UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: HAIR RELAXER MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	**MDL No. 3060** Master Docket Case No. 1:23-cv-00818 Hon. Mary M. Rowland

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS CONSOLIDATED CLASS ACTION COMPLAINT

Dated: March 11, 2024

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INTRODUCTION

The core allegations of the Consolidated Class Action Complaint ("Complaint") filed by Plaintiffs are essentially the same as those in the master long form complaint that was sustained, in large part, by this Court in its previous motion to dismiss ruling. *See In re Hair Relaxer Mktg. Sales Practices and Prods. Liab. Litig.*, MDL No. 3060, 2023 WL 7531230 (N.D. Ill. Nov. 13, 2023). In the present Complaint, Plaintiffs again allege that Defendants' hair relaxer products are toxic and carcinogenic, with scientific studies showing higher risks of ovarian and uterine cancer associated with use of those products. *Id.* at *1–2. However, Defendants argue this motion almost as if this Court's prior motion-to-dismiss ruling does not exist; their memorandum in support of their motion to dismiss contains almost no discussion of it at all and rehashes failed arguments from their prior motion. As discussed further below, many of Defendants' arguments are inconsistent with the law of this case, and the remainder misconstrue both the law and what Plaintiffs have alleged concerning the economic losses they have suffered by purchasing Defendants' defective and dangerous products.

RESPONSE TO DEFENDANTS' STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs' Complaint rests on the same factual foundation as the master long form complaint for personal injury claims, with which this Court is already well familiar. *See Hair Relaxer*, 2023 WL 7531230, at *1–2. The key distinction is that in the present Complaint, rather than bringing personal injury claims on an individual basis only, Plaintiffs bring claims on behalf of themselves and classes of similarly-situated purchasers of Toxic Hair Relaxer Products seeking to recover the economic damages they suffered because they would not have purchased them, or at least would not have paid as much, had they known that using the products would increase their

risk of cancer.[1] Compl. ¶¶ 1, 6. In some states, Plaintiffs also seek medical monitoring for themselves and the other medical monitoring class members in light of these cancer risks. *Id.* ¶ 7.

Defendants' criticisms of what they term "omissions" in the present class action Complaint parrot the same unsuccessful ones they made in moving to dismiss the master long form complaint. *Compare* Defs.' Mem. at 7–10 *with* Dkt. No. 142 at 8–11 (repeating almost verbatim the same arguments regarding what Plaintiffs' complaints purportedly "omit"). Just as the plaintiffs in the master long form complaint did, Plaintiffs here have alleged more than sufficient information to give notice of their claims. Each Plaintiff alleges the Defendants from whom she purchased Toxic Hair Relaxer Products, the product line, and the frequency and length of use of those products. Compl. ¶¶ 14–47. Plaintiffs further allege that each product at issue was toxic and carcinogenic and identify some of the harmful substances these products contain. *Id.* ¶¶ 103–26. This Court has already considered Defendants' arguments and has held that these allegations are sufficient under federal notice pleading standards. *See Hair Relaxer*, 2023 WL 7531230, at *4–5 (finding both that "Defendants' initial contention that Plaintiffs did not identify the products they used or relevant time period for the use is not convincing" and that it did not agree with "Defendants[']conten[tion] that Plaintiffs' allegations are conclusory and they have not identified specific products or defects in those products").

LEGAL STANDARD

When a defendant asserts a facial challenge to subject matter jurisdiction and moves to dismiss for lack of standing pursuant to Rule 12(b)(1), courts apply *Twombly-Iqbal*'s

[1] Defendants' assertion that "the majority of Plaintiffs concede that they are not at an 'increased risk' of cancer as a result of their use of the products," Defs.' Mem. at 6, is incorrect. Plaintiffs have alleged that the Toxic Hair Relaxer Products were "unsafe for human use," "cause[d] exposure to dangerous toxins," and gave them "an increased risk of cancer." Compl. ¶¶ 14–47.

"'plausibility' requirement." *Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015). In assessing whether a plaintiff has established standing, the court accepts as true "all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor." *Bria Health Servs., LLC v. Eagleson*, 950 F.3d 378, 381–82 (7th Cir. 2020).

