the Recalled Products, impliedly warranted to Plaintiff and the Class that the Recalled Products were of merchantable quality and safe for their ordinary and intended use.

197. Defendants breached the implied warranty of merchantability in connection with the sale and distribution of the Recalled Products. At the point of sale, the Recalled Products while appearing normal—contained defects as set forth herein rendering them unsuitable and unsafe for personal use.

198. Had Plaintiffs and the Class known the Recalled Products were unsafe for use, they would not have purchased them.

199. Defendants have refused to provide appropriate warranty relief notwithstanding the risks of using the Recalled Products. Plaintiffs and the Class reasonably expected, at the time of purchase, that the Recalled Products were safe for their ordinary and intended use.

200. As a direct and proximate result of Defendants' breach of the implied warranty of merchantability, Plaintiffs and the Class have sustained damages in an amount to be determined at trial.

COUNT 8
VIOLATIONS OF MAGNUSON-MOSS FEDERAL WARRANTY ACT
15 U.S.C. 2301, *et seq.*
On behalf of the Nationwide Class and all Subclasses

201. Plaintiffs and the Class incorporate by reference all preceding paragraphs.
202. The Recalled Products constitute "consumer products" as defined in 15 U.S.C. § 2301.
203. Plaintiffs and the members of the Class are "consumers" as defined in 15 U.S.C. § 2301.
204. Philips is a "supplier" of the Recalled Products as defined in 15 U.S.C. § 2301.
205. Philips is a "warrantor[s]" as defined in 15 U.S.C. § 2301.
206. The warranties made by Philips pertained to consumer products costing the consumer more than five dollars, *see* 15 U.S.C. § 2302(e).
207. Plaintiffs and the members of the Class invoke federal jurisdiction for the claims stated under this Count pursuant to the Class Action Fairness Act.
208. The Recalled Products were defective at the time they came off Philips' assembly lines and at all subsequent times (including at the times of sale and/or delivery to Plaintiffs and the members of the Class) because the defective PE-PUR foam and design makes them dangerously unsafe.
209. As a result, the Recalled Products were worth less (nothing) at the time of their sales than the prices paid for them.

210. Plaintiffs and the members of the Class would not have purchased or accepted the Recalled Products had they known the machines were defective.

211. Philips violated the Magnuson-Moss Federal Warranty Act by failing to comply with the express warranties they made to Plaintiffs and the members of the Class. Philips violated the Magnuson-Moss Federal Warranty Act by failing to comply with the implied warranties they made to Plaintiffs and the members of the Class.

212. Plaintiffs and the Class need not have given notice of the defects to Philips and an opportunity for Philips to comply with their warranty obligations prior to the filing of this suit, because Plaintiffs may give such notice to Philips on their own behalf and on behalf of the Class after class certification pursuant to 15 U.S.C. § 2310(e).

213. Based on the facts alleged herein, any durational limitations to the warranties that would otherwise bar the Magnuson-Moss Federal Warranty Act claims in this Count are procedurally and substantively unconscionable and otherwise unenforceable under federal law and the applicable state common law.

214. Based on the facts alleged herein, any durational limitation to the warranties that would otherwise bar the claims in this Count are tolled under equitable doctrines.

215. Plaintiffs and the members of the Class sustained injuries and damages as a proximate result of Philips' violation of its express and implied warranties, and are entitled to legal and equitable relief against Defendants, including economic damages, rescission or other relief as appropriate, including compensatory damages consisting of: (a) the difference between the values of the Recalled Products as warranted (their prices) and their actual values at the time of purchase (\$0.00), or (b) the cost to replace the Recalled Products, and (c) other miscellaneous incidental and consequential damages.

216. In addition, pursuant to 15 U.S.C. § 2310(d)(2), Plaintiffs and the other members of the Class are entitled to recover a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the Court to have been reasonably incurred by them in connection with the commencement and prosecution of this action

COUNT 9
UNJUST ENRICHMENT
(In the Alternative)
On behalf of the Nationwide Class and all Subclasses

217. Plaintiffs and the Class incorporate by reference all preceding paragraphs.

218. Plaintiffs and the Class members conferred a tangible and material economic benefit upon Defendants by purchasing the Recalled Products. Plaintiffs and Class members would not have purchased the Recalled Products had they known of the defect and true risks of using the Recalled Products, while Defendants cannot and have not provided a timely repair or replacement for the Recalled Products. Under these circumstances, it would be unjust and inequitable for Defendants to retain the economic benefits they received at the expense of Plaintiff and the Class.

219. Failing to require Defendants to provide remuneration under these circumstances would result in Defendants being unjustly enriched at the expense of Plaintiffs and the Class members who endure being exposed to the risk of developing serious medical conditions and can no longer use their machines safely.

220. Defendants' retention of the benefit conferred upon them by Plaintiff and the Class would be unjust and inequitable.

221. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT 10
Arizona Consumer Fraud Act
A.R.S. §§ 44-1521, *et seq.*
On Behalf of the Arizona Subclass

222. Plaintiffs incorporate by reference all preceding paragraphs.

223. Plaintiff Laurelann Porter brings this cause of action individually and on behalf of the members of the Arizona Subclass.

224. The Arizona Consumer Fraud Act prohibits “[t]he act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged.” A.R.S. § 44-1522.

225. Defendants engaged in unlawful trade practices, and unfair or deceptive acts or practices that violated the Arizona Consumer Fraud Act.

226. Defendants participated in unfair or deceptive trade practices that violated the Arizona Consumer Fraud Act as described herein. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

227. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

228. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

229. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

230. Defendants knew or should have known that their conduct violated the Arizona Consumer Fraud Act.

231. Had Plaintiff Porter and the Arizona Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiffs did not receive the benefit of their bargain as a result of Defendants' misconduct.

232. Defendants owed Plaintiff and the Arizona Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff and the Arizona Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff Porter and the Arizona Subclass Members that contradicted these representations.

233. Plaintiff Porter and the Arizona Subclass Members suffered monetary damages as a result of Defendants' conduct.

234. Defendants' violations present a continuing risk to Plaintiff Porter and the Arizona Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

235. Defendants are liable to Plaintiff and the Arizona Subclass Members for their damages, punitive damages, attorneys' fees costs.

COUNT 11

**Arkansas Deceptive Trade Practices Act
Ark. Code Ann. §§ 4-88-101, *et seq.*
On Behalf of the Arkansas Subclass**

236. Plaintiffs incorporate by reference all preceding paragraphs.

237. Plaintiff Melcher brings this cause of action individually and on behalf of the members of the Arkansas Subclass.

238. The Arkansas Deceptive Trade Practices Act prohibits deceptive and unconscionable trade practices, including, among other things, “[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model” or “[e]ngaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade.” Ark. Code Ann. § 4-88-107.

239. The Arkansas Deceptive Trade Practices Act makes it unlawful to engage in “any deception, fraud, or false pretense” or “[t]he concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission” “[w]hen utilized in connection with the sale or advertisement of any goods.” Ark. Code Ann. § 4-88-108.

240. Defendants engaged in unlawful deceptive and unconscionable trade practices, deception, fraud, or false pretense, and the concealment, suppression, or omission of any material fact with intent that others rely upon that concealment, suppression, or omission, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff Melcher and Arkansas Subclass Members, in violation of Ark. Code Ann. §§ 4-88-101, *et seq.*, including by misrepresenting the true quality of the Recalled Products, and concealing the true risks of the Recalled Products.

241. The above deceptive and unconscionable trade practices or acts by Defendants were conducted in connection with the sale or advertisement of “goods,” as defined Ark. Code Ann. § 4-88-102(4).

242. The above unlawful acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

243. Defendants’ actions were negligent, knowing, and willful, and/or wanton and reckless with respect to the rights of Plaintiff Melcher and the Arkansas Subclass members.

244. Defendants’ actions were material to Plaintiff Melcher and Arkansas Subclass members, who relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

245. As a direct and proximate result of Defendants’ unlawful deceptive and unconscionable acts or practices, Plaintiff and Arkansas Class Members suffered an ascertainable loss of money or property, real or personal, as described above, including the past, present, and future costs associated with replacement of the Recalled Products and ongoing medical costs and testing.

246. Plaintiff Melcher and the Arkansas Subclass members seek relief under Ark. Code Ann. § 4-88-113(f)(1)(A), including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, punitive damages, and attorneys’ fees and costs.

COUNT 12
California Unfair Competition Law
Cal. Civil Code §§ 17200, *et seq.*
On Behalf of the California Subclass

247. Plaintiffs incorporate by reference all preceding paragraphs.

248. Plaintiffs Bailey and DiJohn bring this cause of action individually and on behalf of the members of the California Subclass.

249. California Business & Professions Code § 17200 prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice” and “unfair, deceptive, untrue or misleading advertising.”

250. The acts and practices of Defendants as alleged herein constitute “unfair” business acts and practices under the UCL in that Defendants conduct is unconscionable, immoral, deceptive, unfair, illegal, unethical, oppressive, and/or unscrupulous. Further, the gravity of Defendants’ conduct outweighs any conceivable benefit of such conduct.

251. Defendants have, in the course of their business and in the course of trade or commerce, undertaken and engaged in unfair business acts and practices under the UCL by concealing the true risks of the Recalled Products.

252. These acts also constitute “fraudulent” business acts and practices under the UCL in that Defendants’ conduct is false, misleading, and has a tendency to deceive the Class and the general public.

253. Plaintiffs Bailey and DiJohn and California Subclass Members have suffered injury in fact and have lost money as a result of Defendants’ fraudulent business acts or practices.

254. The unlawful, fraudulent, and unfair business acts or practices described herein present a threat and likelihood of harm and deception to Plaintiffs Bailey and DiJohn and California Subclass Members in that Defendants have systematically perpetrated the unfair conduct upon members of the public by engaging in the conduct described herein.

255. Pursuant to Business and Professions Code §§ 17200 and 17203, Plaintiffs Bailey and DiJohn and California Subclass Members seek an order providing restitution and

disgorgement of all profits relating to the above-described unfair business acts or practices, and injunctive and declaratory relief as may be appropriate.

256. Because of their reliance on Defendants' omissions concerning the Recalled Products, Plaintiffs Bailey and DiJohn and California Subclass Members suffered an ascertainable loss of money, property, and/or value and were harmed and suffered actual damages.

257. Plaintiffs Bailey and DiJohn and California Subclass Members are reasonable consumers who did not expect the risks inherent with the Recalled Products.

258. Defendants' conduct in concealing and failing to disclose the true risks of the Recalled Products is unfair in violation of the UCL, because it is immoral, unethical, unscrupulous, oppressive, and substantially injurious.

259. Defendants acted in an immoral, unethical, unscrupulous, outrageous, oppressive, and substantially injurious manner.

260. The gravity of harm resulting from Defendants' unlawful, fraudulent, and unfair conduct outweighs any potential utility. The Recalled Machines present a substantial health risk to consumers and harmed the public at large and is part of a common and uniform course of wrongful conduct.

261. The harm from Defendants' conduct was not reasonably avoidable by consumers because only Defendants were aware of the true facts concerning the risks of its Recalled Products, and Defendants did not disclose them, despite knowing of such defects. Plaintiffs Bailey and DiJohn and California Subclass Members did not know of and had no reasonable means of discovering the true risk of using the Recalled Products.

262. Plaintiffs Bailey and DiJohn suffered injury in fact, including lost money or property, as a result of Defendants' unlawful, fraudulent, and unfair acts. Absent Defendants' conduct, Plaintiffs would not have bought the Recalled Products.

263. Through its unlawful, fraudulent, and unfair conduct, Defendants acquired money that Plaintiffs once owned.

264. Plaintiffs Bailey and DiJohn and California Subclass Members accordingly seek appropriate relief under the UCL, including (a) restitution in full and (b) such orders or judgments as may be necessary to enjoin Defendants from continuing their unlawful, fraudulent, and unfair practices. Plaintiffs also seek reasonable attorneys' fees and costs under applicable law, including California Code of Civil Procedure section 1021.5.

COUNT 13
Colorado Consumer Protection Act
Colo. Rev. Stat. §§ 6-1-101, *et seq.*
On Behalf of the Colorado Subclass

265. Plaintiffs incorporate by reference all preceding paragraphs.

266. Plaintiff Wilson brings this cause of action individually and on behalf of the members of the Colorado Subclass.

267. The Colorado Consumer Protection Act prohibits unfair or deceptive acts or practices, including, "fail[ing] to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction." Colo. Rev. Stat. § 6-1-105(u). Defendants engaged in deceptive acts or practices that violated the Colorado Consumer Protection Act.

268. Defendants participated in unfair or deceptive trade practices that violated the Colorado Consumer Protection Act as described below and throughout this Class Action

Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale of the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

269. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

270. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

271. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

272. Defendants knew or should have known that their conduct violated the Colorado Consumer Protection Act.

273. Had Plaintiff Wilson and the Colorado Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiffs did not receive the benefit of their bargain as a result of Defendants' misconduct.

274. Defendants owed Plaintiff and the Colorado Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff and the Colorado Subclass Members; and/or (c) made incomplete

representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff and the Colorado Subclass Members that contradicted these representations.

275. Plaintiff Wilson and the Colorado Subclass Members suffered monetary damages as a result of Defendants' conduct.

276. Defendants' violations present a continuing risk to Plaintiff Wilson and the Colorado Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

277. Defendants are liable to Plaintiff and the Colorado Subclass Members for actual damages sustained.

COUNT 14
Connecticut Unfair Trade Practices Act
Conn. Gen. Stat. §§ 42-110a, *et seq.*
On Behalf of the Connecticut Subclass

278. Plaintiffs incorporate by reference all preceding paragraphs.

279. Plaintiff Rohan brings this cause of action individually and on behalf of the members of the Connecticut Subclass.

280. The Connecticut Unfair Trade Practices Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110(b)(a).

281. Defendants participated in unfair or deceptive trade practices that violated the Connecticut Unfair Trade Practices Act as described below and alleged throughout the Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale of the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

282. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

283. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

284. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

285. Defendants knew or should have known that their conduct violated the Connecticut Unfair Trade Practices Act.

286. Had Plaintiff Rohan and the Connecticut Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiffs did not receive the benefit of their bargain as a result of Defendants' misconduct.

287. Defendants owed Plaintiff and the Connecticut Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff and the Connecticut Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff and the Connecticut Subclass Members that contradicted these representations.

288. Plaintiff and the Connecticut Subclass Members suffered monetary damages as a result of Defendants' conduct.

289. Defendants' violations present a continuing risk to Plaintiff and the Connecticut Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

290. Defendants are liable to Plaintiff and the Connecticut Subclass Members for actual damages, punitive damages, equitable relief, attorneys' fees and costs. Conn. Gen. Stat. § 42-110g(a), (d).

291. A copy of this complaint is being mailed to the Connecticut Attorney General and the Connecticut Commissioner of Consumer Protection. Conn. Gen. Stat. § 42-110g(d).

COUNT 15
Delaware Consumer Fraud Act
Del. Code Ann. § 2511, *et seq.*
On Behalf of the Delaware Subclass

292. Plaintiffs incorporate by reference all preceding paragraphs.

293. Plaintiff Jimmy Arriaga brings this cause of action individually and on behalf of the members of the Delaware Subclass.

294. The Delaware Consumer Fraud Act prohibits "the act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale . . . of any merchandise." Del. Code Ann. § 2513.

295. Defendants participated in unfair or deceptive trade practices that violated the Delaware Consumer Fraud Act as described below and alleged throughout the Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale the Recalled Products.

Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

296. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

297. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

298. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

299. Defendants knew or should have known that their conduct violated the Delaware Consumer Fraud Act.

300. Had Plaintiff Arriaga and the Delaware Subclass Members known the truth about the Recalled Products, they would not have obtained the Recalled Products. Plaintiff and the Delaware Subclass did not receive the benefit of their bargain as a result of Defendants' misconduct.

301. Defendants owed Plaintiff and the Delaware Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff and the Delaware Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff and the Delaware Subclass Members that contradicted these representations.

302. Plaintiff and the Delaware Subclass Members suffered monetary damages as a result of Defendants' conduct.

303. Defendants' violations present a continuing risk to Plaintiff and the Delaware Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

304. Defendants are liable to Plaintiff and the Delaware Subclass Members for all damages sustained. Del. Code Ann. § 2525.

COUNT 16
District of Columbia Consumer Protection Act,
D.C. Code § 28-3901, *et seq.*
On Behalf of the District of Columbia Subclass

305. Plaintiffs incorporate by reference all preceding paragraphs.

306. Plaintiff Pinck brings this cause of action individually and on behalf of the members of the District of Columbia Subclass.

307. The D.C. Consumer Protection Act prohibits "unfair or deceptive trade practice[s]." D.C. Code § 28-3904.

308. Defendants participated in unfair or deceptive trade practices that violated the D.C. Consumer Protection Act as described below and alleged throughout the Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

309. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of

any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

310. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

311. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

312. Defendants knew or should have known that their conduct violated the D.C. Consumer Protection Act.

313. Had Plaintiff Pinck and the District of Columbia Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiff and District of Columbia Subclass Members did not receive the benefit of their bargain as a result of Defendants' misconduct.

314. Defendants owed Plaintiff Pinck and the District of Columbia Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff and the District of Columbia Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff and the District of Columbia Subclass Members that contradicted these representations.

315. Plaintiff and the District of Columbia Subclass Members suffered monetary damages as a result of Defendants' conduct.

316. Defendants' violations present a continuing risk to Plaintiff and the District of Columbia Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

317. Defendants are liable to Plaintiff and the District of Columbia Subclass Members for all damages sustained, treble damages of \$1,500, punitive damages, attorneys' fees and costs, and injunctive relief. D.C. Code § 28-3905(k)(1).

COUNT 17
Florida Deceptive Trade Practices Act,
Fla. Stat. Ann. § 501.201, *et seq.*
On Behalf of the Florida Subclass

318. Plaintiffs incorporate by reference all preceding paragraphs.

319. Plaintiff Jones brings this cause of action individually and on behalf of the members of the Florida Subclass.

320. Defendants' business acts and practices alleged herein constitute unfair, unconscionable and/or deceptive methods, acts or practices under the Florida Deceptive and Unfair Trade Practices Act, § 501.201, *et seq.*, Florida Statutes ("FDUTPA").

321. At all relevant times, Plaintiff Jones and the Florida Subclass Members were "consumers" within the meaning of the FDUTPA. F.S.A. § 501.203(7).

322. Defendants' conduct, as set forth herein, occurred in the conduct of "trade or commerce" within the meaning of the FDUTPA. F.S.A. § 501.203(8).

323. Defendants' omissions and practices described herein were likely to, and did in fact, deceive and mislead members of the public, including Plaintiff and the Florida Subclass Members, acting reasonably under the circumstances, to their detriment. By failing to the true risks of the Recalled Products, Defendant violated FDUTPA.

324. Defendants failed to reveal facts that were material to Plaintiff Jones and the Florida Subclass Members' decisions to purchase the Recalled Products, and Defendants intended that Plaintiff and the Florida Subclass Members would rely upon the omissions.

325. Defendants' actions impact the public interest because Plaintiff Jones and the Florida Subclass Members were injured in exactly the same way as thousands of others purchasing Recalled Products as a result of and pursuant to Defendants' generalized course of deception.

326. Had Plaintiff Jones and the Florida Subclass Members known the truth about the Recalled Products, they would not have purchased and the Recalled Products.

327. The foregoing acts, omissions and practices proximately caused Plaintiff and the Florida Subclass Members to suffer actual damages with they are entitled to recover such damages, together with attorneys' fees and costs of suit.

COUNT 18
Hawaii Unfair and Deceptive Trade Practices Act,
Haw. Rev. Stat. § 480-2, *et seq.*
On Behalf of the Hawaii Subclass

328. Plaintiffs incorporate by reference all preceding paragraphs.

329. Plaintiff Chris Brown brings this cause of action individually and on behalf of the members of the Hawaii Subclass.

330. The Hawaii Unfair and Deceptive Trade Practices Act prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Haw. Rev. Stat. § 480-2(a).

331. Defendants participated in unfair or deceptive trade practices that violated the Hawaii Unfair and Deceptive Trade Practices Act as described below and alleged throughout the Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale the Recalled

Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

332. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

333. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

334. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

335. Defendants knew or should have known that their conduct violated the Hawaii Unfair and Deceptive Trade Practices Act.

336. Had Plaintiff Brown and the Hawaii Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiffs did not receive the benefit of their bargain as a result of Defendants' misconduct.

337. Defendants owed Plaintiff Brown and the Hawaii Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff Brown and the Hawaii Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff Brown and the Hawaii Subclass Members that contradicted these representations.

338. Plaintiff and the Hawaii Subclass Members suffered monetary damages as a result of Defendants' conduct.

339. Defendants' violations present a continuing risk to Plaintiff and the Hawaii Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

340. Defendants are liable to Plaintiff and the Hawaii Subclass Members for actual damages, treble damages, equitable relief, attorneys' fees and costs. Haw. Rev. Stat. § 480-13.

COUNT 19
Idaho Consumer Protection Act
Idaho Code Ann. §§ 48-601, *et seq.*
On Behalf of the Idaho Subclass

341. Plaintiffs incorporate by reference all preceding paragraphs.

342. Plaintiff Adam Hale brings this cause of action individually and on behalf of the members of the Idaho Subclass.

343. The purpose of the Idaho Consumer Protection Act is to "protect both consumers and businesses against unfair methods of competition and unfair or deceptive acts and practices in the conduct of trade or commerce." Idaho Code Ann. § 48-601.

344. The Idaho Consumer Protection Act prohibits methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce, including, among other things, "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have" or "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." Idaho Code Ann. § 48-603.

345. Defendants engaged in unfair methods of competition and unfair or deceptive acts or practices, with respect to the sale and advertisement of the Recalled Products purchased by

Plaintiff Hale and Idaho Subclass Members, in violation of Idaho Code Ann. §§ 48-601, *et seq.*, including by misrepresenting the true quality of the Recalled Products, and concealing the true risks of the Recalled Products.

346. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted as part of “trade” or “commerce” as defined by Idaho Code Ann. § 48-602(2).

347. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

348. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Hale and the Idaho Subclass members.

349. Plaintiff Hale and Idaho Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

350. As a direct and proximate result of Defendants’ unfair methods of competition and unfair or deceptive acts or practices, Plaintiff Hale and Idaho Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

351. Plaintiff Hale and Idaho Subclass members seek relief under Idaho Code Ann. § 48-608, including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, treble damages, civil penalties, and attorneys’ fees and costs.

COUNT 20
Illinois Consumer Fraud Act
815 ILCS § 505/1, *et seq.*
On Behalf of the Illinois Subclass

352. Plaintiffs incorporate by reference all preceding paragraphs.

353. Plaintiffs Smock and Oldigs bring this cause of action on their behalf and on behalf of the members of the Illinois Subclass.

354. Defendants engaged in unlawful, unfair, and deceptive acts and practices, with respect to the sale and advertisement of the products purchased by Plaintiffs Smock and Oldigs and Illinois Subclass Members, in violation of 815 ILCS § 505/2, including by concealing the true risks of the Recalled Products. These injuries outweigh any benefits to consumers or to competition.

355. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

356. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs Smock and Oldigs and the Illinois Subclass members.

357. Plaintiffs Smock and Oldigs and Illinois Subclass members would not have purchased, chosen, and/or paid for all or part of the Recalled Products had they known that the Recalled Products were defective

358. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiffs Smock and Oldigs and Illinois Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

359. Plaintiffs Smock and Oldigs and Illinois Subclass members seek relief under 815 ILCS § 505/10a, including, but not limited to injunctive relief, damages, restitution, punitive damages and attorneys' fees and costs.

360. A copy of this complaint is being sent to the Illinois Attorney General. 815 ILCS § 505/10d.

COUNT 21
Iowa Consumer Frauds Act
Iowa Code §§ 714H, 714.16/
On Behalf of the Iowa Subclass

361. Plaintiffs incorporate by reference all preceding paragraphs.

362. Plaintiff Abarr brings this cause of action individually and on behalf of the members of the Iowa Subclass.

363. The Iowa Consumer Frauds Act prohibits the “practice or act the person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of a material fact, with the intent that others rely upon the unfair practice, deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression, or omission in connection with the advertisement, sale, or lease of consumer merchandise, or the solicitation of contributions for charitable purposes.” Iowa Code § 714H.3.

364. Defendants participated in unfair or deceptive trade practices that violated the Iowa Consumer Frauds Act as described below and alleged throughout the Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

365. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

366. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

367. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

368. Defendants knew or should have known that their conduct violated the Iowa Consumer Frauds Act.

369. Had Plaintiff Abarr and the Iowa Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiffs did not receive the benefit of their bargain as a result of Defendants' misconduct.

370. Defendants owed Plaintiff Abarr and the Iowa Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff Abarr and the Iowa Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiff and the Iowa Subclass Members that contradicted these representations.

371. Plaintiff Abarr and the Iowa Subclass Members suffered monetary damages and ascertainable losses as a result of Defendants' conduct.

372. Defendants' violations present a continuing risk to Plaintiff Abarr and the Iowa Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

373. Defendants are liable to Plaintiff and the Iowa Subclass Members for actual damages, treble damages, equitable relief, attorneys' fees and costs. Iowa Code § 714H.5.

374. A copy of this complaint is being sent to the Iowa Attorney General. Iowa Code § 714H.6.

COUNT 22
Kansas Consumer Protection Act
Kan. Stat. Ann. §§ 50-623, *et seq.*
On Behalf of the Kansas Subclass

375. Plaintiffs incorporate by reference all preceding paragraphs.

376. Plaintiff Fisher brings this cause of action individually and on behalf of the members of the Kansas Subclass.

377. A key policy purpose of the Kansas Consumer Protection Act, which is to be “construed liberally,” is “to protect consumers from suppliers who commit deceptive and unconscionable practices.” Kan. Stat. Ann. § 50-623.

378. The Kansas Consumer Protection Act prohibits suppliers from engaging in deceptive acts and practices “in connection with a consumer transaction,” which include, among other things, (1) representations made knowingly or with reason to know that “[p]roperty or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits or quantities that they do not have,” (2) representations made knowingly or with reason to know that “property or services are of particular standard, quality, grade, style or model, if they are of another which differs materially from the representation,” (3) “the willful use, in any oral or written representation, of exaggeration, falsehood, innuendo or ambiguity as to a material fact,” and (4) “the willful failure to state a material fact, or the willful concealment, suppression or omission of a material fact.” Kan. Stat. Ann. § 50-626(b)(1-3).

379. The Recalled Products purchased by Plaintiff and Kansas Subclass Members are “property” as defined by Kan. Stat. Ann. § 50-624(j).

380. Defendants are “suppliers” as defined by Kan. Stat. Ann. § 50-624(l).

381. Defendants engaged in deceptive acts or practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Kansas Subclass Members, in violation of Kan. Stat. Ann. §§ 50-623, *et seq.*, including by misrepresenting the true quality of the Recalled Products, and concealing the true risks of the Recalled Products.

382. The above deceptive acts or practices by Defendants were conducted in connection with “consumer transactions” as defined by Kan. Stat. Ann. § 50-624(c).

383. The above unlawful deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

384. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Fisher and the Kansas Subclass members.

385. Plaintiff Fisher and Kansas Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products would be defective.

386. As a direct and proximate result of Defendants’ deceptive acts or practices, Plaintiff Fisher and Kansas Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

387. Plaintiff and Kansas Subclass members seek relief under by Kan. Stat. Ann. § 50-634, including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, civil penalties and attorneys’ fees and costs.

COUNT 23
Kentucky Consumer Protection Act
Kentucky Revised Statutes Annotated §§ 367.110, *et seq.*
On Behalf of the Kentucky Subclass

388. Plaintiffs incorporate by reference all preceding paragraphs.

389. Plaintiff Coleman brings this cause of action individually and on behalf of the members of the Kentucky Subclass.

390. The Kentucky Consumer Protection Act was passed after its legislature found that “the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services” and declared unlawful “[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce.”

391. Defendants engaged in unfair, false, misleading, or deceptive acts or practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Kentucky Subclass Members, in violation of Ky. Rev. Stat. Ann. § 367.170, including by concealing the true risks of the Recalled Products.

392. The above unfair, false, misleading, or deceptive acts or practices by Defendants were conducted in “trade” or “commerce,” as defined by Ky. Rev. Stat. Ann. § 367.110(2).

393. The above unfair, false, misleading, or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

394. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff and the Kentucky Subclass members.

395. Plaintiff Coleman and Kentucky Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

396. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff Coleman and Kentucky Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

397. Plaintiffs and Kentucky Subclass members seek relief under Kentucky Ky. Rev. Stat. Ann. § 367.220, including, but not limited to injunctive relief, damages, and attorneys' fees and costs.

COUNT 24
Louisiana Unfair Trade Practices and Consumer Protection Law
La. Rev. Stat. Ann. §§ 51:1401, *et seq.*
On Behalf of the Louisiana Subclass

398. Plaintiffs incorporate by reference all preceding paragraphs.

399. Plaintiff Miyahira brings this cause of action individually and on behalf of the members of the Louisiana Subclass.

400. The Louisiana Unfair Trade Practices and Consumer Protection Law makes it unlawful to engage in “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” La. Rev. Stat. Ann. §§ 51:1405(A).

401. Defendants engaged in unfair methods of competition and unfair or deceptive acts or practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff Miyahira and Louisiana Subclass Members, in violation of La. Rev. Stat. Ann. § 51:1405A, including by concealing the true risks of the Recalled Products.

402. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted in “trade” or “commerce,” as defined by La. Rev. Stat. Ann. §§ 51:1402(10).

403. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

404. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Miyahira and the Louisiana Subclass members.

405. Plaintiff Miyahira and Louisiana Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

406. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiff Miyahira and Louisiana Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

407. Plaintiff Miyahira and Louisiana Subclass members seek relief under La. Rev. Stat. Ann. § 51:1409, including, but not limited to damages, treble damages and attorneys' fees and costs.

COUNT 25
Maryland Consumer Protection Act
Md. Code Ann., Com. Law §§ 13-101, *et seq.*
On Behalf of the Maryland Subclass

408. Plaintiffs incorporate by reference all preceding paragraphs.

409. Plaintiff Labonte brings this cause of action individually and on behalf of the members of the Maryland Subclass.

410. Under the Maryland Consumer Protection Act, "[a] person may not engage in any unfair, abusive, or deceptive trade practice" in the sale of any consumer goods. Md. Code Ann., Com. Law § 13-303(1).

411. Under the Maryland Consumer Protection Act, unfair, abusive, or deceptive trade practices include, among other things, representations that consumer goods "have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have" or "are of a particular standard, quality, grade, style, or model which they are not"; "[f]ailure to state a material fact if the failure deceives or tends to deceive; or "[d]eception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any

material fact with the intent that a consumer rely on the same in connection with...[t]he promotion or sale of any consumer goods.” Md. Code Ann., Com. Law § 13-301.

412. Defendants engaged in unfair, abusive, or deceptive trade practices with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Maryland Subclass Members, in violation of Md. Code Ann., Com. Law §§ 13-101, *et seq.*, including by knowingly making statements or representations that were false or misleading regarding the quality of the Recalled Products and concealing the true risks of the Recalled Products.

413. The above unfair, abusive, or deceptive trade practices by Defendants were conducted in connection with the sale of “consumer goods,” as defined by Md. Code Ann., Com. Law § 13-101(d)(1).

414. The above unfair, abusive, or deceptive trade practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

415. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Labonte and the Maryland Subclass members.

416. Plaintiff Labonte and Maryland Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

417. As a direct and proximate result of Defendants’ unfair, abusive, or deceptive trade practices, Plaintiff Labonte and Maryland Subclass members suffered an ascertainable loss of money or property, real or personal, as described above.

418. Plaintiff Labonte and Maryland Subclass members seek relief under Md. Code Ann., Com. Law § 13-408, including, but not limited to compensatory damages, and attorneys’ fees and costs.

COUNT 26
Massachusetts Consumer Protection Act
Mass. Gen. Laws Ann. ch. 93A, §§ 1-11, *et seq.*
On Behalf of the Massachusetts Subclass

419. Plaintiffs incorporate by reference all preceding paragraphs.

420. Plaintiff Robert McClay bring this cause of action individually and on behalf of the members of the Massachusetts Subclass.

421. Under the Massachusetts Consumer Protection Act, “unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” Mass. Gen. Laws Ann. ch. 93A, § 2.

422. Defendants engaged in unfair, abusive, or deceptive trade practices with respect to the sale and advertisement of the Recalled Products purchased by Plaintiffs McClay and Massachusetts Subclass Members, including by knowingly making statements or representations that were false or misleading regarding the quality of the Recalled Products, and concealing the true risks of the Recalled Products.

423. The above unfair, abusive, or deceptive trade practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

424. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs and the Massachusetts Subclass members.

425. Plaintiff McClay and Massachusetts Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

426. As a direct and proximate result of Defendants’ unfair, abusive, or deceptive trade practices, Plaintiff McClay and Massachusetts Subclass members suffered an ascertainable loss of money or property, real or personal, as described above.

427. Plaintiff McClay and Massachusetts Subclass members seek relief under Mass. Gen. Laws Ann. ch. 93A, § 2, including, but not limited to injunctive relief, compensatory damages, statutory damages, and attorneys’ fees and costs.

COUNT 27
Michigan Consumer Protection Act
Mich. Comp. Laws §§ 445.901, *et seq.*
On Behalf of the Michigan Subclass

428. Plaintiffs incorporate by reference all preceding paragraphs.

429. Plaintiffs Lisa Brown and Julie Longway bring this cause of action individually and on behalf of the members of the Michigan Subclass.

430. The Michigan Consumer Protection Act (“Michigan CPA”) prohibits “[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce....” Mich. Comp. Laws § 445.903(1). GM engaged in unfair, unconscionable, or deceptive methods, acts or practices prohibited by the Michigan CPA, including: “(c) Representing that goods or services have... characteristics... that they do not have....;” “(e) Representing that goods or services are of a particular standard... if they are of another;” “(i) Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;” “(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer;” “(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is;” and “(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.” Mich. Comp. Laws § 445.903(1).

431. Defendants engaged in unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the

Recalled Products purchased by Plaintiffs and Michigan Subclass Members, in violation of Mich. Comp. Laws § 445.903, including by misrepresenting the true quality of the Recalled Products, and concealing the true risks of the Recalled Products.

432. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted in “[t]rade or commerce,” as defined by Mich. Comp. Laws § 445.902(1)(g).

433. The above unfair and deceptive practices and acts by Defendants were material misrepresentations of a presently existing or past fact.

434. The representations by Defendants regarding the quality of the Recalled Products was false.

435. Defendants knew the representations were false or made it recklessly as a positive assertion without knowledge of its truth.

436. Defendants intended that persons rely on the above misrepresentation regarding the quality of the Recalled Products.

437. Plaintiffs Brown and Longway and Michigan Subclass members acted in reliance on Defendants’ representations.

438. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

439. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs Brown and Longway and the Michigan Subclass members.

440. Plaintiffs and Michigan Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had

they known that the Recalled Products were defective.

441. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiffs and Michigan Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

442. Plaintiffs Brown and Longway and Michigan Subclass members seek relief under Mich. Comp. Laws § 445.911, including, but not limited to injunctive relief, damages, attorneys’ fees and costs.

COUNT 28
Minnesota Consumer Fraud Act, Minnesota Unlawful Trade Practices Act, and
Minnesota Uniform Deceptive Trade Practices Act
Minn. Stat. §§ 325F.69; 325D.13; and 325D.44, respectively
On Behalf of the Minnesota Subclass

443. Plaintiffs incorporate by reference all preceding paragraphs.

444. Plaintiff Tawnya Porter brings this cause of action individually and on behalf of the members of the Minnesota Subclass.

445. The MPCFA makes unlawful “[t]he act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby.” Minn. Stat. § 325F.69(1). The MPCFA further provides that “any person injured by a violation of [the MPCFA] 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(3a).

446. Defendants engaged in unlawful, unfair, and deceptive acts and practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and

Minnesota Subclass Members, in violation of Minn. Stat. §§ 325F.69; 325D.13; and 325D.44, including by misrepresenting the true quality of the Recalled Products and concealing the true risks of the Recalled Products.

447. The above unfair and deceptive practices and acts by Defendants involved the “sale” of “merchandise,” as defined by Minn. Stat. § 325F.68.

448. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

449. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Porter and the Minnesota Subclass members.

450. Plaintiff Porter and Minnesota Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

451. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff and Minnesota Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

452. Plaintiff Porter and Minnesota Subclass members seek relief under Minn. Stat. § 8.31, subd. 3a; and § 325D.45, including, but not limited to injunctive relief, damages, and attorneys’ fees and costs.

COUNT 29
Missouri Merchandising Practices Act
Mo. Rev. Stat. § 407.010, *et seq.*
On Behalf of the Missouri Subclass

453. Plaintiffs incorporate by reference all preceding paragraphs.

454. Plaintiffs Delores Brown and Donald Basemore bring this cause of action individually and on behalf of the members of the Missouri Subclass.

455. The Missouri Merchandising Practices Act (“MMPA”) was created to protect Missouri consumers from deceptive and unfair business practices.

456. Philips’ conduct described herein constitutes the act, use or employment of deception, false promise, misrepresentation, unfair practice and the concealment, suppression and omission of material facts in connection with the sale and advertisement of merchandise, the Recalled Products, in trade or commerce in Missouri, making it unlawful under Mo. Rev. Stat. § 407.020.

457. Plaintiffs Basemore, Brown, and the Missouri Class members purchased the Recalled Products for personal purposes and suffered ascertainable losses of money or property as the result of the use or employment of a method, act or practice declared unlawful by Mo. Rev. Stat. § 407.020. Plaintiffs Basemore, Brown, and the Missouri Class members acted as reasonable consumers would have acted under the circumstances and Philips’ conduct declared unlawful by Mo. Rev. Stat. § 407.020 would cause reasonable persons to enter into the transactions (purchasing the Recalled Products) that resulted in the damages.

458. Accordingly, pursuant to Mo. Rev. Stat. § 407.025, Plaintiffs Basemore, Brown, and the Missouri Class members are entitled to recover their actual damages, which can be calculated with a reasonable degree of certainty using sufficiently definitive and objective evidence. Those damages are: (a) the difference between the values of the Recalled Products as represented (their prices) paid and their actual values at the time of purchase (\$0.00), or (b) the cost to replace the Recalled Products, and (c) other miscellaneous incidental and consequential damages. In addition, given the nature of Philips conduct, the Court should exercise its discretion to award Plaintiffs Basemore, Brown, and the Missouri Class Members punitive damages,

attorneys' fees based on the amount of time reasonably expended and equitable relief necessary or proper to protect them from Philips' unlawful conduct.

COUNT 30

Montana Unfair Trade Practices and Consumer Protection Act of 1973

Mont. Code Ann. §§ 30-14-101, *et seq.*

On Behalf of the Montana Subclass

459. Plaintiffs incorporate by reference all preceding paragraphs.

460. Plaintiff Worman brings this cause of action individually and on behalf of the members of the Montana Subclass.

461. The Montana Unfair Trade Practices and Consumer Protection Act makes it unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mont. Code Ann. § 30-14-103.

462. Defendants engaged in unlawful methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Montana Subclass members, in violation of Mont. Code Ann. §§ 30-14-103, including by concealing the true risks of the Recalled Products.

463. The above unfair or deceptive acts or practices by Defendants were conducted in "trade" or "commerce," as defined by *id.*, § 30-14-102(8).

464. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

465. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs and the Montana Subclass members.

466. Plaintiff Worman and Montana Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

467. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiff Worman and Montana Subclass members suffered an ascertainable loss of money or property, real or personal, as described above.

468. Plaintiff Worman and Montana Subclass members seek relief under Mont. Code Ann. § 30-14-133, including, but not limited to injunctive relief, damages, treble damages, and attorneys' fees and costs.

COUNT 31
Nebraska Consumer Protection Act
Neb. Rev. Stat. § 59-1601, *et seq.*
On Behalf of the Nebraska Subclass

469. Plaintiffs incorporate by reference all preceding paragraphs.

470. Plaintiff Glaub brings this cause of action individually and on behalf of the members of the Nebraska Subclass.

471. The Nebraska Consumer Protection Act makes it unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Neb. Rev. Stat. § 59-1602.

472. Defendants engaged in unlawful methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Nebraska Subclass Members, in violation of Neb. Rev. Stat. § 59-1602, including by concealing the true risks of the Recalled Products.

473. The above unfair or deceptive acts or practices by Defendants were conducted in "trade" or "commerce."

474. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

475. Defendants' actions were negligent, knowing and willful, and/or wanton and

reckless with respect to the rights of Plaintiff Glaub and the Nebraska Subclass members.

476. Plaintiff Glaub and Nebraska Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

477. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiff Glaub and Nebraska Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

478. Plaintiff Glaub and Nebraska Subclass members seek relief under Neb. Rev. Stat. § 59-16-0, including, but not limited to injunctive relief, damages, and attorneys' fees and costs.

COUNT 32

Nevada Deceptive Trade Practices Act Nev. Rev. Stat. §§598.0903, *et seq.* On Behalf of the Nevada Subclass

479. Plaintiffs incorporate by reference all preceding paragraphs.

480. Plaintiffs Poland, McNulty, and Burlison bring this cause of action individually and on behalf of the members of the Nevada Subclass.

481. Philips' conduct in the course of its business described herein constitutes deceptive trade practices as set forth in Nev. Rev. Stat. § 598.0915, because Philips: (a) knowingly made false representations as to the characteristics, ingredients, uses and benefits of the Recalled Products by falsely representing they are a safe and effective treatment for Obstructive Sleep Apnea and other breathing conditions; (b) represented that the Recalled Products were of a particular standard, quality or grade by falsely representing they are a safe and effective treatment for Obstructive Sleep Apnea and other breathing conditions; and (c) knowingly made other false representations in the transactions that resulted in Plaintiffs Burlison, Poland, McNulty, and the Nevada SubClass Members' ownership and use of the Recalled Products.

482. Philips also engaged in deceptive trade practices in the course of its business under Nev. Rev. Stat. § 598.0923 by knowingly failing to disclose a material fact, the existence of the defective foam, in connection with the sales of the Recalled Products. Philips also engaged in deceptive trade practices in the course of its business under Nev. Rev. Stat. § 598.0925 by making an assertion of scientific, clinical or quantifiable fact, that the Recalled Products are a safe and effective treatment for Obstructive Sleep Apnea and other breathing conditions, in advertisements that would cause reasonable persons to believe the assertion was true when it did not have in its possession factually objective scientific, clinical or quantifiable evidence substantiating the assertion.