In its previous motion-to-dismiss ruling, this Court noted that, under Rule 12(b)(6), it "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] all well-pleaded facts as true, and draw[s] all reasonable inferences in the plaintiff's favor." *Hair Relaxer*, 2023 WL 7531230, at *2 (quoting *Lax v. Mayorkas*, 20 F.4th 1178, 1181 (7th Cir. 2021). "[D]etailed factual allegations are not necessary to survive a motion to dismiss," *Hair Relaxer*, 2023 WL 7531230, at *2 (quoting *Sevugan v. Direct Energy Servs., LLC*, 931 F.3d 610, 614 (7th Cir. 2019)); instead, dismissal for failure to state a claim is proper only "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Hair Relaxer*, 2023 WL 7531230, at *3 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). "Deciding the plausibility of the claim is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Hair Relaxer*, 2023 WL 7531230, at *3 (quoting *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011)).

ARGUMENT[2]

I. PLAINTIFFS ADEQUATELY PLEAD ARTICLE III STANDING

Constitutional standing under Article III is a "short-hand term for the right to seek judicial relief for an alleged injury." *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017). To establish Article III standing, a plaintiff need only show that she: "(1) suffered an injury in fact,

[2] In accordance with Rule 15(a)(2), Plaintiffs confirm that if the Court finds any claim insufficiently pled, Plaintiffs will cure such deficiencies by amendment. *See* Fed. R. Civ. P. 15(a)(2) ("In its response, the non-moving party must also confirm whether, in its view, any deficiencies identified by the motion to dismiss could be cured by amendment.").

(2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1151 (7th Cir. 2020). Defendants' only issue is with the injury-in-fact element of Article III standing, all other elements are indisputably established. Defs.' Mem. at 12–14.

"Injury-in-fact for standing purposes is not the same thing as the ultimate measure of recovery. The fact that a plaintiff may have difficulty proving damages does not mean that he cannot have been harmed." *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 808 (7th Cir. 2013). The Seventh Circuit emphasizes that at "the pleading stage, general factual allegations of [Article III] injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Laidig v. GreatBanc Tr. Co.*, No. 22-CV-1296, 2023 WL 1319624, at *5–6 (N.D. Ill. Jan. 31, 2023) (quoting *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021)). Defendants neglect to mention this "liberal pleading standard" adopted by this Court. *Id.* at *5.

A. Plaintiffs Allege Economic Injuries Constituting Injury-in-Fact Under Article III.

Defendants erroneously contend that Plaintiffs fail to allege an injury-in-fact for purposes of Article III standing. Defs.' Mem. at 12. Plaintiffs, however, plead economic injuries sufficient for establishing injury-in-fact under Article III standing by alleging: (1) the purchase of one or more unsafe, toxic, adulterated, and carcinogenic Toxic Hair Relaxer Products, and/or (2) medical costs stemming from frequent exposure to Toxic Hair Relaxer Products. Compl. ¶¶ 6–9. As the plaintiffs did in *Barnes v. Unilever United States Inc.*, No. 21 C 6191, 2023 WL 2456385, at *4 (N.D. Ill. Mar. 11, 2023), Plaintiffs here allege that, had they been aware of the true nature of the

Toxic Hair Relaxer Products, Plaintiffs either would have paid less for the Products or would not have purchased them at all. *E.g.*, Compl. ¶ 291.

Plaintiffs allege cognizable economic injury for purposes of Article III standing, as affirmed by the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021): "If a defendant has caused physical or monetary injury to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." *Id.* at 425. The Seventh Circuit[3] also recognizes that when consumers allege that they would not have purchased a product, or would have paid less for it, had the defendant not misrepresented the product or failed to disclose its limitations, the consumer plaintiffs plausibly allege an injury-in-fact. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 968 (7th Cir. 2016) (recognizing Article III standing "where the product itself was defective or dangerous and consumers claim they would not have bought it (or paid a premium for it) had they known of the defect"). This theory of economic injury constituting injury-in-fact has "been adopted by courts only where the product itself was defective or dangerous and consumers claim they would not have bought it (or paid a premium for it) had they known of the defect." *Id.*; *see also In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 751 (7th Cir. 2011) ("The plaintiffs' loss is financial: they paid more for the toys than they would have, had they known of the risks the beads posed to children. A financial injury creates standing.").

[3] At least the First, Third, Fifth, and Ninth Circuits are in clear accord. *See In re Evenflo Co., Inc., Mktg., Sales Pracs. & Prod. Liab. Litig.,* 54 F.4th 28, 35 (1st Cir. 2022) (recognizing overpayment as a cognizable form of Article III injury); *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 283 (3d Cir. 2018) (holding that "a plaintiff might successfully plead an economic injury by alleging that she bargained for a product worth a given value but received a product worth less than that value"); *Cole v. Gen. Motors Corp*., 484 F.3d 717, 723 (5th Cir. 2007) (holding that "it is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered"); *Mazza v. Am. Honda Motor Co*., 666 F.3d 581, 595 (9th Cir. 2012) (holding that "[t]o the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an injury in fact") (internal quotation marks omitted).