483. Pursuant to Nev. Rev. Stat. § 41.600, Plaintiffs Burlison, Poland, McNulty, and the Nevada Class are entitled to recover for these deceptive trade practices the damages they have sustained: (a) the difference between the values of the Recalled Products as represented (their prices) and their actual values at the time of purchase (\$0.00), or (b) the cost to replace the Recalled Products, and (c) other miscellaneous incidental and consequential damages. In addition, they are entitled to recover any equitable relief the Court deems appropriate and their costs in the action and reasonable attorneys' fees.

484. Pursuant to Nev. Rev. Stat. § 598.0977, Plaintiffs Burlison, Poland, McNulty, and the Nevada Subclass members over age 60 are entitled to recover the damages they suffered as a result of Philips's deceptive trade practices: (a) the difference between the values of the Recalled Products as represented (their prices) paid and their actual values at the time of purchase (\$0.00), or (b) the cost to replace the Recalled Products, and (c) other miscellaneous incidental and consequential damages. In addition, they are entitled to recover punitive damages, if appropriate, and reasonable attorneys' fees.

COUNT 33
New Hampshire Consumer Protection Act
N.H. Rev. Stat. Ann. § 358-A:1, *et seq.*
On Behalf of the New Hampshire Subclass

485. Plaintiffs incorporate by reference all preceding paragraphs.

486. Plaintiffs Vlahos and Lizotte brings this cause of action individually and on behalf of the members of the New Hampshire Subclass.

487. The New Hampshire Consumer Protection Act makes it unlawful to engage in “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” N.H. Rev. Stat. Ann. § 358-A:2.

488. Defendants engaged in unlawful methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiffs Vlahos and Lizotte and New Hampshire Subclass Members, in violation of N.H. Rev. Stat. Ann. § 358-A:2, including by concealing the true risks of the Recalled Products.

489. The above unfair or deceptive acts or practices by Defendants were conducted in “trade” or “commerce.”

490. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

491. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs Vlahos and Lizotte and the New Hampshire Subclass members.

492. Plaintiffs Vlahos and Lizotte and New Hampshire Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

493. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiffs Vlahos and Lizotte and New Hampshire Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

494. Plaintiffs Vlahos and Lizotte and New Hampshire Subclass members seek relief under N.H. Rev. Stat. Ann. § 358-A:10, including, but not limited to injunctive relief, damages, treble damages, and attorneys' fees and costs.

495. A copy of this complaint is being sent to the New Hampshire Attorney General.

COUNT 34
New Jersey Consumer Fraud Act
N.J. Stat. Ann. §§ 56:8-1, *et seq.*
On Behalf of the New Jersey Subclass

496. Plaintiffs incorporate by reference all preceding paragraphs.

497. The New Jersey Consumer Fraud Act ("NJCFA") makes unlawful "[t]he 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 the 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 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. Stat. Ann. § 56:8-2.

498. Defendants engaged in unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiffs Ryan and Jacobs and New Jersey Subclass Members, in violation of N.J. Stat. Ann. §§ 56:8-2, including by making statements or representations that were false or misleading

regarding the quality of the Recalled Products, and concealing the true risks of the Recalled Products.

499. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

500. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs Ryan and Jacobs and New Jersey Subclass members.

501. Plaintiffs Ryan and Jacobs and New Jersey Subclass members relied on Defendants' representations and omissions in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known of the true risks of purchasing or using the Recalled Products.

502. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiffs Ryan and Jacobs and New Jersey Subclass Members suffered an ascertainable loss of money or property, real or personal, as described above, including the purchase of the Recalled Products and the costs of repairing or replacing the Recalled Products in a timely manner.

503. Plaintiffs Ryan and Jacobs and New Jersey Subclass members seek relief under N.J. Stat. Ann. §§ 56:8-2.11 and 56:8-19, including, but not limited to a refund of all moneys acquired by Defendants for the Recalled Product, injunctive relief, damages, treble damages, and attorneys' fees and costs.

COUNT 35
New Mexico Unfair Practices Act
N.M. Stat. Ann. §§ 57-12-1, *et seq.*
On Behalf of the New Mexico Subclass

504. Plaintiffs incorporate by reference all preceding paragraphs.

505. Plaintiffs Jo Dawn Ward and Myron Fields bring this cause of action individually and on behalf of the members of the New Mexico Subclass.

506. The New Mexico Unfair Trade Practices Act, N.M. STAT. ANN. §§ 57-12-1, et seq. (“New Mexico UTPA”) makes unlawful any “[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce.” N.M. STAT. ANN. § 57:12-3. Trade or commerce includes the “sale or distribution of any services.” N.M. STAT. ANN. § 57-12-2(C).

507. Defendants engaged in unfair or deceptive trade practices and unconscionable trade practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiffs and New Mexico Subclass Members, in violation of N.M. Stat. Ann. § 57-12-3, including by making statements or representations that were false or misleading regarding the quality of the Recalled Products and concealing the true risks of the Recalled Products.

508. The above unfair or deceptive acts or practices by Defendants were conducted in or affecting “commerce,” as defined by *id.*, § 57-12-2(C).

509. The above unfair or deceptive trade practices and unconscionable trade practices by Defendants were immoral, unethical, oppressive, and unscrupulous, and the type that may, tend to, or does deceive or mislead any person.

510. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs and the New Mexico Subclass members.

511. Plaintiffs Ward and Fields and New Mexico Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

512. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiffs Ward and Fields and New Mexico Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

513. By engaging in the practices discussed above, including, but not limited to, Defendants’ undisclosed defects, Defendants have violated N.M. Stat. Ann. § 57-12-2.

514. Plaintiffs Ward and Fields and New Mexico Subclass members seek relief under N.M. Stat. Ann. § 57-12-10, including, but not limited to injunctive relief, damages, and attorneys’ fees and costs.

COUNT 36
N.Y. Gen. Bus. Law § 349
On Behalf of the New York Subclass

515. Plaintiffs incorporate by reference all preceding paragraphs.

516. Plaintiffs Scunziano and Gold bring this cause of action individually and on behalf of the members of the New York Subclass.

517. Plaintiffs Scunziano and Gold and the New York Subclass Members are “persons” within the meaning of New York General Business Law (“New York GBL”). N.Y. Gen. Bus. Law § 349(h).

518. Defendants are a “person,” “firm,” “corporation,” or “association” within the meaning of N.Y. Gen. Bus. Law § 349.

519. New York’s General Business Law § 349 makes unlawful “[d]eceptive acts or practices in the conduct of any business, trade or commerce.” N.Y. GEN. BUS. LAW § 349. Defendants’ conduct, as described in this Complaint, constitutes “deceptive acts or practices” within the meaning of the New York GBL. All of Defendants’ deceptive acts and practices, which were intended to mislead consumers in a material way in the process of purchasing Recalled Products, constitute conduct directed at consumers and “consumer-oriented.” Further, Plaintiffs Scunziano and Gold and the New York Subclass Members suffered injury as a result of the deceptive acts or practice.

520. Defendants' actions, as set forth above, occurred in the conduct of business, trade or commerce.

521. Defendants participated in unfair or deceptive trade practices that violated the New York GBL as described below and alleged throughout the Complaint. By concealing the true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale of the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

522. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

523. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

524. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

525. Defendants knew or should have known that their conduct violated the New York GBL.

526. Had Plaintiffs Scunziano and Gold and the New York Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiffs did not receive the benefit of their bargain as a result of Defendants' misconduct.

527. Defendants owed Plaintiffs Scunziano and Gold and the New York Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiffs Scunziano and Gold and the New York Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding material facts from Plaintiffs Scunziano and Gold and the New York Subclass Members that contradicted these representations.

528. Plaintiffs and the New York Subclass Members suffered injury in fact to a legally protected interest. As a result of Defendants' conduct, Plaintiffs and the New York Subclass Members were harmed and suffered actual damages.

529. Defendants' violations present a continuing risk to Plaintiffs Scunziano and Gold and the New York Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

530. Pursuant to N.Y. Gen. Bus. Law § 349(h), Plaintiff and the New York Subclass Members seek actual damages or \$50, whichever is greater, in addition to discretionary three times actual damages up to \$1,000 for Defendants' willful and knowing violation of N.Y. Gen. Bus. Law § 349. Plaintiffs and the New York Subclass Members also seek attorneys' fees, an order enjoining Defendants' deceptive conduct, and any other just and proper relief available under the New York GBL.

COUNT 37

North Carolina Unfair and Deceptive Trade Practices Act

N.C. Gen. Stat. §§ 75-1.1, *et seq.*

On Behalf of the North Carolina Subclass

531. Plaintiffs incorporate by reference all preceding paragraphs.

532. Plaintiff Tony Jones brings this cause of action individually and on behalf of the members of the North Carolina Subclass.

533. North Carolina’s Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1.1, et seq. (“NCUDTPA”), prohibits a person from engaging in “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce[.]” The NCUDTPA provides a private right of action for any person injured “by reason of any act or thing done by any other person, firm or corporation in violation of” the NCUDTPA. N.C. Gen. Stat. § 75-16.

534. Defendants engaged in unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and North Carolina Subclass Members, in violation of N.C. Gen. Stat. § 75-1.1(a), including by making false representations or concealing the true risks of the Recalled Products.

535. The above unfair or deceptive acts or practices by Defendants were conducted in or affecting “commerce,” as defined by *id.*, § 75-1.1(b).

536. The above unfair or deceptive acts or practices by Defendants were reasonably calculated to deceive class members and other consumers, and made with intent to deceive.

537. The above unfair or deceptive acts or practices by Defendants did in fact deceive class members and other consumers, causing them damage.

538. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

539. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff and the North Carolina Subclass members.

540. Plaintiff Tony Jones and North Carolina Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

541. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiffs and North Carolina Class Members suffered an ascertainable loss of money or property, real or personal.

542. Plaintiff Tony Jones and North Carolina Subclass members seek relief under N.C. Gen. Stat. §§ 75-16 and 75-16.1, including, but not limited to injunctive relief, damages, treble damages, and attorneys' fees and costs.

COUNT 38
North Dakota Consumer Protection Act
N.D. Cent. Code § 51-15-01, *et seq.*
On Behalf of the North Dakota Subclass

543. Plaintiffs incorporate by reference all preceding paragraphs.

544. Plaintiff Byers brings this cause of action individually and on behalf of the members of the North Dakota Subclass.

545. Under North Dakota law, the use of deceptive or unconscionable acts or practices in connection with the sale or advertisement of any merchandise is unlawful. N.D. Cent. Code § 51-15-02.

546. Defendants engaged in unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff Byers and North Dakota Subclass Members, in violation of N.D. Cent. Code § 51-15-01, *et. seq.*, including by misrepresenting the true quality of the Recalled Products, concealing the true risks of the Recalled Products.

547. The above unfair methods of competition and unfair or deceptive acts or practices

by Defendants were immoral, unethical, oppressive, and unscrupulous.

548. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Byers and the North Dakota Subclass members.

549. Plaintiff Byers and North Dakota Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

550. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiff Byers and North Dakota Subclass Members suffered an ascertainable loss of money or property, real or personal, as described above.

551. Plaintiff Byers and North Dakota Subclass members seek relief under N.D. Cent. Code. § 51-15-09, *et seq.*, including, but not limited to injunctive relief, compensatory damages, treble damages, and attorneys' fees and costs. N.D. Cent. Code. § 51-15-09.

COUNT 39
Ohio Consumer Sales Practices Act
Ohio Rev. Code Ann. §§ 1345.01, *et seq.*
On Behalf of the Ohio Subclass

552. Plaintiffs incorporate by reference all preceding paragraphs.

553. Plaintiff Ward brings this cause of action individually and on behalf of the members of the Ohio Subclass.

554. Ohio make it unlawful to "commit an unfair or deceptive act or practice in connection with a consumer transaction" Ohio Rev. Code Ann. § 1345.02.

555. Defendants engaged in unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Ohio Subclass Members, in violation of Ohio Rev. Code Ann. §§ 1345.021 *et seq.*, including by misrepresenting the true quality of the Recalled

Products and concealing the true risks of the Recalled Products.

556. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

557. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Ward and Ohio Subclass members.

558. Plaintiff Ward and Ohio Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

559. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiff and Ohio Subclass Members suffered an ascertainable loss of money or property, real or personal, as described above.

560. Plaintiff Ward and Ohio Subclass members seek relief under Ohio Rev. Code § 1345.09, *et seq.*, including, but not limited to injunctive relief, damages, and attorneys' fees and costs.

COUNT 40
Oklahoma Consumer Protection Act
Okla. Stat. tit. 15, § 751, *et seq.*
On Behalf of the Oklahoma Subclass

561. Plaintiffs incorporate by reference all preceding paragraphs.

562. Plaintiff Wells brings this cause of action individually and on behalf of the members of the Oklahoma Subclass.

563. The Oklahoma Consumer Protection Act makes it unlawful to make a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person," or engage in "any practice which

offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” Okla. Stat. tit. 15, § 752.

564. Defendants engaged in unfair methods of competition and unfair or deceptive acts or practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Oklahoma Subclass Members, in violation of Okla. Stat. tit. 15, § 752, including by concealing the true risks of the Recalled Products.

565. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted as part of a “consumer transaction,” as defined by Okla. Stat. tit. 15, § 752.

566. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

567. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Wells and the Oklahoma Subclass members.

568. Plaintiff Wells and Oklahoma Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

569. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff Wells and Oklahoma Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

570. Plaintiff Wells and Oklahoma Subclass members seek relief under Okla. Stat. tit. 15, § 75, *et seq.*, including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, civil penalties and attorneys’ fees and costs.

COUNT 41
Oregon Unlawful Trade Practices Law
Or. Rev. Stat. §§ 646.605, *et seq.*
On Behalf of the Oregon Subclass

571. Plaintiffs incorporate by reference all preceding paragraphs.

572. Plaintiff Mclean brings this cause of action individually and on behalf of the members of the Oregon Subclass.

573. Oregon make it unlawful to for any person to employ “any unconscionable tactic in connection with selling, renting or disposing of real estate, goods or services, or collecting or enforcing an obligation.” Or. Rev. Stat. § 646.607(1).

574. Defendants engaged in unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Oregon Subclass Members, in violation of Or. Rev. Stat. §§ 646.605, *et seq.*, including by misrepresenting the true quality of the Recalled Products, concealing the true risks of the Recalled Products..

575. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted in “[t]rade” and/or “commerce,” as defined by Or. Rev. Stat. § 646.605(8).

576. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

577. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff and the Oregon Subclass members.

578. Plaintiff Mclean and Oregon Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

579. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff Mclean and Oregon Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

580. Plaintiff Mclean and Oregon Subclass members seek relief under Or. Rev. Stat. § 646.638, *et seq.*, including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, punitive damages, civil penalties and attorneys’ fees and costs.

COUNT 42
Pennsylvania Unfair Trade Practices and Consumer Protection Law
73 P.S. §§ 201-1, *et seq.*
On Behalf of the Pennsylvania Subclass

581. Plaintiffs incorporate by reference all preceding paragraphs.

582. Plaintiff Koenck brings this cause of action individually and on behalf of the members of the Pennsylvania Subclass.

583. Plaintiff Koenck and the Pennsylvania Subclass Members purchased their Recalled Products primarily for personal, family or household purposes within the meaning of 73 P.S. § 201-9.2.

584. All of the acts complained of herein were perpetrated by Defendants in the course of trade or commerce within the meaning of 73 P.S. § 201-2(3).

585. The Pennsylvania Unfair Trade Practices and Consumer Protection Law (“Pennsylvania CPL”) prohibits unfair or deceptive acts or practices, including, “[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding.” 73 P.S. § 201-2(4). Defendants engaged in unlawful trade practices, and unfair or deceptive acts or practices that violated Pennsylvania CPL.

586. Defendants participated in unfair or deceptive trade practices that violated the Pennsylvania CPL as described below and alleged throughout the Complaint. By concealing the

true risks of the Recalled Products, Defendants knowingly and intentionally misrepresented and omitted material facts in connection with the sale the Recalled Products. Defendants systematically misrepresented, concealed, suppressed, or omitted material facts relating to the Recalled Products in the course of their business.

587. Defendants also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of the Recalled Products.

588. Defendants' unfair and deceptive acts or practices occurred repeatedly in Defendants' trade or business, were capable of deceiving a substantial portion of the purchasing public, and imposed a serious safety risk on the public.

589. Defendants knew that the risks inherent in the Recalled Products made them not suitable for their intended use.

590. Defendants knew or should have known that their conduct violated the Pennsylvania CPL.

591. Had Plaintiff Koenck and the Pennsylvania Subclass Members known the truth about the Recalled Products, they would not have purchased the Recalled Products. Plaintiff did not receive the benefit of their bargain as a result of Defendants' misconduct.

592. Defendants owed Plaintiff and the Pennsylvania Subclass Members a duty to disclose the truth about the Recalled Products because Defendants: (a) possessed exclusive, specific and superior knowledge of the true risks of the Recalled Products; (b) intentionally concealed the foregoing from Plaintiff and the Pennsylvania Subclass Members; and/or (c) made incomplete representations regarding the Recalled Products, while purposefully withholding

material facts from Plaintiff and the Pennsylvania Subclass Members that contradicted these representations.

593. Plaintiff Koenck and the Pennsylvania Subclass Members suffered injury in fact to a legally protected interest. As a result of Defendants' conduct, Plaintiff Koenck and the Pennsylvania Subclass Members were harmed and suffered actual damages.

594. Defendants' violations present a continuing risk to Plaintiff Koenck and the Pennsylvania Subclass Members, as well as to the general public. Defendants' unlawful acts and practices complained of herein affect the public interest.

595. Defendants are liable to Plaintiff and the Pennsylvania Subclass Members for treble their actual damages or \$100, whichever is greater, and attorneys' fees and costs under 73 P.S. § 201-9.2(a). Plaintiff Koenck and the Pennsylvania Subclass Members are also entitled to an award of punitive damages given that Defendants' conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others.

COUNT 43
Rhode Island Unfair Trade Practice and Consumer Protection Act
R.I. Gen. Laws §§ 6-13.1-1, *et seq.*
On Behalf of the Rhode Island Subclass

596. Plaintiffs incorporate by reference all preceding paragraphs.

597. Plaintiff Lamontagne brings this cause of action individually and on behalf of the members of the Rhode Island Subclass.

598. The Rhode Island Unfair Trade Practice and Consumer Protection Act ("Rhode Island Act") identifies several types of "unfair" and/or "deceptive trade practices, but also incorporates by reference "the Federal Trade Commission's and federal courts' interpretations of section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)," rather than set forth specific definitions of those operative terms. R.I. Gen. Laws § 6-13.1-2.

599. Rhode Island has adopted a three-part test to determine whether an act is “deceptive”: (1) a representation, omission, or practice, that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3), the representation, omission, or practice is material,” meaning the representation is important to the consumer and likely to affect their decisions with respect to the product.

600. Defendants engaged in unlawful, unfair, and deceptive acts and practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Rhode Island Subclass Members, in violation of R.I. Gen. Laws §§ 6-13.1-1, *et seq.*, including by misrepresenting the true quality of the Recalled Products and concealing the true risks of the Recalled Products.

601. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted in “[t]rade” and/or “commerce,” as defined by R.I. Gen. Laws § 6-13.1-1(5).

602. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

603. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff and the Rhode Island Subclass members.

604. Defendants’ actions were material to Plaintiff and Rhode Island Subclass members, who relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

605. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff and Rhode Island Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

606. Plaintiff and Rhode Island Subclass members seek relief under R.I. Gen. Laws §§ 6-13.1-5.2, including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, punitive damages, and attorneys' fees and costs.

COUNT 44
South Carolina Unfair Trade Practices Act
S.C. Code Ann. §§ 39-5-10, *et seq.*
On Behalf of the South Carolina Subclass

607. Plaintiffs incorporate by reference all preceding paragraphs.

608. Plaintiffs Harris Jenkins and Vicki Chambers bring this cause of action individually and on behalf of the members of the South Carolina Subclass.

609. The South Carolina Unfair Trade Practices Act adopts the interpretations given by the Federal Trade Commission and the Federal Courts to Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to determine what conduct constitutes unfair or deceptive acts and practices. S.C. Code Ann. § 39-5-20.

610. Defendants engaged in unlawful methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiffs Jenkins and Chambers and South Carolina Subclass Members, in violation of S.C. Code Ann. § 39-5-20, including by concealing the true risks of the Recalled Products.

611. The above unfair or deceptive acts or practices by Defendants were conducted in "trade" or "commerce," as defined by S.C. Code Ann. § 39-5-10(b).

612. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

613. The above unfair and deceptive practices and acts by Defendants have impacted the South Carolina public at large if Defendants are not forced to cease engaging in such acts and practices, they are likely to continue.

614. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs Chambers and Jenkins and the South Carolina Subclass members.

615. Plaintiffs Chambers and Jenkins and South Carolina Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

616. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiffs and South Carolina Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

617. Plaintiffs and South Carolina Subclass members seek relief under S.C. Code § 39-5-140, including, but not limited to restitution, statutory damages, compensatory damages, punitive damages, civil penalties and attorneys' fees and costs.

COUNT 45
Tennessee Consumer Protection Act
Tenn. Code Ann. §§ 47-18-101, *et seq.*
On Behalf of the Tennessee Subclass

618. Plaintiffs incorporate by reference all preceding paragraphs.

619. Plaintiff Craig brings this cause of action individually and on behalf of the members of the Tennessee Subclass.

620. The Tennessee Consumer Protection Act ("TNCPA") was enacted to "protect consumers...from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within [Tennessee]." Tenn. Code Ann. § 47-18-102(2).

621. The TNCPA makes unlawful, among other things, “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have” and “[r]epresenting that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another.” Tenn. Code Ann. § 47-18-104.

622. Defendants engaged in unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Tennessee Subclass Members, in violation of Tenn. Code Ann. §§ 47-18-101, *et seq.*, including by making statements or representations that were false or misleading regarding the quality of the Recalled Products and concealing the true risks of the Recalled Products .

623. Defendants intended that other persons rely on the above unfair and deceptive practices and acts by Defendants were material misrepresentations of a presently existing or past fact, and their reliance was reasonable.

624. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

625. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff and the Tennessee Subclass members.

626. Plaintiff Craig and Tennessee Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

627. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff Craig and Tennessee Subclass members suffered an ascertainable loss of money or property, real or personal, as described above.

628. Plaintiff Craig and Tennessee Subclass members seek relief under Tenn. Code § 47-18-108-109, including, but not limited to injunctive relief, compensatory damages, statutory damages, punitive damages, statutory damages, civil penalties and attorneys’ fees and costs.

COUNT 46
Utah Consumer Sales Practices Act
Utah Code Ann. §§ 13-11-1, *et seq.*
On Behalf of the Utah Subclass

629. Plaintiffs incorporate by reference all preceding paragraphs.

630. Plaintiff Nagy brings this cause of action individually and on behalf of the members of the Utah Subclass.

631. The Utah Consumer Sales Practices Act, Utah Code Ann. §§ 13-11-1, *et seq.* makes it unlawful to, among other things, “knowingly or intentionally” “indicate[] that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not” or “that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not.” Utah Code Ann. § 13-11-4.

632. A “Consumer transaction” means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance) to, or apparently to, a person for...primarily personal, family, or household purposes.” Utah Code Ann. § 13-11-3.

633. Defendants engaged in unfair or deceptive trade practices and unconscionable trade practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Utah Subclass Members, in violation of Utah Code Ann. §§ 13-11-1, *et seq.*,

including by making statements or representations that were false or misleading regarding the quality of the Recalled Products and concealing the true risks of the Recalled Products.

634. The above unfair or deceptive trade practices and unconscionable trade practices by Defendants were immoral, unethical, oppressive, and unscrupulous, and the type that may, tend to, or does deceive or mislead any person.

635. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff and the Utah Subclass members.

636. Plaintiff Nagy and Utah Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

637. As a direct and proximate result of Defendants' deceptive acts and practices, Plaintiff Nagy and Utah Subclass Members suffered an ascertainable loss of money or property, real or personal, as described above.

638. By engaging in the practices discussed above, including, but not limited to, Defendant's undisclosed defects, Defendant has violated Utah Code Ann. §§ 13-11-1, *et seq.*

639. Plaintiff Nagy and Utah Subclass members seek relief under Utah Code Ann. § 13-11-17 and -19, including, but not limited to injunctive relief, compensatory damages, statutory damages, civil penalties and attorneys' fees and costs.

COUNT 47
Vermont Consumer Fraud Act
Vt. Stat. Ann. tit. 9, §§ 2451, *et seq.*
On Behalf of the Vermont Subclass

640. Plaintiffs incorporate by reference all preceding paragraphs.

641. Plaintiff Martin brings this cause of action individually and on behalf of the members of the Vermont Subclass.

642. The Vermont Consumer Fraud Act makes it unlawful to engage in “[u]nfair methods of competition and unfair or deceptive acts or practices in commerce.” Vt. Stat. Ann. tit. 9, § 2453, et. seq.

643. Defendants engaged in unlawful methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Vermont Subclass Members, in violation of Vt. Stat. Ann. tit. 9, § 2453 including by concealing the true risks of the Recalled Products.

644. The above unfair or deceptive acts or practices by Defendants were conducted in “trade” or “commerce.”

645. The above unfair and deceptive practices and acts by Defendants were immoral, unethical, oppressive, and unscrupulous.

646. Defendants’ actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Martin and the Vermont Subclass members.

647. Plaintiff Martin and Vermont Subclass members relied on Defendants’ representations in that they would not have purchased, chosen, and/or paid for all or part of the Recalled Products had they known that the Recalled Products were defective.

648. As a direct and proximate result of Defendants’ deceptive acts and practices, Plaintiff Martin and Vermont Subclass Members suffered an ascertainable loss of money or property, real or personal, as described above.

649. Plaintiff Martin and Vermont Subclass members seek relief Vt. Stat. Ann. tit. 9, § 2461(b). including, but not limited to injunctive relief, damages, treble damages, and attorneys’ fees and costs.

COUNT 48
Virginia Consumer Protection Act
Va. Code Ann. §§ 59.1-196, *et seq.*
On Behalf of the Virginia Subclass

650. Plaintiffs incorporate by reference all preceding paragraphs.

651. Plaintiffs Rose and Gorris bring this cause of action individually and on behalf of the members of the Virginia Subclass.

652. Virginia Consumer Protection Act, Va. Code Ann. §§ 59.1-196, *et seq.* (“VCPA”) was enacted to “promote fair and ethical standards of dealings between suppliers and the consuming public.”

653. Philips committed the following acts declared unlawful and prohibited by Va. Code Ann. § 59.1-200: (a) misrepresenting the qualities, characteristics, ingredients, uses and benefits of the Recalled Products by falsely representing they are a safe and effective treatment for Obstructive Sleep Apnea and other breathing conditions; (b) misrepresenting that the Recalled Products were of a particular standard, quality or grade by falsely representing they are a safe and effective treatment for Obstructive Sleep Apnea and other breathing conditions; and (c) using other deception, false promise or misrepresentation in connection with the transactions that resulted in Plaintiffs Gorris, Rose, and the Virginia Class members’ ownership and use of the Recalled Products.

654. Because they suffered loss as a result of Philips’ violations of the VCPA, Plaintiffs Gorris, Rose, and the Virginia Class members may each recover actual damages or \$500, whichever is greater, pursuant to Va. Code Ann. § 59.1-204. Because Philips’ violations were willful, the jury may increase the damages to an amount not exceeding three times the actual damages or \$1,000, whichever is greater. The actual damages are: (a) the difference between the values of the Recalled Products as represented (their prices) and their actual values at the time of

purchase (\$0.00), or (b) the cost to replace the Recalled Products, and (c) other miscellaneous incidental and consequential damages. In addition, Plaintiffs Gorris, Rose, and the Virginia Class members are entitled to recover reasonable attorneys' fees and court costs. The Court may award additional relief pursuant to Va. Code Ann. § 59.1-205.

COUNT 49

**Washington Consumer Protection Act
Wash. Rev. Code § 19.86.020, *et. seq.*
On Behalf of the Washington Subclass**

655. Plaintiff Lopez incorporates by reference all preceding paragraphs.

656. Plaintiff Lopez brings this cause of action individually and on behalf of the members of the Washington Subclass.

657. The Washington Consumer Protection Act makes it unlawful to engage in “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Wash. Rev. Code § 19.86.020.

658. Defendants engaged in unfair methods of competition and unfair or deceptive acts or practices, with respect to the sale and advertisement of the Recalled Products purchased by Plaintiff and Washington Subclass Members, in violation of Wash. Rev. Code §§ 19.86.010, *et seq.*, including by concealing the true risks of the Recalled Products.

659. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were conducted as part of “trade” or “commerce” as defined by Wash. Rev. Code § 19.86.010.

660. The above unfair methods of competition and unfair or deceptive acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

661. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiffs and the Washington Subclass members.

662. Plaintiff and Washington Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

663. As a direct and proximate result of Defendants' unfair methods of competition and unfair or deceptive acts or practices, Plaintiff and Washington Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

664. Plaintiff and Washington Subclass members seek relief under Wash. Rev. Code §§ 19.86.090, including, but not limited to injunctive relief, restitution, statutory damages, compensatory damages, civil penalties and attorneys' fees and costs.

COUNT 50
Wisconsin False Advertising Act
Wis. Stat. § 100.18
On Behalf of the Wisconsin Subclass

665. Plaintiffs incorporate by reference all preceding paragraphs.

666. Plaintiff Alt brings this cause of action individually and on behalf of the members of the Wisconsin Subclass.

667. Wisconsin law prohibits companies from making "untrue, deceptive, or misleading" statements in any "notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, [or] label" in selling merchandise. Wis. Stat. § 100.18(1).

668. Defendants made "untrue, deceptive or misleading" statement with respect to the sale and advertisement of the Recalled Products purchased by Plaintiffs and Wisconsin Subclass Members, in violation of Wash. Rev. Code §§ 19.86.010, *et seq.*, including by concealing the true risks of the Recalled Products.

669. The above untrue, deceptive, or misleading acts or practices by Defendants were immoral, unethical, oppressive, and unscrupulous.

670. Defendants' actions were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of Plaintiff Alt and the Wisconsin Subclass members.

671. Plaintiff Alt and Wisconsin Subclass members relied on Defendants' representations in that they would not have purchased, chosen, and/or paid for all or part of Recalled Products had they known that the Recalled Products were defective.

672. As a direct and proximate result of Defendants' unfair methods of competition and unfair or deceptive acts or practices, Plaintiff Alt and Wisconsin Class Members suffered an ascertainable loss of money or property, real or personal, as described above.

673. Plaintiff Alt and Wisconsin subclass members have suffered pecuniary loss and seek damages, including double damages, costs, and attorneys' fees. Wis. Stat. § 108.18(11)(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request, individually and on behalf of the Class and Subclasses, that this Court:

A. determine that the claims alleged herein may be maintained as a class action under Rule 23(a), (b)(2), and/or (b)(3) of the Federal Rules of Civil Procedure on behalf of the Nationwide Class and Subclasses defined above, and designate Plaintiffs as the class representatives and Plaintiffs' counsel as counsel for the Nationwide Class and Subclasses;

B. award equitable and injunctive relief, including but not limited to, requiring Defendants to institute a medical monitoring program for Class and Subclass members, restitution, and disgorgement of profits;

C. award all actual, general, special, incidental, punitive, and consequential damages to which Plaintiffs and Class members are entitled;

D. award pre-judgment and post-judgment interest on such monetary relief;

- E. award reasonable attorneys' fees and costs; and
- F. grant such further and other relief that this Court deems appropriate.

JURY DEMAND

Plaintiffs and the Class demand a trial by jury on all issues so triable.

Dated: August 16, 2021

Respectfully Submitted,

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/s/ Jason M. Leviton

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EXHIBIT B

	First Name	Last Name	Device	State
1	Diana	Lapham	Philips DreamStation GO CPAP, APAP	AK
2	Elliott	Baez	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
3	Adam	Berry	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
4	Rodney	Bragg	Philips DreamStation ASV	AL
5	Allandra	Carpenter	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
6	George	Elijah	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
7	Mark	English	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
8	Coby	Hirschler	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
9	Ernest	Holland	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
10	Charmaris	Mack	REMStar System One	AL
11	Darryl	Mann	Philips SystemOne, ASV4	AL
12	Justin	Messick	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
13	Jack	Morgan	Philips REMStar SE Auto CPAP	AL
14	Billy	Ramsey	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
15	John	Wynn	Philips DreamStation CPAP, Auto CPAP, BiPAP	AL
16	Marcus	Gardner	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
17	Gary	Garrett	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
18	Matt	Jones	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
19	Christina	Mitchell	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
20	Robert Wayne	Morphew	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
21	Christopher	Parent	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
22	Hans	Pfeil	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
23	Scott	Sickles	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
24	Jason	Siebert	Philips DreamStation CPAP, Auto CPAP, BiPAP	AR
25	Michael	Birchall	Philips Trilogy 100 Ventilator	AZ
26	Sean	Douglas	Philips DreamStation CPAP, Auto CPAP, BiPAP	AZ
27	Jacob	Geller	Philips Trilogy 100 Ventilator	AZ
28	Toni	Hurley	Philips DreamStation CPAP, Auto CPAP, BiPAP	AZ
29	Sean	Purdy	Philips DreamStation CPAP, Auto CPAP, BiPAP	AZ
30	Sue H	Savitt	Philips DreamStation CPAP, Auto CPAP, BiPAP	AZ
31	Maria	Saylor	Philips DreamStation CPAP, Auto CPAP, BiPAP	AZ
32	Susan	Bartholome	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
33	Richard	Bartle	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
34	Madeleine	Belanger	Philips SystemOne (Q Series) Remstar Auto A-Flex	CA
35	Anita	Bell	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
36	Peter	Bernasconi	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
37	Patricia	Bess-Ellis	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
38	Susan	Bowman	Philips REMStar SE Auto CPAP	CA
39	Ulonda	Brewster	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
40	Anthony	Browne	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
41	Terry	Campbell	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
42	Joseph	Chambers	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
43	Susann	Coffman	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
44	Andre	Crenshaw	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
45	Salvatore	D'Amico	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
46	Brad	Davis	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
47	Loretta	Ervin	Philips Trilogy 100 Ventilator	CA
48	Wilfredo	Gonzalez	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
49	Steven	Goodwin	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
50	Thomas	Hardy	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
51	Paul	Kirchubel	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
52	Raquel	Mckuen	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
53	Stanley	Medeiros	Philips SystemOne Remstar Auto Aflex	CA
54	John	Miller	REMStar Auto A Flex	CA
55	Michael	Myers	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
56	William	O'Leary	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
57	Lou	Polcari	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
58	William	Torres	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA
59	John	Ucker	Philips DreamStation ASV	CA
60	Sherri	Wesley	Philips DreamStation CPAP, Auto CPAP, BiPAP	CA

61	Paul	Balon	Philips REMStar SE Auto CPAP	CO
62	Wally	Brauer	Philips DreamStation Auto CPAP	CO
63	Barry	Holliefield	Philips DreamStation CPAP, Auto CPAP, BiPAP	CO
64	Janet	Mullen	Philips Trilogy 100 Ventilator	CO
65	Andrew	Esposito	Philips DreamStation CPAP, Auto CPAP, BiPAP	CT
66	Linda	Ness	Philips DreamStation CPAP, Auto CPAP, BiPAP	CT
67	Kathryn	Piscitello	Philips DreamStation ASV	CT
68	Scott	Roncarti	Philips DreamStation CPAP, Auto CPAP, BiPAP	CT
69	Earle	Wright	Philips DreamStation CPAP, Auto CPAP, BiPAP	CT
70	Karla	Gilchrist Saunders	Philips DreamStation CPAP, Auto CPAP, BiPAP	DC
71	Charles	Pinck	Philips DreamStation GO CPAP, APAP	DC
72	Eric	Kraus	Philips DreamStation CPAP, Auto CPAP, BiPAP	DE
73	Michael	Pantano	REMStar Pro C Flex	DE
74	Joyce	Akridge	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
75	Richard	Bielinski	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
76	Mark	Blair	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
77	Cesar	Blanco	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
78	Billy	Bowen Jr	System one REMstar Pro C-flex+	FL
79	Nina	Boyd	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
80	Robert	Bradley	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
81	Carol	Bryant	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
82	Dana	Burkett	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
83	Andres	Cardona	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
84	Steve	Crowley	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
85	Sandra	Decker	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
86	Michael	Derrick	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
87	Vance	Devane	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
88	Rita	Gonzalez	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
89	Patricio	Gonzalez	Philips Garbin Plus, Aeris, LifeVent Ventilator	FL
90	Benjamin	Hart	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
91	Richard	Holloway	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
92	David	Hollows	Philips SystemOne, ASV4 & DreamStation CPAP	FL
93	Quintina	Holmes	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
94	Kenneth	Howse	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
95	Nancy	Infield	Philips SystemOne (Q Series)	FL
96	Mary	Klett	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
97	Ronald	Knight	Philips REMStar SE Auto CPAP	FL
98	Richard	Maya	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
99	Estrilia	Merry	Philips Trilogy 100 Ventilator	FL
100	Tyrone	Millen	Philips REMStar SE Auto CPAP	FL
101	Ron	Palermo	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
102	Norma	Pérez	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
103	Karen	Perkins	Philips DreamStation GO CPAP, APAP	FL
104	Lewis	Piper	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
105	Bart	Plaskoff	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
106	David	Pruitt	Philips DreamStation CPAP, Auto CPAP, BiPAP & REMstar	FL
107	Freddie	Rohland	Philips Auto BiPAP	FL
108	Henry	Rosenfelder	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
109	Michael	Rossignol	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
110	Miki	Sigmon	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
111	Brian	Smith	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
112	William	Taylor	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
113	Kathy	Thomas	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
114	Danial	Turner	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
115	Joseph	Underwood	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
116	Karl	Welhart	Philips DreamStation CPAP, Auto CPAP, BiPAP	FL
117	Clyde	Gilbert	Philips REMStar SE Auto CPAP	GA
118	Lloyd	Grant	Philips REMStar SE Auto CPAP (System One)	GA
119	Bruce	Kubler	Philips DreamStation CPAP, Auto CPAP, BiPAP	GA
120	Walter	Notheis	Philips DreamStation ASV	GA
121	Michael	Slentz	Philips DreamStation CPAP, Auto CPAP, BiPAP	GA

122	Diane	Strickland	Philips DreamStation CPAP, Auto CPAP, BiPAP	GA
123	Dean	De Jesus	Philips DreamStation BiPAP	HI
124	Richard	Puhalla	Philips DreamStation CPAP, Auto CPAP, BiPAP	HI
125	David	Allen	Philips DreamStation CPAP, Auto CPAP, BiPAP	IA
126	James	Berg	Philips DreamStation CPAP, Auto CPAP, BiPAP	IA
127	Sandy	Dix	Philips DreamStation CPAP, Auto CPAP, BiPAP	IA
128	Douglas	Dix	Philips DreamStation CPAP, Auto CPAP, BiPAP	IA
129	Rich	Goodwin	Philips SystemOne (Q Series)	IA
130	Milne	Rundle	REMStar PRO-DOM	IA
131	Tim	Carpenter	Philips DreamStation CPAP	IL
132	Tishla	Daniel	Philips DreamStation CPAP, Auto CPAP, BiPAP	IL
133	Pattiyal	Lukose	Philips DreamStation CPAP, Auto CPAP, BiPAP	IL
134	Denis	Murphy	Philips DreamStation CPAP, Auto CPAP, BiPAP	IL
135	Dennis	Smentek	Philips DreamStation ASV	IL
136	Vicki	Tunks	Philips DreamStation CPAP, Auto CPAP, BiPAP & SystemOne BiPAP Auto	IL
137	Shawn	Woodruff	Philips DreamStation CPAP, Auto CPAP, BiPAP	IL
138	Neil	Younkin	Philips DreamStation CPAP, Auto CPAP, BiPAP	IL
139	Daryal	Higgins	Philips Trilogy 100 Ventilator	IN
140	Leroy	Langel	Philips DreamStation CPAP, Auto CPAP, BiPAP	IN
141	Stacy	Smith	Philips DreamStation CPAP, Auto CPAP, BiPAP	IN
142	Andrew	Swain	Philips DreamStation CPAP, Auto CPAP, BiPAP	IN
143	Nancie	Veldhuizen	Philips DreamStation CPAP, Auto CPAP, BiPAP	IN
144	Tony	Allred	Philips DreamStation CPAP, Auto CPAP, BiPAP	KS
145	Andrew	Fisher	Philips DreamStation CPAP, Auto CPAP, BiPAP	KS
146	Brent	Holladay	Philips DreamStation CPAP, Auto CPAP, BiPAP	KS
147	Adam	Ricketts	Philips DreamStation CPAP, Auto CPAP, BiPAP	KS
148	Rebecca	Vallejo	Philips DreamStation CPAP, Auto CPAP, BiPAP	KS
149	Mia	Coleman	Philips DreamStation CPAP, Auto CPAP, BiPAP	KY
150	Earlene	Conner	Philips DreamStation CPAP, Auto CPAP, BiPAP	KY
151	Lagena	Ison	Philips DreamStation CPAP, Auto CPAP, BiPAP	KY
152	Terry	Jackson	Philips SystemOne, ASV4	KY
153	Jacob	Klein	Philips DreamStation GO CPAP, APAP	KY
154	Brianna	Ledbetter	Philips DreamStation CPAP, Auto CPAP, BiPAP	KY
155	Aaron	Mason	Philips DreamStation CPAP, Auto CPAP, BiPAP	KY
156	Jose	Rodriguez	Philips DreamStation CPAP, Auto CPAP, BiPAP	KY
157	Larry	Stromberg	Philips Trilogy 100 Ventilator	KY
158	Anthony	Antoine	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
159	Stephanie	Dove	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
160	Shannon	Finley	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
161	Scott	Hill	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
162	Levert	Kemp	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
163	Fawad	Khan	Philips DreamStation GO CPAP, APAP	LA
164	Marjorie	Mcgee	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
165	Mary	Mingo	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
166	Keith	Pellerin	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
167	Pedro	Ramos	Philips REMStar SE Auto CPAP	LA
168	Christian	Rice	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
169	David	Rollins	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
170	Jairo	Santanilla, Sr.	Philips DreamStation CPAP, Auto CPAP, BiPAP	LA
171	Scott	Bordeleau	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
172	Lennart	Bourin	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
173	Elizabeth	Chaves	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
174	Francis	Crowley	Philips REMStar SE Auto CPAP & DreamStation	MA
175	Jessica	Deisenrieder	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
176	Mark	Horenstein	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
177	Carol	Larkin	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
178	Christopher	Mackin	Philips DreamStation CPAP, Auto CPAP, BiPAP & DreamStation Go	MA
179	Seth	Mills	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
180	Thomas	Patria	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
181	Deven	Pearson	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
182	Theresa	Stevenson	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA

183	Anne	Sullivan-Soydan	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
184	Nancy	Sutcliffe	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
185	Harry	Traxler li	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
186	Lori	Tritto	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
187	Melissa	Westbrook	Philips DreamStation CPAP, Auto CPAP, BiPAP	MA
188	James	Colbert	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
189	Robert	Ketchum	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
190	Alexander	Mehner	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
191	Gracie	Moss	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
192	Elliott	Ratliff	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
193	David	Sherman	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
194	Kenneth	Wease	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
195	Cathy	Whitten	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
196	John	Wood	Philips SystemOne (Q Series)	MD
197	Boris	Zusin	Philips DreamStation CPAP, Auto CPAP, BiPAP	MD
198	Peggy	Bayliss	Philips DreamStation CPAP, Auto CPAP, BiPAP	ME
199	William	Picher	Philips DreamStation CPAP, Auto CPAP, BiPAP	ME
200	Belinda	Conarty	Philips SystemOne, ASV4	MI
201	Yana	Freeman	Philips DreamStation CPAP, Auto CPAP, BiPAP	MI
202	Maurice	Groce	Philips DreamStation CPAP, Auto CPAP, BiPAP	MI
203	Eric	Heard	REMStar System One	MI
204	Crystal	Martin	Philips DreamStation CPAP, Auto CPAP, BiPAP	MI
205	Martin	Nowak	Philips DreamStation CPAP, Auto CPAP, BiPAP	MI
206	Bonnie	Schuon	Philips DreamStation ASV	MI
207	Rosie	Wade	Philips DreamStation CPAP, Auto CPAP, BiPAP	MI
208	Amy	Louhela	Philips DreamStation CPAP, Auto CPAP, BiPAP	MN
209	Pat	Spicer	Philips DreamStation ST, AVAPS	MN
210	James	Boyle	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
211	Delores	Brown	Philips DreamStation Auto CPAP	MO
212	Beverly	Brown	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
213	Charles	Coleman	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
214	Denise	Dunn	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
215	Selina	Jones-Kerney	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
216	Candace	Symons	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
217	Naima	Wartts	Philips DreamStation CPAP, Auto CPAP, BiPAP	MO
218	Debbie	Bass	Philips DreamStation CPAP, Auto CPAP, BiPAP	MS
219	Ivan	Foster	Philips DreamStation CPAP, Auto CPAP, BiPAP	MS
220	Angela	Harris	Philips DreamStation CPAP, Auto CPAP, BiPAP	MS
221	Kimberly	Morgan	Philips DreamStation CPAP	MS
222	Forrest	Stafford	Philips DreamStation CPAP	MS
223	Marion	Aldridge	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
224	Robert	Browning	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
225	Sandy	Bullard	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
226	Michele	Clark	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
227	Ronnie	Emory	Philips DreamStation ASV	NC
228	Michael	Friedman	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
229	Charles	Jones	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
230	Michael	Levi	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
231	Susan	Levi	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
232	Sal	Petruso	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
233	John	Scoff	Philips DreamStation CPAP, Auto CPAP, BiPAP	NC
234	Rose	Sullivan	Philips DreamStation ASV	NC
235	Gerald	Fleck	Philips DreamStation CPAP, Auto CPAP, BiPAP	NE
236	Robert	Mccollough	Philips DreamStation CPAP, Auto CPAP, BiPAP	NE
237	Shae	Baddour	Philips DreamStation CPAP, Auto CPAP, BiPAP	NH
238	William	Vlahos	Philips DreamStation CPAP, Auto CPAP, BiPAP	NH
239	Andrew	Christopher	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
240	Antonio	Demarco	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
241	Susanne	Dennis	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
242	Alvaro	Duenas	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
243	Mario	Gillio	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ

244	Lori	Guido	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
245	Stephanie	Henderson	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
246	Lonnie	Moore	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
247	Steven	Muller	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
248	Vivian	Ordner	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
249	Jason	Schultz	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
250	Adam	Seidman	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
251	William	Slavin	Philips DreamStation CPAP, Auto CPAP, BiPAP	NJ
252	Darryl	Fortson	Philips DreamStation Auto CPAP & (2) BiPAP	NV
253	Katrina	Fries	Philips SystemOne, ASV4	NV
254	Lois	Grant	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
255	Avner	Mandler	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
256	Judy	Mantooth	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
257	Tandra	Martinez	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
258	Susan	Mayle	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
259	Bobbie	Norred	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
260	Matthew E	Osa	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
261	Vincent	Panuccio	Philips SystemOne (Q Series)	NV
262	John	Poland	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
263	Jackie	Richardson	Philips DreamStation CPAP, Auto CPAP, BiPAP	NV
264	Brian	Seitz	Philips DreamStation CPAP	NV
265	Yasser	Ali	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
266	Peter	Arlotta	Philips DreamStation GO CPAP, APAP	NY
267	Carl	Cangialosi	Philips DreamStation ASV	NY
268	Joseph	Capparelli	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
269	James	Carroll	Philips SystemOne (Q Series)	NY
270	Phyllis	Domino	Philips Trilogy 100 Ventilator	NY
271	William	Frantz	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
272	Vicky	Gallo	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
273	Thomas	Gramuglia	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
274	Peter	Guastamacchia	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
275	Thomas	Kelly	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
276	Vicki	Kidd-Juma	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
277	Kathryn	Kocurek	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
278	Bruce	Korotkin	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
279	Luigi	Lifrieri	Philips DreamStation ST, AVAPS	NY
280	Angela	Scunziano	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
281	Luke	Sinclair	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
282	Grant	Taylor	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
283	William	Weller	Philips REMStar SE Auto CPAP	NY
284	Robert	Zablinis	Philips DreamStation CPAP, Auto CPAP, BiPAP	NY
285	Larry	Combs	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
286	Deborah	Dear	Philips SystemOne, ASV4	OH
287	Molly	Foraker	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
288	James	Hepburn	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
289	Richard	Jones	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
290	Laura	Mitchell	Philips DreamStation ST, AVAPS	OH
291	Tammy	Nunnery	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
292	Robert	Pfeffenberger	Philips DreamStation ST, AVAPS	OH
293	Douglas	Sandorf	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
294	Sherry	Sprague	Philips SystemOne (Q Series) BiPAP Pro	OH
295	Matthew	Ward	Philips DreamStation CPAP, Auto CPAP, BiPAP	OH
296	Maria	Hilton	Philips DreamStation CPAP, Auto CPAP, BiPAP	OK
297	Mark	Ketchum	Philips SystemOne (Q Series)	OK
298	Gary	Brokaw	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR
299	Kevin	Dearth	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR
300	Margaret	Hall	Philips Trilogy 100 Ventilator	OR
301	Terry	Hummel	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR
302	Terry	Johnson	Philips DreamStation ASV	OR
303	Gary	Kots	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR
304	Marla	Matlock	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR

305	Bob	Peavler	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR
306	Kendall	Uhlenhopp	Philips DreamStation CPAP, Auto CPAP, BiPAP	OR
307	Feliciano	Angeli	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
308	Karon	Behlin	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
309	Stephen	Burns	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
310	Gene	Carr	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
311	Armonde	Casagrande	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
312	Charles	Cooper	Philips DreamStation ASV	PA
313	Joseph	Corrato	Philips SystemOne, ASV4	PA
314	Paul	Crispin	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
315	Donald	Cubler	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
316	David	Dienert	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
317	Patricia	Digangi	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
318	Jane	Edel	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
319	Mark	Ferguson	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
320	Dena	Focht	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
321	William	Garcia	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
322	Rob	Grenier	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
323	Russell	Guthrie	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
324	Trevor	Hahn	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
325	Michael	Halick	Philips SystemOne (Q Series)	PA
326	Michelle	Harrison	Philips DreamStation ASV	PA
327	Kevin	Houck	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
328	Jonathan	Jones	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
329	Lynn	Koenck	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
330	David	Krueger	Philips DreamStation ST, AVAPS	PA
331	James	Laufenberg	Philips DreamStation Hum Core Pack DOM	PA
332	Lance	Lewis	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
333	Thomas	Love	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
334	Gustino	Martini	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
335	Patricia	Nardolillo	Philips DreamStation Auto CPAP	PA
336	Rocco	Piliero	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
337	Lisa	Piper-Smith	Philips Trilogy 100 Ventilator	PA
338	Joseph	Podlogar	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
339	Richard	Rauch Jr.	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
340	Mario	Reyes	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
341	Travis	Reynolds	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
342	Christopher	Rhodes	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
343	John	Siroki	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
344	Renn	Sminkey	Philips DreamStation ASV	PA
345	William	Tolan	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
346	Walter	Truckley, Jr.	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
347	Timothy	Wagner	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
348	Donna	Yount	Philips DreamStation CPAP, Auto CPAP, BiPAP	PA
349	Fernando	Arteaga	Philips DreamStation CPAP, Auto CPAP, BiPAP	PR
350	Antonio	Perez Bonano	Philips DreamStation CPAP, Auto CPAP, BiPAP	PR
351	Lawrence	Geller	Philips DreamStation CPAP, Auto CPAP, BiPAP	RI
352	Jeffrey	Whitman	Philips DreamStation CPAP, Auto CPAP, BiPAP	RI
353	Betty	Birchmore-Woods	Philips DreamStation CPAP, Auto CPAP, BiPAP	SC
354	James	Brunson	Philips DreamStation CPAP, Auto CPAP, BiPAP	SC
355	Robert	Crawford	Philips DreamStation CPAP, Auto CPAP, BiPAP	SC
356	James	Jones	Philips DreamStation CPAP, Auto CPAP, BiPAP	SC
357	Paul	Rogers	Philips DreamStation CPAP, Auto CPAP, BiPAP	SC
358	Anne	Temme	Philips DreamStation CPAP, Auto CPAP, BiPAP	SC
359	William	Woodard	Philips REMStar SE Auto CPAP	SC
360	Scott	Boatman	Philips REMStar SE Auto CPAP	TN
361	Michael	Curry	Philips DreamStation Auto CPAP	TN
362	Victor	Green	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
363	Renee	Hendrian	Philips DreamStation Auto CPAP	TN
364	Aaron	Hunt	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
365	Jason	Krause	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN

366	Ryan	Long	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
367	Carmela	Merriman	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
368	Sean	Pierce	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
369	Chris	Piersol	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
370	Brian	Ranger	Philips DreamStation Auto CPAP	TN
371	Barbara	Santomauro	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
372	Adam	Snyder	Philips DreamStation CPAP, Auto CPAP, BiPAP	TN
373	Stephen	Sterback	Philips Continuous Flow	TN
374	Byron	Anderson	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
375	Mark	Barnett	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
376	Estella	Carter	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
377	Christopher	Chenevert	Philips SystemOne (Q Series)	TX
378	Barbara	Davidson	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
379	Juan	Delgado	Philips DreamStation ST, AVAPS	TX
380	Brian	Fuller	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
381	Fernando	Gonzalez	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
382	Colby	Jarrett	System One BiPAP AutoSV Adv SystemOne	TX
383	Troy	Jones	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
384	Diane	Kaufman	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
385	Nathan	Martinez	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
386	Paul	Panzer	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
387	Davis	Parsons	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
388	Wayne	Perritt	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
389	Charles	Steele	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
390	Michael	Stephens	Philips SystemOne, ASV4	TX
391	Joann	Vallejo	Philips DreamStation	TX
392	Steven	Wagner	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
393	Wesley	Williams	Philips DreamStation CPAP, Auto CPAP, BiPAP	TX
394	Melissa	Wardrop	Philips Trilogy 100 Ventilator	UT
395	Nancy	Butler	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
396	Orval	Cottrill	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
397	Dale	Duchene	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
398	Mariana	Eastwood Hatch	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
399	Joshua	Ferguson	Philips SystemOne (Q Series)	VA
400	Charlie	Martin	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
401	John	Mason	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
402	Aimee	Morrissey	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
403	Delano	Reid	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
404	Cameron	Rose	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
405	Steven	Schultz	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
406	Sherry	Slayton	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
407	Eileen	Suehr	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
408	Annette	Torregrosa	Philips DreamStation CPAP, Auto CPAP, BiPAP	VA
409	Melinda	Beebe	Philips DreamStation CPAP, Auto CPAP, BiPAP	VT
410	Korbin	Hayes	Philips DreamStation ASV	VT
411	Robert	Anderson	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
412	Vicki	Bowles	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
413	Dustin	Caldart	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
414	Laroi	Carter, Jr.	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
415	Kay	Cockerill	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
416	Elizabeth	Engel	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
417	Marcy	Engelstein	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
418	Kirsten	Gillespie	Philips DreamStation CPAP, Auto CPAP, BiPAP	WA
419	Pat	Lannoye	Philips REMStar SE Auto CPAP	WA
420	Duane	Alt	Philips SystemOne, ASV4	WI
421	Michele	Falk	Philips REMStar SE Auto CPAP	WI
422	Alan	Owan	Philips DreamStation CPAP, Auto CPAP, BiPAP	WI
423	Carlos	Romero	Philips DreamStation CPAP, Auto CPAP, BiPAP	WI
424	Leanne	Sandmeyer	Philips DreamStation CPAP, Auto CPAP, BiPAP & DreamStation Go	WI
425	Scott	Tiedke	Philips DreamStation CPAP	WI
426	Malena	Keneda	Philips DreamStation CPAP, Auto CPAP, BiPAP	WV

427	Douglas	Landers	Philips DreamStation CPAP	WV
428	Mark	Pickens	Philips DreamStation CPAP, Auto CPAP, BiPAP	WV
429	Michael	Spencer	Philips DreamStation CPAP, Auto CPAP, BiPAP	WV
430	Todd	Tyree	Philips DreamStation CPAP, Auto CPAP, BiPAP	WV
431	Thomas	Vallaningham	Philips DreamStation Auto CPAP	WV
432	Rachael	Dimaio	Philips DreamStation CPAP, Auto CPAP, BiPAP	WY

EXHIBIT B

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October 8, 2021

VIA EMAIL

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Re: Conley –Demand Letter

Dear Counsel:

I write in response to your letter dated September 8, 2021, in which you purport to notify Philips North America LLC ("Philips NA") and Philips RS North America LLC ("Philips RS NA") (collectively, "Philips") of a potential claim on behalf of your client, Daniel F. Conley, and purportedly on behalf of hundreds of individuals identified in Exhibit B to your letter and of "all similarly situated U.S. purchasers of the above-described Hazardous Devices" (collectively, "Plaintiffs") under "under *all* state consumer protection statutes in the United States that require or may require such notice, including Alabama Deceptive Trade Practices Act (Ala. Code §§ 8-19-1, *et seq.*); Alaska Unfair Trade Practices and Consumer Protection Act (Alaska Stat. §§ 45.50.471, *et seq.*); California's Consumer Legal Remedies Act (Cal. Civ. Code § 1750), California's Song-Beverly Act (Cal. Civ. Code § 1790 *et seq.*), Florida Deceptive and Unfair Trade Practices Act (Fla. Stat. §§ 501.201 *et seq.*), Georgia Fair Business Practices Act (Ga. Stat. Ann. §§ 10-1-390, *et seq.*), Illinois Consumer Fraud Act (815 Ill. Comp. Stat. 505/1, *et seq.*), Indiana Deceptive Consumer Sales Act (Ind. Code §24-5-0.5-2 *et seq.*), Maine Unfair Trade Practices Act (Me. Rev. Stat. Ann. Tit. 5, §§ 205A, *et seq.*), Massachusetts Consumer Protection Act (Mass. Gen. Laws ch. 93A, §§ 1, *et seq.*), Michigan Consumer Protection Act (Mich. Comp. Laws § 445.903 *et seq.*), Mississippi Consumer Protection Act (Miss. Code Ann. §§ 75-24-1, *et seq.*), New York GBL §§ 349 -350, North Carolina Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. §§ 75-1.1, *et seq.*), Ohio Consumer Sales Practices Act (Ohio Rev. Code Ann. §§ 1345.01, *et seq.*), Pennsylvania Unfair Trade Practices and Consumer Protection Law (73, Pa. Cons. Stat. Ann. §§ 201-1, *et seq.*), the Texas Deceptive Trade Practices- Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.01, *et seq.*, West Virginia Code §§ 46A-6-101, *et seq.*, and Wyoming Consumer Protection Act (Wyo. Stat. Ann. §§ 40-12-101 *et seq.*)" (emphasis added).

As a threshold matter, your purported notice is clearly defective to the extent it seeks to notify Philips of the claims of your clients and others "similarly situated" under a litany of state consumer protection statutes. Your notice clearly is insufficient to provide notice of a claim under the many state warranty statutes tacked on to the end of your letter, given that you fail to explain which statutes apply to which of your clients or identify how any of the statutes you list have been violated.

Further, your notice is insufficient to constitute a compliant demand notice under statutes requiring plaintiffs to serve a compliant demand notice *prior* to filing suit, because it was sent weeks *after* your clients filed suit, rendering it defective. *See, e.g.* M.G.L. ch. 93A, § 9 (requiring notice "30 days prior to filing suit."); Cal. Civ. Code § 1782 (a) (notice and demand required "[t]hirty days or more prior to the commencement of an action for damages"); Ga. Stat. Ann. § 10-1-399(b) (demand must be

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delivered “[a]t least 30 days prior to the filing of any such action”); Ind. Code §§ 24-5-0.5-5 and 24-5-0.5-2(a)(5)-(8)(notice and demand required “30 days prior to filing suit.”); Tex. Bus. & Com. Code § 17.505 (a) (requiring that, “[a]s a prerequisite to filing a suit seeking damages under [the DTPA] . . . a consumer shall give written notice to the person at least 60 days before filing the suit”); Me. Rev. Stat. Ann. tit. 5 § 213(1-A)(demand must be delivered “[a]t least 30 days prior to the filing of an action for damages”); *Broderick v. Dairyland Ins. Co.*, 2012 WY 22, ¶ 22, 270 P.3d 684, 692 (Wyo. 2012) (“An uncured unlawful deceptive trade practice is defined as an unlawful deceptive trade practice of which the consumer ‘has given notice to the alleged violator pursuant to W.S. § 40–12–109’ and either no offer to cure has been made within 15 days or there has been no cure within a reasonable amount of time after the acceptance of the offer.”) (citing Wyo. Stat. Ann. § 40–12–102(a)(ix)); Miss. Code § 75-24-15(2) (“In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General,” which includes pre-suit notice); Ala. Code § 8-19-10(e) (requiring notice “[a]t least 15 days prior to the filing of any action under this section”); Alaska Stat. § 45.50.535 (b)(requiring pre-suit notice where, as here, the consumer seeks an injunction).

The letter also fails to reasonably describe the unfair or deceptive act or practice relied upon and the injury suffered, including by failing to provide basic information about the nature of the transaction at issue or your clients’ alleged reliance. *See, e.g.*, M.G.L. ch. 93A, § 9 (requiring, inter alia, that the pre-litigation “written demand for relief... reasonably describ[e] the unfair or deceptive act or practice relied upon and the injury suffered.”); Cal. Civil Code § 1782(a)(1) (demand must “[n]otify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the *particular* alleged violations of Section 1770.”) (emphasis added); Tex. Bus. & Com. Code § 17.505(a) (demand must advise “the person in reasonable detail of the consumer’s specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys’ fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant”); Ga. Stat. Ann. § 10-1-399(b) (demand must “identify[] the claimant and reasonably describe[e] the unfair or deceptive act or practice relied upon and the injury suffered”); Wyo. Stat. Ann. § 40-12-109 (demand “shall state fully the nature of the alleged unlawful deceptive trade practice and the actual damage suffered therefrom.”); Me. Rev. Stat. Ann. tit. 5 § 213(1-A) (demand must “identify[] the claimant and reasonably describe[e] the unfair and deceptive act or practice relied upon and the injuries suffered”); Ala. Code § 8-19-10(e) (demand must “identify[] the claimant and reasonably describe[e] the unfair or deceptive act or practice relied upon and the injury suffered”).

Notably, the letter fails to provide any information at all about the unnamed “similarly situated” individuals on whose behalf you purport to assert this claim. Thus, the letter fails to describe, among other key elements of import, with respect to any of these “similarly situated” individuals, whether or which received reimbursement for some or all of any payments made from a government entity or third party, what role (if any) each individual played in the selection of the referenced devices (which are prescription medical devices sold, leased or provided by a durable medical device provider or insurer and not sold directly by Philips to individuals), the identity of the device used by each individual, its current condition, and/or the nature and history of each individual’s alleged use of the device. The absence of any such information in the letter reflects another fundamental failure to undertake to meet the requirements of a written demand as set out in the various statutes you cite.