Notably, Defendants misrepresent the economic injury Plaintiffs allege as one "stemming from the purchase of products that she entirely consumed and that functioned for her as expected." Defs.' Mem. at 12 (quoting *Johnson & Johnson*, 903 F.3d at 280). But Plaintiffs are not alleging that the Toxic Hair Relaxer Products functioned as expected; instead, they allege that the Toxic Hair Relaxer Product(s) they purchased were defective and carcinogenic, and that had they known of the toxic nature of the products and the carcinogenic risks to their personal health, they would not have purchased such products or would have paid less for them. *See, e.g.*, Compl. ¶¶ 6–7; *see also Remijas v. Neiman Marcus Group LLC*, 794 F.3d 688, 694–95 (7th Cir. 2015) ("[W]e have held that financial injury in the form of an overcharge can support Article III standing."); *Aqua Dots*, 654 F.3d at 751 (finding financial injury when plaintiffs "paid more for the toys than they would have, had they known of the risks the beads posed to children").[4]

B. Plaintiffs Allege Sufficiently Particularized and Substantially Similar Harm.

Defendants rely on *Bowen v. Energizer Holdings, Inc.*, No. CV 21-4356-MWF (AGRx), 2022 WL 18142508 (C.D. Cal. Aug. 29, 2022) to argue that, because Plaintiffs have not alleged that the products purchased by each Plaintiff actually contained the toxins alleged, Plaintiffs have not adequately pled that their injuries are sufficiently particularized. Defs.' Mem. at 13. Contrary to Defendants' contention, in its previous motion-to-dismiss ruling, this Court held that Plaintiffs did in fact sufficiently identify specific products and the toxicity defects in those products. *Hair Relaxer*, 2023 WL 7531230, at *12.[5] The allegations this Court found sufficient for these purposes

[4] *Flynn v. FCA US LLC*, No. 15-CV-855-SMY, 2020 WL 1492687 (S.D. Ill. Mar. 27, 2020), *aff'd as modified*, 39 F.4th 946 (7th Cir. 2022) is inapplicable, in that the plaintiffs were unable to establish that the products they purchased were defective. None of the vehicles at issue had "ever been successfully hacked," and the vehicles received a software patch that eliminated the defect going forward. 39 F.4th at 950.

[5] "Plaintiffs allege that Defendants' products contained toxic chemicals. Specifically, they allege harmful and carcinogenic ingredients in Defendants' hair relaxer products 'are known to disrupt and/or harm a woman's endocrine system.' Such harmful, toxic and carcinogenic ingredients have included over time, but are not limited to, phthalates, parabens, cyclosiloxanes, di-(2-ethylhexyl), octamethylcyclotetrasiloxane,

previously are also included in the present Complaint. Compl. ¶¶ 1–2, 116–126, 233–236. Thus, Plaintiffs' theory of injury is sufficiently particularized and based on the proposition that Plaintiffs would not have purchased the Toxic Hair Relaxer Products had they known of the risk they contained carcinogenic chemicals that initiate and promote uterine and ovarian cancer. Compl. ¶ 2.[6]

Defendants' erroneously attempt to construe Plaintiffs' allegations to render admission "that the unidentified products they purchased may not have contained any such defect" because of the mere inclusion of the phrase "have contained" rather than "currently contain or that they contained such toxic ingredients when Plaintiffs used them." Defs.' Mem. at 12–13. Plaintiffs, however, have sufficiently pled prior, current, and continued presence of toxins within products at issue and corresponding wrongful marketing practices throughout the Complaint. *See* Compl. ¶ 3 ("Defendants systematically omitted, misrepresented, and continue to omit and misrepresent the significant health impacts of Toxic Hair Relaxer Product use"); *id.* ¶ 2 ("The Toxic Hair Relaxer Products contain constituent chemicals and active ingredients which include chemicals that disrupt the endocrine system, alter hormonal balance, cause inflammation, alter immune response, and cause other toxic responses that both initiate and promote cancer.").[7]

Furthermore, Defendants demand more precision in product identification on a class basis than is required. A plaintiff has standing to assert claims on behalf of class members based on

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lye, formaldehyde, and other toxic chemicals. The phthalates and other EDCs in Defendants' hair relaxer products, Plaintiffs claim, 'significantly increase the risk of cancers and other negative health conditions.'" *Id.* (citations omitted).