For these reasons, your letter also lacks sufficient detail to satisfy the basic elements of an unfair practices claim under the statutes you cite, which require a plaintiff to prove an unfair or deceptive practice, causation, and injury. *See, e.g., Fitzpatrick v. Gen. Mills, Inc.*, 635 F.3d 1279, 1283 (11th Cir. 2011) (Fla. law) (plaintiff must prove “that an objective reasonable person would have been

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deceived"); *In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008) (Minn. law) (defendant can introduce evidence of non-reliance to negate causal nexus); *Mayberry v. Bristol-Meyers Squibb Co.*, 2009 WL 5216968, at *8-9 (D.N.J. Dec. 30, 2009) (Miss. law) (dismissing claim under Mississippi statute upon finding of insufficient allegations of a causal connection between the defendants' deception and the plaintiffs' injuries); *Tiismann v. Linda Martin Homes Corp.*, 637 S.E.2d 14, 17 (Ga. 2006) (to prevail under the GFBPA, a plaintiff must prove an unfair or deceptive practice, causation, and injury); *Heller Fin. v. INA*, 573 N.E.2d 8 (Mass. 1991) (plaintiff must show causal connection between misrepresentation and injury); *McCormick Piano & Organ Co. v. Geiger*, 412 N.E.2d 842, 853 (Ind. App. 1980) (defining actual damages in an action under the IDCSCA as "the difference in value between that which the plaintiff parted with and that which he received"); W. Va. Code § 46A-6-106(b) (plaintiff who bases a claim on an affirmative misrepresentation must show that it "caused him or her to enter into the transaction," and that, for an omission, the plaintiff must show that his or her loss was "proximately caused" by the omission.").

Given the defects and utter lack of detail in your purported demand, Philips is under no obligation to provide an exhaustive account of the many fatal defects inherent in the claims you purport to assert under the laundry list of statutes you cite. However, Philips notes that your purported claims fail to satisfy a variety of additional requirements under many of those statutes. For example, the purported claims also would fail under those statutes which require a plaintiff to prove reliance. *See, e.g., Hardison v. Biomet, Inc.*, No. 5:19-CV-00069-TES, 2020 WL 4334108, at *19 (M.D. Ga. July 27, 2020) ("claimant alleg[ing] that a defendant violated the GFBPA as a result of a misrepresentation . . . must demonstrate that he was injured as the result of his intermediary's reliance upon the alleged misrepresentation"); *Bumpers v. Cmty. Bank*, 747 S.E.2d 220 (N.C. 2013) (when a claim under North Carolina unfair and deceptive practices act stems from an alleged misrepresentation, the plaintiff must show reasonable reliance in order to demonstrate proximate causation); *Princess Cruise Lines, Ltd. v. Superior Court*, 101 Cal. Rptr. 3d 323 (Cal. Ct. App. 2009) (interpreting California Consumer Legal Remedies Act as imposing reliance requirement); *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186 (Pa. 2007) (reliance is an element of claim under Pennsylvania UDAP); *GxG Management, LLC v. Young Bros. and Co., Inc.*, 457 F. Supp. 2d 47 (D. Me. 2006) (granting defendant's motion for summary judgment on a UDAP claim because reliance was not shown); *Evans v. Ameriquest Mortg. Co.*, 2003 WL 734169, at *3 (Mich. App. 2003) (noting that several of the "unfair, unconscionable, or deceptive methods, acts or practices" actionable under statute "expressly require some form of reasonable reliance by the consumer").

Further, state consumer protection statutes often exempt transactions and conduct subject to regulatory oversight and authorization, like the medical devices at issue here. These claims involve medical devices and a related recall, all of which arise in a heavily regulated area with direct oversight by the U.S. Food and Drug Administration (the "FDA"). Your letter fails to address or reconcile the provisions of the cited statutes that exempt transactions subject to regulatory oversight or specifically authorized by regulatory authorities. *See, e.g.,* O.C.G.A. § 10-1-396(1) (Georgia Fair Business Practices Act does not apply to "[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States."); M.G.L. ch. 93A, § 3 (exempting "transactions or actions otherwise permitted under laws as administered by" state and federal regulatory boards, but Massachusetts courts have read this exemption narrowly to require the defendant to "show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive."); 815 Ill. Comp. Stat. § 505/10b(1) (exempting "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."); Mich. Comp. Laws § 445.904(1) (exempting "a transaction or conduct specifically authorized under laws administered by a regulatory board").

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Some states also require a plaintiff to prove how the alleged conduct harms the general consuming public. *See, e.g., Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000) (imposing public interest test under Minnesota statute); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.Y.S.2d 20 (N.Y. 1995) (New York unfair practices law requires a showing of a broader impact on consumers at large); *Marrale v. Gwinnett Place Ford*, 271 Ga. App. 303, 306-07 (1995) (under Georgia statute, harm to public must be shown because statute should not be treated as an additional remedy for private wrongs).

Finally, to the extent Plaintiffs seek to maintain a class action under the Mississippi statute, such an action is impermissible under Miss. Code § 75-24-15(4) ("Nothing in this chapter shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.").

For these principal reasons, Philips is under no obligation to respond to your letter as your purported claims are not actionable under the statutes you cite and, to the extent those statutes require notice as a prerequisite to state a claim or to seek multiple damages, your letter fails to satisfy the timing and content requirements applicable to such demand letters.

By way of further response, Philips notes that, as the devices at issue are medical devices, as noted above, the recall process is subject to oversight by the FDA. FDA authorization is needed for the design changes that will be required for several of the key repair and replacement options that Philips Respironics has proposed. Last month, Philips received authorization from the FDA to commence rework of the affected first-generation DreamStation devices. Philips notes that it has implemented a registration process with respect to the repair/replacement program that it has made available to all customers affected by the recall. That program is designed to provide for the repair or replacement of affected devices. If your clients have not done so already, they should register for the repair/replacement program to avail themselves of the benefits of that program as a means of addressing the issues raised by the recall that are the subject of your deficient letter. They can register online at <https://www.philipssrcupdate.expertinquiry.com/>.

Sincerely,

/s/ Daniel S. Savrin

Daniel S. Savrin

DSS/

EXHIBIT C

**LYNCH
CARPENTER**



SEEGERWEISS LLP

LEVIN SEDRAN & BERMAN LLP
Counsellors at Law and Proctors in Admiralty

May 16, 2022

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Dear Counsel:

On behalf of clients represented by Co-Lead Counsel, Plaintiffs' Steering Committee, Co-Liaison Counsel, the Settlement Committee, the Leadership Development Committee, and the Plaintiffs' Time and Expense Subcommittee, including those clients listed in filed complaints and listed or will be listed on the tolling agreements with Philips (collectively "Plaintiffs"), we are providing you notice of Plaintiffs' claims prior to the filing of forthcoming consolidated or master complaints. As you are aware, Plaintiffs have asserted claims against Defendants Philips Koninklijke, N.V., Philips North America, and Philips RS North America, and other Philips-related entities (collectively "Philips"), seeking damages and other relief related to Philips' recall of CPAP machines, BiPAP machines, and ventilators ("Recalled Products") in June 2021, due to the presence of a toxic and carcinogenic PE-PUR foam within the Recalled Products that degrades and can enter the airways of the user. We are sending this demand letter to comply with certain requirements under state law for various consumer protection laws and warranty

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laws. By sending this letter, we are not conceding that any of these demand requirements apply in this matter, as Philips has been on notice of nationwide class action claims *for nearly a year* with hundreds of lawsuits brought against Philips.

The basis for the claims is fully set forth in the complaints that have been filed to date, but to briefly summarize, Plaintiffs are consumers who used the Recalled Products and have out-of-pocket costs and other injuries in connection with their use of the Recalled Products, including costs associated with the purchase or rental of the Recalled Product, costs of purchasing accessories such as replacement masks, hoses, and other accessories, and costs of obtaining a replacement device. Moreover, Plaintiffs have all been exposed to toxic carcinogens that require ongoing medical monitoring and further medical costs. Philips has long been aware of the problems with the Recalled Products but did nothing until the recall in June 2021.

I. Notice of Claims

This letter provides written notice of Plaintiffs' claims for violation of the following consumer protection laws. All claims are brought on behalf of Plaintiffs and all those similarly situated.

- Alabama Deceptive Trade Practices Act, Ala. Code. §§ 8-19-1, *et seq.*,
- Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Stat. §§ 45.50.471, *et seq.*,
- California Consumer Legal Remedies Act, Cal. Civ. Code. §§ 1750, *et seq.*
- Massachusetts General Laws Chapter 93A;
- Georgia Fair Business Practices Act, Ga. Code Ann. §§ 10-1-390, *et. seq.*
- Indiana Deceptive Consumer Sales Act, Ind. Code. §§ 24-5-0.5-1, *et seq.*
- Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, §§ 205A, *et seq.*
- Mississippi Consumer Protection Act, Miss. Code Ann. §§ 75-24-1, *et seq.*
- Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. Com. Code §§ 17.41, *et seq.*
- West Virginia Code §§ 46A-6-101, *et seq.*
- Wyoming Consumer Protection Act, Wyo. Stat. Ann. §§ 40-12-101, *et seq.*

This letter also provides notice on behalf of Plaintiffs and those similarly situated of a breach of the applicable warranty laws where the Recalled Products have been sold or provided.

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Plaintiffs, on behalf of themselves and those similarly situated, seek all available damages, including, without limitation, the return of the purchase price of their Recalled Products and all accessories with interest from the time they were purchased; the reimbursement for any and all costs associated with obtaining a replacement device; costs associated with ongoing medical monitoring; all available damages and penalties (including treble damages and punitive damages); reasonable costs and attorneys' fees; and any other damages ordered by the courts. In addition, Plaintiffs and the Class will seek appropriate injunctive and declaratory relief relating to the Recalled Products, including, without limitation, notice to the Class regarding the defect, and replacement or repair of the Recalled Products.

A. Alabama Deceptive Trade Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute deceptive acts or practices that violate Alabama Code § 8-19-5. Philips' violations include, but are not limited to, the following provisions:

- Ala. Code § 8-19-5(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;
- Ala. Code § 8-19-5(7): Representing that goods are of a particular standard, quality, or grade, if they are of another;
- Ala Code § 8-19-5(9): Advertising goods with intent not to sell them as advertised; and
- Ala Code § 8-19-5(27): Engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce.

Philips has failed to abide by its consumer protection obligations to Plaintiff John Cook and others in Alabama, and has failed to adequately compensate Plaintiffs for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all members of the Alabama Subclass set forth in the Class Action Complaint within 15 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

We note that the pre-suit notice requirement of this statute does not apply if Philips does not "maintain a place of business or keep assets within" Alabama. Ala. Code. § 8-9-10(e). We are unaware of any place of business maintained by Philips or assets kept by Philips in Alabama.

B. Alaska Unfair Trade Practices and Consumer Protection Act Demand

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Pursuant to Alaska Stat. § 45.50.535, Plaintiffs intend to seek an injunction against Defendants for their failure to reimburse others for the costs of replacement machines, failure to return the purchase price of the Recalled Products, and any other injunctive relief related to the recall as appropriate. Philips' actions constitute deceptive acts or practices that violate Alaska Stat. Ann. § 45.50.471. Philips' violations, include, but are not limited to, the following provisions:

- Alaska Stat. Ann. § 45.50.471(4): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that the person does not have;
- Alaska Stat. Ann. § 45.50.417(6): Representing that goods are of a particular standard, quality, or grade, if they are of another;
- Alaska Stat. Ann. § 45.50.417(8): Advertising goods with intent not to sell them as advertised; and
- Alaska Stat. Ann. § 45.50.417(12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing, or omitting a material fact with intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived, or damaged.

In addition to an injunction, Plaintiffs will also be seeking the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

C. California Consumer Legal Remedies Act Demand

Philips has violated and continues to violate numerous subsections of the Consumer Legal Remedies Act, including, but not limited to, the following:

- Cal. Civ. Code § 1770(a)(5): Representing that goods have characteristics, uses, and benefits which they do not have;
- Cal. Civ. Code § 1770(a)(7): Representing that goods are of a particular standard, quality, or grade, if they are of another;
- Cal. Civ. Code § 1770(a)(9): Advertising goods with intent not to sell them as advertised; and
- Cal. Civ. Code § 1770(a)(16): Representing that goods have been supplied in accordance with a previous representation when they have not.

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Philips has failed to abide by its consumer protection obligations to Plaintiffs and others from California, and has failed to provide adequate compensation for the damage caused to them by the Recalled Products. Plaintiffs demand full and appropriate relief for themselves and all members of the California within thirty (30) calendar days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and accessories, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory, treble damages, and punitive damages; and reasonable costs and attorneys' fees.

D. Georgia Fair Business Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute unfair or deceptive acts or practices that violate Ga. Code Ann. § 10-1-393(a). Additionally Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of unfair or deceptive practices:

- Ga. Code Ann. § 10-1-393(b)(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;
- Ga. Code Ann. § 10-1-393(b)(7): Representing that goods are of a particular standard, quality, or grade, if they are of another; and
- Ga. Code Ann. § 10-1-393(b)(9): Advertising goods with intent not to sell them as advertised.

Philips has failed to abide by its consumer protection obligations to Plaintiffs and others from Georgia and has failed to provide adequate compensation for the damages caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all Georgians within 30 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

We note that the pre-suit notice requirement of this statute does not apply if Philips does not "maintain a place of business or keep assets within" Georgia. Ga. Code Ann. § 10-1-399(b). We are unaware of any place of business or assets kept by Philips in Georgia.

E. Indiana Deceptive Consumer Sales Act Demand

Philips' actions described herein and in the Class Action Complaint constitute unfair, abusive, or deceptive acts, omissions, or practices under Indiana Code § 24-5-0.5-3. Additionally,

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Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of unfair or deceptive trade practices:

- Ind. Code. § 24-5-0.5-3(b)(1): That such subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have; and
- Ind. Code. § 24-5-0.5-3(b)(2): That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.

Philips has failed to abide by its consumer protection obligations to Plaintiffs and others from Indiana and has failed to provide adequate compensation to Plaintiffs and others from Indiana for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties, including statutory and treble damages, and reasonable costs and attorneys' fees.

We note that the sending of this notice is not required because Philips' deceptive acts are incurable and uncured.

F. Maine Unfair Trade Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute unfair or deceptive acts or practices that violate Me. Rev. Stat. Ann., tit. 5, § 207. Philips has failed to abide by its consumer protection obligations to Plaintiffs and others from Maine listed and has failed to provide adequate compensation for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief within 30 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs and attorneys' fees.

G. Massachusetts General Laws Chapter 93A Demand

Philips' actions described herein constitute unfair and deceptive business practices that violate Massachusetts General Laws Chapter 93A. Philips has violated c. 93A because, among other things, Philips knew or should have known that the defects were present in the Recalled Products, but knowingly and/or recklessly misrepresented to consumers that the Recalled Products were free from defects, were merchantable and fit for their ordinary purposes, and took no action to adequately warn Plaintiffs and others from Massachusetts or appropriately remedy the defects. Instead, Philips concealed and failed to warn customers and potential customers that

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the carcinogenic PE-PUR foam in the in Recalled Products can degrade and enter the airways of the Recalled Machines resulting in users breathing in toxic particles. Accordingly, Plaintiffs demands full and appropriate relief for all consumers from Massachusetts , including but not limited to actual and/or statutory damages per violation under c. 93A.

H. Mississippi Consumer Protection Act Demand

Philips' actions described herein and in the Class Action Complaint constitute unfair or deceptive trade practices that violate Miss. Code Ann. § 74-25-5(a). Additionally Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of unfair or deceptive trade practices:

- Miss. Code Ann. § 74-25-5(2)(e): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that h does not have;
- Miss. Code Ann. § 74-25-5(2)(f): Representing that goods are of a particular standard, quality, or grade, if they are of another; and
- Miss. Code Ann. § 74-25-5(2)(g): Advertising goods with intent not to sell them as advertised.

Philips has failed to abide by its consumer protection obligations and has failed to provide adequate compensation to Plaintiffs and the Mississippi Subclass for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief for all consumers from Mississippi including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties, and reasonable costs and attorneys' fees.

Pursuant to Miss. Code Ann. § 74-24-15(2), Plaintiffs request that Philips engage an informal dispute settlement program approved by the Mississippi Attorney General. If Philips is interested in participating in such a program, please advise.

I. Texas Deceptive Trade Practices Act Demand

Philips' actions described herein and in the attached Complaint constitute false, misleading, or deceptive acts or practices that violate Tex. Bus. & Com. Code § 17.46(a). Additionally, Philips' violations, include, but are not limited to, the following provisions which are intended to be illustrative of false, misleading, or deceptive practices:

- Tex. Bus. & Com. Code § 17.46(b)(5): Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not

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have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have;

- Tex. Bus. & Com. Code § 17.46(b)(7): Representing that goods are of a particular standard, quality, or grade, if they are of another; and
- Tex. Bus. & Com. Code § 17.46(b)(7): Advertising goods with intent not to sell them as advertised.

These acts in violation of Section 17.46 are actionable pursuant to Tex. Bus. & Com. Code § 17.50 (a)(1) because they were relied upon by Plaintiffs to their detriment. Philips actions as described herein also constitute breaches of express and implied warranties and unconscionable actions or an unconscionable course of action that are actionable pursuant to Tex. Bus. & Com. Code § 17.50 (a)(2) & (3).

Philips has failed to abide by its consumer protection obligations and has failed to provide adequate compensation to Plaintiffs and others from Texas for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief within 60 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including treble damages; and reasonable costs and attorneys' fees.

J. West Virginia Consumer Protection Act Demand

Philips' actions described herein and in the Class Action Complaint constitute unfair or deceptive trade practices that violate W. Va. Code, § 46A-6-10. Plaintiffs and others from West Virginia demand full relief to be provided within 45 days of the receipt of this letter including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties, including statutory damages, and reasonable costs and attorneys' fees.

K. Wyoming Consumer Protection Act Demand.

Philips' actions described herein and in the attached Class Action Complaint are deceptive trade practices that violate Wyo. Code. Ann. § 40-12-105. Philips' violations, include, but are not limited to:

- Wyo. Code Ann. § 40-12-105(a)(i): Represents that merchandise is of a particular standard, grade, style or model, if it is not;
- Wyo. Code Ann. § 40-12-105(a)(x): Advertises merchandise with intent not to sell it as advertised; and

- Wyo. Code Ann. § 40-12-105(a)(xv): Engages in unfair or deceptive acts or practices.

Philips has failed to abide by its consumer protection obligations to Plaintiffs and others from Wyoming, and has failed to provide adequate compensation to for the damage caused to them by Philips' Recalled Products. Based upon the above, Plaintiffs demand full and appropriate relief within 60 days of your receipt of this letter, including, without limitation, the return of the purchase price of the Recalled Products and accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device, all costs of ongoing medical monitoring, and all other available damages and penalties, and reasonable costs and attorneys' fees.