[6] *See also id.* ¶ 117 ("These chemicals can alter the body's delicate hormonal balance . . . and cause other pro-cancerous phenomena in the tumor microenvironment.").

[7] In an effort to hedge this first argument, Defendants further argue that "[a]nd, in any event, '[m]ere exposure' to a harmful ingredient is insufficient to establish injury in fact." Defs.' Mem. at 14. However, as explained previously, Plaintiffs allege cognizable economic injury for purposes of Article III standing and do not allege "mere exposure.".

products he or she did not purchase so long as the plaintiffs allege substantially similar injuries from similar products with similar misrepresentations. *Womick v. Kroger Co.*, No. 21-CV-00574-NJR, 2022 WL 673095, at *4 (S.D. Ill. Mar. 7, 2022) (citing *Geske v. PNY Techs., Inc.*, 503 F. Supp. 3d 687, 700 (N.D. Ill. 2020)). For claims based upon common misrepresentations, the substantial similarity determination is a context-specific analysis that frequently entails reference to whether the challenged products are of the same kind, whether they are composed of largely the same ingredients, and whether each of the challenged products bears the same alleged mislabeling. *Wagner v. Gen. Nutrition Corp*., No. 16-CV-10961, 2017 WL 3070772, at *5–6 (N.D. Ill. July 19, 2017) ("In light of the alleged similarity of ingredients, labels, and misrepresentations at issue in this case, the Court refuses to dismiss the class claims for lack of standing.") (citing *Clay v. Cytosport, Inc.*, No. 15-cv-165 L(DHB), 2015 WL 5007884, at *7 (S.D. Cal. Aug. 19, 2015)). Here, Plaintiffs' allegations satisfy the substantial similarity standard because Plaintiffs allege identical economic harm as a result of purchasing Defendants' Toxic Hair Relaxer Products that are subject to the same harmful and carcinogenic defects that Defendants "systematically" omitted, misrepresented, and continue to omit and misrepresent. Compl. ¶¶ 2, 122.

II. PLAINTIFFS HAVE STANDING TO PROCEED WITH STATUTORY CONSUMER PROTECTION CLAIMS BEYOND PLEADING STAGE.

Defendants attempt to prematurely litigate class certification in contending that, because Plaintiffs reside in only 17 different states, they do not have standing to assert claims on behalf of "all putative class members." Defs.' Mem. at 14. At its core, Defendants' standing argument here is a challenge to the typicality of the class representatives under Rule 23.[8] However, Defendants

[8] In *Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002), the Seventh Circuit distinguished the standing inquiry from "the inquiry under Rule 23 about the suitability of a plaintiff to serve as a class representative[.]"

fail to acknowledge that the "prevailing view," joined by this Court, is that it is better to litigate and resolve this issue at the class-certification stage, not at the pleading stage:

> Defendant argues that although Plaintiffs allege 12 statutory consumer protection claims on behalf of a multi-state class under the laws of 12 states, including California and Illinois, Plaintiffs were not personally injured in and do not reside in the other states. The Court finds that Plaintiffs may proceed with these claims beyond the pleading stage…. *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395, at *5 (N.D. Ill. May 17, 2022) ("The prevailing view, particularly recently, is that the issue is best framed through the class-certification lens, not standing."). This Court will follow that prevailing view.

Acosta-Aguayo v. Walgreen Co., No. 22-CV-00177, 2023 WL 2333300, at *8 (N.D. Ill. Mar. 2, 2023) (Rowland, J.) Under this prevailing view, Plaintiffs should be allowed to proceed with their claims on behalf of a multi-state consumer class under the statutory consumer protection laws of various states.

III. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED.

Defendants' contention that Plaintiffs' claims are preempted by the FDCA is unavailing. Defendants' preemption argument relies solely on express preemption under 21 U.S.C. § 379s(a), which only preempts claims that "may establish or continue in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a requirement specifically applicable to" the products at issue. Defendants fail, however, to identify any federal requirement applicable to the Toxic Hair Relaxer Products that is different in any way from any requirements that Plaintiffs' claims would impose. Indeed, the disclosure of health risks that Plaintiffs' claims require fits hand-in-glove with the federal requirement that a cosmetic product "bear a warning statement whenever necessary or appropriate to prevent a health hazard that may be associated with the product." 21 C.F.R. § 740.1(a).