L. Breach of Warranties

This letter is also to provide you notice that Philips as breached its express or implied warranties as set forth herein and in the Class Action Complaint, in violation of the following laws:

Jurisdiction	Authority
Alabama	Ala. Code § 7-2-313, 7-2-314, <i>et seq.</i>
Alaska	Alaska. Stat. § 45.02.314, 45.02.725, <i>et seq.</i>
Arizona	Ariz. Rev. Stat. Ann. §§ 47-2313, § 47-2314, <i>et seq.</i>
Arkansas	Ark. Code Ann. §§ 4-2-314, <i>et seq.</i> ; Ark. Code Ann. § 4-2-313(1), <i>et seq.</i>
California	Cal. Comm. Code §§ 2313, 2314, <i>et seq.</i>
Colorado	Colo. Rev. Stat. §§ 4-2-313, 4-2-314, <i>et seq.</i>
Connecticut	Conn. Gen. Stat. Ann. § 42a-2-313, 42a-2-314 <i>et seq.</i>
Delaware	Del. Code Ann. tit. 6, §§ 2-313, 2-314, <i>et seq.</i> ;
District of Columbia	D.C. Code Ann. §§ 28:2-725, 28:2-314, <i>et seq.</i>
Florida	Fla. Stat. Ann. §§ 672.313, 672.314, <i>et seq.</i>
Georgia	Ga. Code Ann. §§ 11-2-313, 11-2-314, <i>et seq.</i> ;
Hawaii	Haw. Rev. Stat. §§ 490:2-313; 490:2-314, <i>et seq.</i>
Idaho	Id. Code §§ 28-2-313, 28-2-314, <i>et seq.</i>
Illinois	Ill. Comp. Stat. Ann. Ch. 810, 5/2-313, 5/2-314, <i>et seq.</i>
Indiana	Indiana Code Ann. §§ 26-1-2-3131, 26-1-2-314, <i>et seq.</i>
Iowa	Iowa Code Ann. §§ 554.2318, 554.2314, <i>et seq.</i>
Kansas	Kan. Stat. Ann. §§ 84-2-313, 84-2-314, <i>et seq.</i>
Kentucky	Ky. Rev. Stat. Ann. §§ 355.2-313, 355.2-314, <i>et seq.</i>
Louisiana	La. Civ. Code Ann. art. 2520, <i>et seq.</i> (and is liable for redhibitory defects); La. Rev. Stat. Ann. § 9:2800.58, <i>et seq.</i>
Maine	Me. Rev. Stat. Ann. tit. 11, §§ 2-313, 2-314, <i>et seq.</i>

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Maryland	Md. Code Ann., Com. Law §§ 2-313, 2-314, <i>et seq.</i>
Massachusetts	Mass. Gen. Laws Ann. Ch. 106, §§ 2-313, 2-314, <i>et seq.</i>
Michigan	Mich. Comp. Laws Ann. §§ 4440.2313, 440.2314, <i>et seq.</i>
Minnesota	Minn. Stat. Ann. §§ 336.2-313, 336.2-314, <i>et seq.</i>
Mississippi	Miss. Code Ann. §§ 75-2-313, 75-2-314, <i>et seq.</i>
Missouri	Mo. Rev. Stat. Ann. §§ 400.2-313, 400.2-314, <i>et seq.</i>
Montana	Mont. Code Ann. §§ 30-2-313, 30-2-314, <i>et seq.</i>
Nebraska	Neb. Rev. Stat. §§ 2-313, 2-314, <i>et seq.</i>
Nevada	Nev. Rev. Stat. §§ 104.2313, 104.2314, <i>et seq.</i> ;
New Hampshire	N.H. Rev. Stat. Ann. §§ 382-A:2-313, 382-A:2-314, <i>et seq.</i>
New Jersey	N.J. Stat. Ann. §§ 12A:2-313; 12A:2-314, <i>et seq.</i>
New Mexico	N.M. Stat. Ann. §§ 55-2-313(1); 55-2-314, <i>et seq.</i>
New York	N.Y. U.C.C. Law §§ 2-313, 2-314, <i>et seq.</i>
North Carolina	N.C. Gen. Stat. Ann. §§ 25-2-313, 25-2-314, <i>et seq.</i>
North Dakota	N.D. Cent. Code §§ 41-02-30, 41-02-31, <i>et seq.</i>
Ohio	Ohio Rev. Code Ann. §§ 1302.26, 1302.27, <i>et seq.</i>
Oklahoma	Okla. Stat. Tit. 12A, §§ 2-313, 2-314 <i>et seq.</i>
Oregon	Or. Rev. Stat. §§ 72.3130, 72.3140, <i>et seq.</i>
Pennsylvania	13 Pa. Stat. Ann. §§ 2313, 2314 <i>et seq.</i>
Puerto Rico	P.R. Laws. Ann. Tit. 31, § 3841, <i>et seq.</i>
Rhode Island	R.I. Gen. Laws §§ 6A-2-313, 6A-2-314, <i>et seq.</i>
South Carolina	S.C. Code Ann. §§ 36-2-313, 36-2-314, <i>et seq.</i>
South Dakota	S.D. Codified Laws §§ 57-A-2-313; 57A-2-314, <i>et seq.</i>
Tennessee	Tenn. Code Ann. §§ 47-2-313, 47-2-314, <i>et seq.</i>
Texas	Tex. Bus. & Com. Code Aim. §§ 2.313, 2.314, <i>et seq.</i>
Utah	Utah Code Ann. §§ 70A-2-313, 70A-2-314, <i>et seq.</i>
Vermont	Vt. Stat. Ann. tit. 9A, §§ 2-313, 2-314, <i>et seq.</i>
Virginia	Va. Code §§ 8.2-313, 8.2-314, <i>et seq.</i> ;
Washington	RCW §§ 62A.2-313, 62A.2-314 <i>et seq.</i> ;
West Virginia	W. Va. Code §§ 46-2-313, 46-2-314, <i>et seq.</i>
Wisconsin	Wis. Stat. Ann. §§ 402.313, 402.314, <i>et seq.</i>
Wyoming	Wyo. Stat. Ann. §§ 34.1-2-313, 34.1-2-314, <i>et seq.</i>

We look forward to your response.

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Respectfully,

LYNCH CARPENTER, LLP

/s/ Kelly K. Iverson
Kelly K. Iverson

LEVIN SEDRAN & BERMAN LLP

/s/ Sandra L. Duggan
Sandra L. Duggan

SEEGER WEISS LLP

/s/ Christopher A. Seeger
Christopher A. Seeger

**CHIMICLES SCHWARTZ KRINER &
DONALDSON-SMITH LLP**

/s/ Steven A. Schwartz
Steven A. Schwartz

EXHIBIT D

June 15, 2022

VIA E-MAIL

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Re: Demand Letter

Dear Counsel:

I write in response to your letter dated May 16, 2022, which you state was sent in an effort to “comply with certain requirements under state law for various consumer protection laws and warranty laws,” including pre-suit notice requirements.

As an initial matter, the letter fails to address, much less account for, the fact that Philips RS North America LLC (“Respironics”) has undertaken to remediate and cure the issues that are the genuine and proper subject of your letter by providing no cost repair and replacement of devices, to date, to over 1.1 million US-based device users. Such efforts were begun prior to the filing of suit by you or any other counsel and were undertaken entirely independent of your letter or that of any other counsel. Respironics is actively working to provide additional replacement devices, to obtain clearance from the FDA for additional replacement efforts, and where provision of a replacement device has not been approved and replacement in the foreseeable future appears impracticable, has communicated with the FDA about a potential refund program.

Additionally, the laws you reference in your letter set out specific requirements with respect to the provision of such *pre-suit* notice. Your letter—which acknowledges that it was sent nearly a year after the first suits were filed, and was tendered in anticipation of the June 20, 2022 deadline for filing a Consolidated Master Class Action Complaint in an MDL proceeding that had been pending for over seven (7) months—inherently does not comply with the referenced statutes’ requirements for the provision of *pre-suit* notice. The letter’s references to “filed complaints,” “the attached Complaint,” and “the attached Class Action Complaint” (though there were no attachments to the letter) reinforce both the failure to provide *pre-suit* notice as required by the referenced statutes and the perfunctory manner in which the letter was prepared and tendered.

The letter, as outlined below, also does not comply with other requirements of those statutes—or the spirit of those statutes—which contemplate the provision of material information about individual claimants and their individual alleged injuries to enable the pre-suit assessment of claims and to encourage the provision by the recipient of an offer to remediate or address the alleged claim to avoid litigation. Your

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perfunctory May 16, 2022 letter, accordingly, fails to meet the notice “requirements under state law” that are referenced in that very same letter.

Moreover, we note that the letter was improperly addressed to several entities that are referred to collectively as “Philips” (i.e., “Philips Koninklijke, N.V., Philips North America, and any other unnamed “Philips-related entities”). Ltr. at 1. Only Respireonics was responsible for the manufacture, distribution and warranty of the devices that are the subject of your letter. Thus, Respireonics is the only proper addressee. Tellingly, no effort is made in the letter to explain why there would even be a basis for a claim against the other “Philips” entities, reflective of the fact that they are not proper subjects of your letter or the claims that have been made or that are planned to be incorporated into the forthcoming Consolidated Master Class Action Complaint.

With respect to Respireonics, the letter fails to acknowledge or account for the material efforts made by Respireonics to remediate or cure matters related to the CPAP machines, BiPAP machines, and ventilators (hereinafter referred to as “Respireonics Medical Devices”) that, while not identified with any detail, are understood to be the focus of your letter. As the Respireonics Medical Devices are medical devices, Respireonics is required to obtain clearance from the U.S. Food and Drug Administration (FDA), which has primary jurisdiction with respect to the devices at issue, for the provision of repaired or replacement devices. Respireonics actively worked—and continues to work—to obtain clearance for the provision of repaired or replacement devices for the Respireonics Medical Devices. To date, as noted, over 1.1 million replacements for Respireonics Medical Devices have been provided to US-based device users.¹

While a two-year warranty against defects in material and workmanship was typically provided with Respireonics Medical Devices, in conjunction with the recall, Respireonics has made its no-cost repair and replacement program available to *all* device users regardless of whether the device was within the warranty period or otherwise would not qualify for repair or replacement under the warranty as a legal or factual matter. While Respireonics would have legal and factual defenses with respect to those individuals in a litigation context, including that their claims are beyond the applicable warranty period, and defenses including, among others, concerning care and use of the devices, damage caused by accident, misuse, abuse, alteration, water ingress or other handling and use issues, the nature of an alleged “defect,” matters unrelated to material and workmanship, harm caused to the device by third parties or products manufactured by third parties, Respireonics has put aside such defenses solely for purposes of the repair and replacement program and undertaken to provide repaired or replacement devices to all device users (to the extent cleared to do so by the FDA).²

In short, unlike in a litigated context, Respireonics is offering—where permitted to do so by the FDA—a repaired or replacement device to all Respireonics Medical Device users. That offer has been fulfilled

¹ These basic facts confirm the patent inaccuracy of your contention that neither Respireonics nor other Philips entities took action to provide an “appropriately remedy” in response to what you identify as purported “defects.” Ltr. at 6. Rather, this *post facto* appears designed to create the appearance of compliance with the state law notice requirements, and the appearance of an issue that has not been remediated when Respireonics has, independently, been working on remediation. The letter is improper and cannot serve as a basis for the provision of notice or the pursuit of enhanced damages or attorneys’ fees.

² For avoidance of doubt, Respireonics, as well as the other Philips entities, deny any liability related to the allegations raised in your letter and reserve all rights to assert any available defenses and objections should you elect, as anticipated, to further pursue litigation of the purported claims referenced in your legally deficient letter.

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to over 1.1 million US-based device users and stands as remediation and a cure for any and all claims—warranty or otherwise—that they might have possessed. For others whose device has been registered and are in process—the provision of devices will, per the FDA, follow a prioritization approach based on information provided by or on behalf of the device users. Those repairs/replacements that are in the process of being fulfilled will, too, as noted herein, stand as remediation and cure for any and all claims (warranty or otherwise). While the repair and replacement program was instituted independent from any litigation, the repair and replacement program and its associated benefits to device users stands as an offer to cure—and actual cure—of any and all claims purported to be addressed in your letter.

Subject to the foregoing, we outline below major deficiencies in your letter which highlight why the letter otherwise does not “comply with certain requirements under state law for various consumer protection laws and warranty laws.”

I. The Letter Fails to Meet Notice Requirements

A. Notice is Required Prior to Suit; Notice Sent Over Seven (7) Months After the MDL was Formed and Almost Eleven (11) Months After the Filing of the First Lawsuits Is Non-Compliant

As noted above, your letter and the purported notice contained therein is non-compliant as a matter of timing because the statutes you cite require Plaintiffs to serve a compliant demand notice *prior* to filing suit. To that end, your letter acknowledges that “Philips has been on notice of nationwide class action claims **for nearly a year** with hundreds of lawsuits brought against Philips.” Ltr. at 2 (emphasis in original). You also admit that “[t]he basis for the claims” set forth in your letter are “set forth in the complaints that have been filed to date. . .” *Id.* These passages (among others in the letter) make plain that your letter is abjectly non-compliant with regard to any statutory requirement that notice be provided *pre-suit*. The letter also fails to comply with the requirement under many statutes that the pre-suit notice concern *uncured* conduct, because as discussed above the alleged conduct (none of which is described in detail in the letter) has been cured or is in the process of being cured through the repair or replacement program.

A review of several of the statutes at issue, including but not limited to those set out in outline below, makes plain that the May 16, 2022 letter did not, by dint of timing alone, comply with either the requirements or intent of statutes cited in the letter. Nor does the letter contain any facts that would excuse the pre-suit notice requirements set forth in the statutes:

- **Alabama:** Ala. Code § 8-19-10(e) (requiring notice “[a]t least 15 days prior to the filing of any action under this section”); *Smith v. Apple, Inc.*, No. 08-AR-1498-S, 2009 WL 3958096, at *1 (N.D. Ala. Nov. 4, 2009) (granting motion to dismiss for failure to state a claim where plaintiff failed to provide defendant with pre-suit notice of the alleged breach of warranty).
- **Alaska:** Alaska Stat. § 45.50.535(b) (requiring pre-suit notice where, as here, consumer seeks injunctive relief).
- **California:** Cal. Civ. Code § 1782 (a) (notice and demand required “[t]hirty days or more prior to the commencement of an action for damages”).
- **Massachusetts:** M.G.L. ch. 93A, § 9 (requiring notice “30 days prior to filing suit”); *Burns v. DeFelice Corporation*, No. 17-P-879, 2018 WL 1659808, at *4 (Mass. App. Ct. Apr. 6, 2018) (93A suit rightfully dismissed where plaintiffs sent demand letter and filed the complaint the same day); *York v. Sullivan*, 369 Mass. 157, 164 (1975) (“the thirty-day requirement is a prerequisite to suit”).

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- **Georgia:** Ga. Stat. Ann. § 10-1-399(b) (demand must be delivered “[a]t least 30 days prior to the filing of any such action”).
- **Indiana:** Ind. Code §§ 24-5-0.5-5 and 24-5-0.5-2(a)(5)-(8) (notice and demand required “30 days prior to filing suit”); *Lemon v. Anonymous Physician*, No. 1:04CV2083LJMWTL, 2005 WL 2218359, at *2 (S.D. Ind. Sept. 12, 2005) (granting motion to dismiss for failure to state a claim for breach of implied warranties where plaintiff “failed to allege that they had given [defendant] notice of breach prior to filing suit”); *Mackey v. Belden, Inc.*, No. 4:21-CV-00149-JAR, 2021 WL 3363174, at *13 (E.D. Mo. Aug. 3, 2021) (applying Indiana law and holding that a “claim for an uncured act requires notice to the supplier”).
- **Florida:** *North Brevard County Hospital District v. Metrus Energy-Atlantis, LLC*, 2020 WL 10459467, at *4 (M.D. Fla. July 10, 2020) (dismissing breach of warranty claims for failure to provide pre-suit notice of breach, explaining that “[i]n Florida, to state a claim for breach of an express warranty and warranty for a particular purpose, the plaintiff must allege notice to the seller of the breach.” (citing Fla. Stat. § 672.607(3)(a))).
- **Maine:** Me. Rev. Stat. Ann. tit. 5 § 213(1-A) (demand must be delivered “[a]t least 30 days prior to the filing of an action for damages”).
- **Mississippi:** Miss. Code § 75-24-15(2) (“In any private action brought under this chapter, the plaintiff must have first made a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General,” which includes pre-suit notice).³
- **Texas:** Tex. Bus. & Com. Code § 17.505 (a) (“As a prerequisite to filing a suit seeking damages under [the DTPA] . . . a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer’s specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys’ fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant.”).
- **West Virginia:** WV ST § 46A-5-108(a) (“An action may not be brought . . . until 45 days after the consumer has informed the creditor, debt collector, seller, or lessor in writing and by certified mail, return receipt requested . . . of the alleged violation and the factual basis for the violation.”); *Stanley v. Huntington Nat. Bank*, 2012 WL 254135, at *7 (N.D.W. Va. Jan. 27, 2012) (“A plaintiff’s failure to comply with this “mandatory prerequisite . . . bars [such plaintiff] from bringing a [WVCCPA] claim.”); *Heater v. General Motors*, 2021 WL 4896546, at *3 (N.D.W. Va. Oct. 20, 2021)

³ The letter states that “[p]ursuant to Miss. Code Ann. § 74-24-15(2), Plaintiffs request that Philips engage [*sic*] an informal dispute settlement program approved by the Mississippi Attorney General. If Philips is interested in participating in such a program, please advise.” Ltr. at 7. As noted, the Mississippi Code contemplates *pre-suit* notice as an avenue to engage in pre-suit informal dispute resolution. The Plaintiffs you represent have already filed suit, a Settlement Master has already been appointed by the MDL Court, and the parties have already agreed to engage in dispute resolution. While your *post hoc* attempt to fulfill the Mississippi notice requirements after filing suit is without merit, through the Settlement Master or otherwise, Respironics is prepared to engage in dispute resolution discussions beginning with the tender and offer of a repair/replacement outlined in this response letter.

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(granting motion to dismiss WVCCPA claim because plaintiff failed to provide timely pre-suit notice in form of demand letter).

- **Wyoming:** W.S. 40-12-105; W.S. 40-12-109 (noting that as a prerequisite to filing a complaint under that statute, a plaintiff must serve a compliant demand letter prior to filing suit alleging an “uncured unlawful deceptive trade practice” and pre-suit notice “shall state fully the nature of the alleged unlawful deceptive trade practice and the actual damage suffered therefrom”); *Broderick v. Dairyland Ins. Co.*, 270 P.3d 684, 692 (Wyo. 2012) (citing Wyo. Stat. Ann. § 40-12-102(a)(ix) (“An uncured unlawful deceptive trade practice is defined as an unlawful deceptive trade practice of which the consumer ‘has given notice to the alleged violator pursuant to W.S. § 40-12-109’ and either no offer to cure has been made within 15 days or there has been no cure within a reasonable amount of time after the acceptance of the offer.”)).

As the foregoing examples demonstrate, your letter (which is deficient for the additional reasons outlined herein) not only was sent months after you first filed suit in contravention of express statutory requirements, but also was tendered in a manner antithetical to the purpose of these statutes’ pre-suit notice requirements to (a) encourage and enable pre-litigation resolution of consumer disputes and (b) limit recoverable damages by consumers who do not accept good faith pre-litigation settlement offers. *See, e.g., Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40-41 (1975) (the California Consumer Legal Remedies Act’s notice requirements are intended to “provide and facilitate pre-complaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished,” and “[t]his clear purpose may only be accomplished by literal application of the notice provisions”); *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 505 (2011) (citation omitted) (“[O]ne function of the demand letter ‘is to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct.’”); *Budach v. NIBCO, Inc.*, No. 2:14-CV-04324-NKL, 2015 WL 6870145, at *3-5 (W.D. Mo. Nov. 6, 2015) (pre-suit notice “promotes the resolution of warranty issues outside of the adversarial judicial process”); *Carrozza v. CVS Pharmacy, Inc.*, 992 F.3d 44, 50 (1st Cir. 2021) (“The purpose of the demand letter is to facilitate the settlement and damage assessment aspects of c. 93A and as such the letter and notice therein is a procedural requirement, the absence of which is a bar to suit.”). In sum, the failure to provide compliant notice in your letter not only renders the notice deficient, it also contravenes the purpose and intent of requiring pre-suit notice letters.

B. Filing a Lawsuit Does Not Fulfill the Pre-Suit Notice Requirements

The letter’s attempt to fulfill the pre-suit notice requirements after hundreds of suits already have been filed fails to fulfill the pre-suit notice requirements. Thus, the Plaintiffs cannot assert claims pursuant to those statutes which require pre-suit notice. The statutes your letter cites, both by their express terms and as numerous courts have held, do not countenance the sue first, send letter (many months) later approach you have attempted here. Likewise, courts have held that filing suit does not satisfy the statutory pre-suit notice requirements. *See, e.g., Hobbs v. General Motors Corp.*, 134 F. Supp. 2d 1277, 1285 (N.D. Ala. 2001) (“the filing of a lawsuit is not considered to be sufficient notice under Alabama Law”); *Tasion Commc’ns, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803 EMC, 2014 WL 1048710, at *4 (N.D. Cal. Mar. 14, 2014) (“the notice must be provided before the lawsuit—notice that is after, or contemporaneous with, the filing of the lawsuit is insufficient”); *McKay v. Novartis Pharmaceutical Corp.*, 751 F.3d 694, 706 (5th Cir. 2014) (internal quotations omitted) ((1) “general notification of problems . . . do not suffice”; (2) “commencement of litigation does not satisfy the notice requirement”; and (3) “the notification requirement must be satisfied before litigation”); *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 590 (Ill. 1997) (“the section 2-607 notice requirement was not fulfilled by filing a breach of warranty complaint”); *Willard v. Home Depot, U.S.A.*, 2009 WL 4730644, at *3 (rejecting plaintiff’s contention that the filing of “similar

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lawsuits” established the required notice); *Gorman v. American Honda Motor Co, Inc.*, 839 N.W.2d 223, 230 (Mich. Ct. App. 2013) (plaintiff failed to fulfill pre-suit notice requirement where plaintiff did not provide defendant with notice of their breach of warranty claim until they filed a lawsuit); *Waters v. Electrolux Home Products, Inc.*, 154 F. Supp. 3d 340, 354 (N.D.W. Va. 2015) (“the WVCCPA requires a plaintiff to provide notice ‘in writing and by certified mail,’ not by filing a complaint”). That filing suit is not a substitute for pre-suit notice is a hornbook maxim. See 18 Williston on Contracts § 52:42 (4th ed.) (“[T]he 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”).

The suggestion in your letter that statutory *pre-suit* notice is not required or that Plaintiffs can unilaterally disregard such notice because of the prior pendency of litigation (including in this case, suits filed by your firms) is inconsistent with both the statutes’ requirements and court’s interpretation of those statutory requirements. Notice by prior lawsuit, much like post-suit notice, does not comport with the pre-suit notice “requirements under state law for various consumer protection laws and warranty laws” or cure the deficiencies with respect to the timing and content of your letter. Purporting to rely on prior litigation as prior notice has been deemed non-compliant and also undertaken in violation of both the spirit and the letter of statutory pre-suit notification requirements. See, e.g., *Bakopoulos v. Mars Petcare US, Inc.*, No. 20 CV 6841, 2022 WL 846603, at *3 (N.D. Ill. Mar. 22, 2022) (noting that sending notice “just days” before plaintiff asked to be added to ongoing litigation would not constitute “pre-suit notice in good faith” because “plaintiffs’ letter would have given [defendant] no time to engage in settlement, cure the defect, or minimize damages”); *Budach*, 2015 WL 6870145, at *4 (providing a summons and complaint “is hardly within the spirit of . . . the Uniform Commercial Code requirement of the giving of timely notice”).

II. The Letter Does Not Undertake to Set Out Information Required to Meet the Minimum Standards for a State Consumer Protection Statute Notice or Demand Letter

Your purported notice letter also is defective to the extent it seeks to notify Respironics (or other Philips entities) about Plaintiffs’ claims (and those of others who are purportedly “similarly situated”) under the litany of state consumer protection statutes you invoke. The letter is devoid of detail with respect to numerous elements that are fundamental to providing a compliant notice and demand under the cited state consumer protection laws. Given the utter lack of detail and repetition of broad conclusory language, your letter seems designed to “paper the record” rather than undertake, by any reasonable measure, to comply with the state consumer protection laws notice requirements. Neither Respironics (nor the other Philips entities) are under an obligation to respond further or to provide an exhaustive account of the many fatal flaws inherent in your letter. Respironics, however, identifies below certain primary deficiencies in Plaintiffs’ letter:

A. The Letter Fails to Identify Plaintiffs or Detail Facts Surrounding Their Claims

As a threshold matter, your letter is devoid of any details regarding the identity or circumstances of all but one of the parties on whose behalf you purport to send the letter. With respect to all but one of those individuals, there is no identifying information provided, no information provided about the device(s) at issue, or any aspect of their experience or purported claim. Instead, all the letter provides by way of identifying information is the following broad definition of the term “Plaintiffs”: “clients represented by Co-Lead Counsel, Plaintiffs’ Steering Committee, Co-Liaison Counsel, the Settlement Committee, the Leadership Development Committee, and the Plaintiffs’ Time and Expense Subcommittee, including those clients listed in filed complaints and listed or will be listed on the tolling agreements with Philips (collectively “Plaintiffs”).” Ltr. at 1. Neither that open-ended definition nor the allusion to filed complaints suffices to identify a claimant and/or their individual claim, let alone satisfy other claims identification and explanation

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requirements under state consumer protection laws. *See, e.g., Passatempo v. McMenimen*, 461 Mass. 279, 960 N.E.2d 275, 293 (2012) (affirming the dismissal of a Chapter 93A claim where the demand letter “did not mention [the defendant’s] name and failed to identify or describe any unfair or deceptive act or practice committed by [the defendant]”).

There is an isolated reference under the Alabama heading to John Cook, but no further information is provided beyond his name. *See* Ltr. at 3. The letter fails to provide even the most basic information that would be necessary in order to understand Mr. Cook’s situation. To the extent that it is John Cook referenced as a named plaintiff in *Daniel F. Conley, et al. v. Koninklijke Philips N.V., et al.*; Case No. 1:21-cv-11328 (filed on Aug. 16, 2021 in U.S. District Court for the District of Massachusetts), he already is a plaintiff in a lawsuit so the letter logically is not pre-suit notice of his claim.⁴

Beyond the issues concerning “John Cook,” the letter fails to describe, among other key elements of import, with respect to Mr. Cook or any of the “Plaintiffs” or any purported “similarly situated” individuals, whether or which purchased or leased a device, whether or which received reimbursement for some or all of any payments made from a government entity or third party, what role (if any) each individual played in the selection of the referenced devices (which are prescription medical devices sold, leased or provided by a durable medical device provider or insurer and not sold directly by Respireonics, or any other Philips entity, to individuals), the identity of the device used by each individual, when each device was obtained, its current condition, the nature and history of each individual’s alleged use of the device and/or information concerning each individual’s health or physical condition. *See, e.g., Spring v. Geriatric Auth. of Holyoke*, 394 Mass. 274, 288 (1985) (noting that 93A, § 9, provides that a written demand for relief must “reasonably” describe the unfair practice complained of and the “injury suffered”); *Sotelo v. Rawlings Sporting Goods Co., Inc.*, No. CV 18-9166-GW(MAAX), 2019 WL 4392528, at *7 (C.D. Cal. May 8, 2019) (finding that plaintiff’s pre-suit notice in suit pursuant to the Consumers Legal Remedies Act was deficient to the extent it sought to bring claims for products other than those identified in the notice).

The letter similarly fails to establish a nexus between “Plaintiffs” and the litany of states referenced, thus failing to establish a basis for any claim pursuant to any of the state statutes. The letter simply refers to “Plaintiffs” generally, without alleging any Plaintiffs’ names or their nexus to any of the states you mention.

The absence of any such information in the letter reflects another fundamental failure to undertake to meet the requirements of a written demand as set out in the various statutes you cite. Further, given your letter’s attempts to lump every individual into a massive definition, there is an inability to identify whether individuals that you consider part of that group (none of whom is identified save for John Cook) include the over 1.1 million US device users who already have obtained a repaired or replacement device from Respireonics or who are in line to receive one, such that any alleged “claim” might be deemed addressed and/or satisfied by the offer that Respireonics has made to all device users regardless of circumstance.

B. The Letter’s Rote Recitation of Conclusory Language Fails to Describe the Unfair or Deceptive Act or Practice Relied Upon and the Injury Suffered.

⁴ Respireonics has made diligent efforts to obtain information about the prescription for John Cook’s device to enable provision of a replacement device but has, to date, not been provided with same. Upon provision of prescription information, Respireonics is prepared to provide Mr. Cook with a replacement device in remediation and cure of any claim that is purported to be set out in your letter.

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The letter repeats in rote fashion the following parallel or identical conclusory and formulaic language based on the text of 11 different consumer protection statutes: "Philips' actions . . . constitute deceptive acts or practices," including "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have; [r]epresenting that goods are of a particular standard, quality, or grade, if they are of another; [a]dvertising goods with intent not to sell them as advertised; and [e]ngaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce." See Ltr. at 3-9.

Your letter, however, does not identify any consumer-facing representation or advertisement, or the language that it contained, that is contended to have contravened the standards repeated in the letter in rote fashion. A consumer protection demand or notice letter that fails to identify the alleged representation or advertisement and how it was alleged to be misleading, inherently fails to meet the minimum threshold for identifying an alleged consumer protection law violation. See, e.g., M.G.L. ch. 93A, § 9 (requiring, inter alia, that the pre-litigation "written demand for relief . . . reasonably describ[e] the unfair or deceptive act or practice relied upon and the injury suffered"); *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. at 505 ("Specificity is required to describe the practices complained of . . ."); *Thorpe v. Mutual of Omaha Ins. Co.*, 984 F.2d 541, 544, (1st Cir. 1993) (demand letter was insufficient where it "neither alleged physical harm sustained nor the damages requested"); Cal. Civil Code § 1782(a)(1) (demand must "[n]otify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770."); Tex. Bus. & Com. Code § 17.505(a) (demand must advise "the person in reasonable detail of the consumer's specific complaint and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees, if any, reasonably incurred by the consumer in asserting the claim against the defendant"); Ga. Stat. Ann. § 10-1-399(b) (demand must "identify[] the claimant and reasonably describe[e] the unfair or deceptive act or practice relied upon and the injury suffered"); Wyo. Stat. Ann. § 40-12-109 (demand "shall state fully the nature of the alleged unlawful deceptive trade practice and the actual damage suffered therefrom."); Me. Rev. Stat. Ann. tit. 5 § 213(1-A) (demand must "identify[] the claimant and reasonably describe[e] the unfair and deceptive act or practice relied upon and the injuries suffered"); Ala. Code § 8-19-10(e) (same).

Coupling conclusory and formulaic recitations of statutory language—detached from any factual allegations—with catch-all language, as your letter undertakes to do, falls far short of meeting the standards outlined above for complying with state consumer protection law notice requirements.

C. The Letter Fails to Describe any Reliance on Behalf of the Plaintiffs

Given the abject failure to identify alleged misrepresentations or advertisements purported to be at issue and the reliance on recitation of statutory and catch-all language in lieu of alleged facts, the letter also inherently fails to satisfy basic notice letter requirements concerning causation; i.e., alleged reliance on any alleged misrepresentations made. See, e.g., *Princess Cruise Lines, Ltd. v. Superior Court*, 101 Cal. Rptr. 3d 323 (Cal. Ct. App. 2009) (interpreting California Consumer Legal Remedies Act as imposing reliance requirement); *Mayberry v. Bristol-Meyers Squibb Co.*, 2009 WL 5216968, at *8-9 (D.N.J. Dec. 30, 2009) (Miss. law) (dismissing claim under Mississippi statute upon finding of insufficient allegations of a causal connection between the defendants' deception and the plaintiffs' injuries); *Heller Fin. v. INA*, 573 N.E.2d 8 (Mass. 1991) (plaintiff must show causal connection between misrepresentation and injury); W. VA. CODE § 46A-6-106(b) (plaintiff who bases a claim on an affirmative misrepresentation must show that it "caused him or her to enter into the transaction," and that, for an omission, the plaintiff must show that his or her loss was "proximately caused" by the omission").

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Given that the letter fails to identify alleged misrepresentations or advertisements, inherently it cannot set out any facts related to reliance or causation. For those states where causation and reliance are elements of a consumer protection law claim, the letter fails to comply on that separate ground.

D. The Letter Fails to Describe Plaintiffs' Injury

The letter also fails with respect to its purported articulation of alleged injury. The letter does not set out a claimed injury with respect to any individual claimant or provide any explanation with respect to how or why a claimed injury could have been experienced on a uniform basis across the multitude of individuals vaguely identified in the definition of "Plaintiffs." Instead, it contains a veritable catalog of different potential prayers for relief without any association to an injury or explanation as to which categories of alleged relief is alleged to be recoverable by whom, why it is recoverable, or what amounts are sought.⁵

The letter's formulaic approach fails to address actual injury by any of the Plaintiffs, much less the nexus between alleged injury and any form or degree of damages. The absence of such information in the letter reflects a failure to comply with the requirements of the statutes or their intended purposes, which is to provide detailed information sufficient to enable pre-suit resolution of the alleged claims. *See supra* Section II. B (citing cases for the proposition that plaintiffs must detail injury with specificity in consumer protection demand letters); *Casavant*, 460 Mass. at 505 (internal quotations omitted) (noting that demand letter should "define the injury suffered and relief demanded in a manner that provides the prospective defendant with an opportunity to review the facts and the law involved to see if the requested relief should be granted or denied and enables him to make a reasonable tender of settlement"); *Marrale v. Gwinnett Place Ford*, 271 Ga. App. 303, 306-07 (1995) (under Georgia statute, harm to public must be shown because statute should not be treated as an additional remedy for private wrongs). On this element, too, the letter fails to comply with the requirements of a demand letter under the "various consumer protections laws" that you attempt to invoke.

III. Were a Proper Letter Sent, State Consumer Protection Statutes Often Exempt Transactions and Conduct—As Here—That is Subject to Regulatory Oversight and Authorization

Many of the state consumer protection statutes you seek to invoke exempt transactions and conduct subject to regulatory oversight and authorization, like the repair/replacement of the medical devices at issue here. These claims involve medical devices and a related recall, all of which arise in a heavily regulated area with direct oversight by the FDA. Your letter fails to address—much less reconcile—the provisions of the cited statutes that exempt transactions subject to regulatory oversight or specifically authorized by regulatory authorities. *See, e.g.*, O.C.G.A. § 10-1-396(1) (Georgia Fair Business Practices Act does not apply to "[a]ctions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States"); *Chancellor v. Gateway Lincoln-Mercury, Inc.*, 502 S.E.2d 799, 805 (Ga. Ct. App. 1998) (noting that courts have limited

⁵ For instance the letter identifies "out-of-pocket costs and other injuries in connection with their use of the Recalled Products, including costs associated with the purchase or rental of the Recalled Product, costs of purchasing accessories such as replacement masks, hoses, and other accessories, and costs of obtaining a replacement device," "ongoing medical monitoring and further medical costs," "the return of the purchase price of the Recalled Products and Accessories, with interest from the time they were purchased; all costs associated with the procurement of a replacement device; all costs of ongoing medical monitoring, and all other available damages and penalties including statutory and treble damages; and reasonable costs . . ." Ltr. at 2-4.

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the Georgia Fair Business Practices Act “to the unregulated consumer marketplace” and noting that it does “not apply in regulated areas of activity, because regulatory agencies provide protection or the ability to protect against the known evils in the area of the agency's expertise”; M.G.L. ch. 93A, § 3 (exempting “transactions or actions otherwise permitted under laws as administered by” state and federal regulatory boards); *Smallwood v. Cent. Peninsula Gen. Hosp.*, 151 P.3d 319, 329 (Alaska 2006) (“AS 45.50.481(a)(1) exempts from the UTPA any acts or transactions ‘regulated under laws administered by the state, [or] by a regulatory board or commission . . . unless the law regulating the act or transaction does not prohibit the practices declared unlawful in AS 45.50.471.’”). In sum, even putting aside the deficiencies in your letter, several statutes exempt the subject matter of your suit from their scope.

IV. Plaintiffs’ Alleged Notice for Breach of Warranty Similarly Fails to Set Out Even the Most Basic Predicates for a Breach of Warranty Notice Concerning the Warranties at Issue, When They Were Issued, or Any Elements Concerning a Specific Plaintiff or an Alleged Breach

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.” See U.C.C. § 2-607(3)(a). Many of the statutes that are referenced in the letter have incorporated 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.⁶ As discussed above, the failure to provide pre-suit notice renders the letter of no effect with respect to these state warranty laws and negates the ability to pursue a claim thereunder.

In addition, for many of the same reasons that the letter fails to comply with the requirements of cited state consumer protection statutes, Plaintiffs’ purported notice for breach of warranty claims is deficient and non-compliant. Plaintiffs provide even *less* detail with respect to their breach of warranty claims, offering no more than a threadbare legal conclusion:

“[t]his letter is also to provide you notice that Philips as [*sic*] breached its express or implied warranties as set forth herein and in the Class Action Complaint, in violation of the following laws”

and by, thereafter, pasting in a chart that does no more than list citations to warranty law provisions of 50 states plus Puerto Rico and the District of Columbia. Ltr. at 9-10.

The notice of claims contemplated by the cited state warranty statutes require far more than this minimalist, barebones approach. What the statutes *minimally* require is a description of the transaction and warranty at issue, an identification of the warranty and its terms, and explanation of how the warranty was allegedly breached and the impact of the breach and the requested remediation. See, e.g., *In re ZF-TRW Airbag Control Units Prod. Liab. Litig.*, No. LAML1902905JAKFFMX, 2022 WL 522484, at *129 (C.D. Cal. Feb. 9, 2022) (citing *Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 169 (1993) (noting that “[t]he most important policy behind the notice requirement is to allow the seller the opportunity to cure the breach and minimize its damages. . . . the seller must have a reasonable opportunity to discover facts and prepare for negotiation and his defense to a lawsuit”)); *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Pracs. &*

⁶ See, e.g., ALA. CODE § 7-2-607(3)(a); COLO. REV. STAT. § 4-2-607(3)(a); GA. CODE § 11-2-607(3)(a); IDAHO CODE § 28-2-607(3)(a); 810 ILCS 5/2-607(3)(a); ME. REV. STAT. tit. 11, § 2-607(3)(a); MINN. STAT. § 336.2-607(3)(a); N.J. STAT. § 12A:2-607(3)(a); N.Y. U.C.C. Law § 2-607(3)(a); N.C. GEN. STAT. § 25-2-607(3)(a); R.I. GEN. LAWS § 6A-2-607(3)(a); TENN. CODE § 47-2-607(3)(a); TEX. BUS. & COM. CODE § 2.607(c)(1); VA. CODE § 8.2-607(3)(a); WASH. REV. CODE § 62A.2-607(3)(a).

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Prod. Liab. Litig., 288 F. Supp. 3d 1087, 1200 (D.N.M. 2017) (citation omitted) (notice “afford[s] the seller a reasonable opportunity to learn the facts so that he may adequately prepare for negotiation and defend himself in a suit”).

In contrast, the letter fails to identify, with respect to *any* plaintiffs, the elements that would support a breach of warranty claim, i.e., the transaction with respect to which the warranty is alleged to apply, the manner in which a warranty was alleged to have been afforded to the claimant, identification of the warranty at issue, allegations concerning how Respironics breached the warranty, and how the alleged breach caused Plaintiffs’ damages. In the end, the letter and chart identify no elements of each (or any) breach of warranty claim and no facts in an attempt to support breach of any of these state warranty statutes. Failure to include any of these details amount to a failure to provide the Philips entities with valid notice of Plaintiffs’ claims.⁷

V. Over 1.1 Million US-Based Device Users Have Secured the Benefit of a Replacement Device Through Respironics’ Repair/Replacement Program Which Has Been Made Available to All Affected Customers as a Tender and Cure of Any Alleged Claim, and Work Continues Apace To Remediate Any and All Potential Claims

In addition to its other shortcomings, the letter portends that “Plaintiffs and the Class will seek appropriate injunctive and declaratory relief relating to the Recalled Products, including, without limitation, notice to the Class regarding the defect, and replacement or repair of the Recalled Products.” Ltr. at 3. As stated *supra*, that relief—replacement or repair of the Respironics Medical Devices—has been provided by Respironics, at no cost, to over 1.1 million US-based device users. As you should be well aware from your efforts to impose certain preservation conditions with respect to Respironics’ ongoing repair and replacement efforts, Respironics has implemented a registration process with respect to the repair/replacement program that it has made available, free of charge, to all customers affected by the recall, including your clients and any other so-called “similarly situated” individuals.

Your letter fails to identify which Plaintiffs, if any, have already sought repair or replacement of their devices and/or already received a repaired or replacement device. This lack of specificity is fatal to Plaintiffs’ claims, does not fulfill the pre-suit statutory notice requirements, and leaves Respironics without the required information to respond to the demand beyond the existing offer of repair or replacement generally provided by Respironics.

If any of the unnamed “Plaintiffs” or “similarly situated” individuals on whose behalf you wrote have not done so already, they should register for the repair/replacement program to avail themselves of the benefits of that program as a means of addressing the issues raised by the recall that are the subject of your deficient letter. They can register online at <https://www.philipssrcupdate.expertinquiry.com/> and provide supplemental information for prioritization purposes at: <https://www.usa.philips.com/healthcare/resource-catalog/landing/experience->

⁷ The approach adopted in the letter also is antithetical to the purposes of these cited notice provisions which are to enable cure of the defects, settlement, and limitation of damages. *See, e.g., Bakopoulos*, 2022 WL 846603, at *2 (noting that “[t]he requirement of pre-suit notice [for breach of warranty] is intended to encourage settlement, cure defects, and minimize damages”); *Dilly v. Corp.*, No. 2:14-CV-03307-DCN, 2016 WL 53828, at *11 (D.S.C. Jan. 4, 2016) (citing cases and PEB Study Group, Uniform Commercial Code Article 2: Preliminary Report 167 (1990) (noting that the purposes of § 2-607 are to effect a cure, or to facilitate an effort to negotiate a settlement, to gather and preserve evidence for possible litigation, and to defeat commercial bad faith)).

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[catalog/sleep/communications/src-update/news/understanding-the-recall-process](#). As also discussed above, to the extent that the FDA has not cleared a remediation program for certain types of devices, and securing clearance and implementing remediation in the coming months for those devices seems impracticable, Respironics has proposed to the FDA the provision of refunds for a limited volume of devices that are not presently part of the cleared and progressing repair and replacement program.

This repair and replacement program described above constitutes an offer to cure, and a confirmation of cure, in satisfaction of all claims pursuant to the statutes you reference and as a control on efforts to pursue damages or enhanced damages claims or the recovery of attorneys' fees. *See, e.g., Heater v. Gen. Motors, LLC*, No. 1:21CV24, 2021 WL 4896546, at *3 (N.D.W. Va. Oct. 20, 2021) (demand must "put [recipient] on notice of its violative conduct and give it an opportunity to cure the resulting harm"); Cal. Civ. Code § 1782(a)(1)-(2) (requiring the consumer to notify the potential defendant "of the particular alleged violations of Section 1770" and demand that the defendant "correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770") (citing Cal. Civ. Code § 1782(a)(1)-(2)); *Benson v. S. California Auto Sales, Inc.*, 239 Cal. App. 4th 1198, 1212 (2015) (noting that plaintiff should not have filed a suit for damages pursuant to the Consumers Legal Remedies Act after defendant offered an appropriate correction, stating that "[i]t is neither efficient nor economical to engage in protracted litigation and to run up attorney fees when an appropriate correction has been offered at the very outset"); *Sotelo v. Rawlings Sporting Goods Co., Inc.*, No. CV 18-9166-GW(MAAX), 2019 WL 4392528, at *6 (C.D. Cal. May 8, 2019) ("The purpose of the CLRA notice requirement is to allow a manufacturer or vendor sufficient opportunity to correct or replace a deficient product."); *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1261, 99 Cal. Rptr. 3d 768, 789 (2009) (noting that pre-suit notice "requirement exists in order to allow a defendant to avoid liability for damages if the defendant corrects the alleged wrongs within 30 days after notice, or indicates within that 30-day period that it will correct those wrongs within a reasonable time"); *Spring v. Geriatric Auth. of Holyoke*, 394 Mass. 274, 288 (1985) (noting "[t]he purposes of the [93A] letter are twofold: (1) 'to encourage negotiation and settlement by notifying prospective defendants of claims arising from allegedly unlawful conduct' and (2) 'to operate as a control on the amount of damages which the complainant can ultimately recover.' If the defendant makes a reasonable tender of settlement which is rejected by the complainant, the damages recoverable are limited to the amount of tender.").

Sincerely,

/s/ Daniel S. Savrin

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Sincerely,

/s/ Michael H. Steinberg

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