In determining whether Congress intended to preempt state law in an area that traditionally falls under state regulation, a court "begin[s] [its] analysis with the assumption that the historic

police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). This Court previously recognized that this analysis is guided by the recognition that "the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation." *Hair Relaxer*, 2023 WL 7531230, at *4 (quoting *Wyeth v. Levine*, 555 U.S. 555, 579 (2009)). Here, Defendants' argument for preemption rests solely on their mistaken view that Plaintiffs "allege that Defendants are defrauding consumers by failing to identify the constituent ingredients that compose the fragrance in their products." Defs.' Mem. at 18. But the Complaint alleges a much more basic failure by Defendants to disclose that the Toxic Hair Relaxer Products are unsafe and unhealthy. *See, e.g.*, Compl. ¶ 3 ("Defendants systematically omitted, misrepresented, and continue to omit and misrepresent the significant health impacts of Toxic Hair Relaxer Product use."). Defendants fail to identify any federal requirement preventing them from disclosing these health risks. *See Itamar Med., Ltd. v. Ectosense nv*, No. 20-60719-CIV, 2021 WL 12095092, at *11 (S.D. Fla. Jan. 4, 2021) (finding no preemption where the defendant "does not point to a specific regulation or requirement imposed by the FDCA which would preempt Plaintiff's [consumer fraud] claim").

Every court to consider the effect of Section 379s(a) on claims founded on a failure to warn has held that such claims are not preempted. *See Bojko v. Pierre Fabre USA Inc.*, No. 22 C 6728, 2023 WL 4204663, at *5 (N.D. Ill. June 27, 2023) (finding that the plaintiffs' claim that the shampoo products at issue should have warned of the presence of benzene, a carcinogenic substance, was not preempted); *Henning v. Luxury Brand Partners, LLC*, No. 22-cv-07011-TLT, 2023 WL 3555998, at *6 (N.D. Cal. May 10, 2023); *Johnson & Johnson v. Fitch*, 315 So. 3d 1017, 1023 (Miss. 2021) (finding no preemption of the state's claim that the defendant should include a

cancer warning); *Potts v. Johnson & Johnson Consumer Inc.*, No. 20-10406 (FLW), 2021 WL 2177386, at *10 (D.N.J. May 28, 2021) (finding that claims that the defendant "failed to inform consumers of material information regarding the safety of the Products" were not preempted). This makes sense, because warning consumers about health risks is not just consistent with, but actually *required* by the federal regulatory scheme under 21 C.F.R. § 740.1(a). *See Bojko*, 2023 WL 4204663, at *5 (noting that the defendant did "not explain how Plaintiffs' claim that the Products' labels fail to warn consumers about the presence of benzene is different from or in addition to the requirement in 21 C.F.R. § 740.1(a)").

Defendants' sole case citation is to *Critcher v. L'Oréal USA, Inc.*, 959 F.3d 31 (2d Cir. 2020), in which the court held that plaintiffs' claims concerning the defendant's disclosure of the amount of cream in the product's container were preempted. *Id.* at 36. As this Court has already noted, the plaintiffs in *Critcher* "did not claim, as here, that the product contained toxic chemicals or ingredients." *Hair Relaxer*, 2023 WL 7531230, at *4 n.4. This distinction is dispositive, given that Plaintiffs' claims that Defendants failed to warn of these toxic substances are consistent with the FDCA.

IV. THE ECONOMIC LOSS DOCTRINE DOES NOT BAR PLAINTIFFS' PRODUCT LIABILITY CLAIMS.

The purpose of products liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured person. In the present Complaint, where Plaintiffs seek medical monitoring relief for their product liability claims, such costs are the economic cost of medical monitoring or a monitoring program that provides the necessary care. *See, e.g.*, *Petito v. A.H. Robins Co., Inc.*, 750 So. 2d 103, 107 (Fla. Dist. Ct. App. 1999); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717-718 (Mo. 2007). Plaintiffs' product liability claims are not just claims for "increased risk," as

Defendants incorrectly assert, Defs.' Mem. at 20, but are also claims for Plaintiffs' present need for diagnostic monitoring. To the extent the economic loss doctrine could even apply to such relief, this case falls well within exceptions to the economic loss doctrine when: (1) the plaintiffs sustained harm resulting from a defect making a product hazardous or unreasonably dangerous, or (2) the plaintiffs' damages are proximately caused by a defendant's intentional, false representation. *Bd. of Educ. of City of Chicago v. A, C & S, Inc.*, 546 N.E.2d 580, 587–90 (1989); *see In re Chicago Flood Litig.*, 680 N.E.2d 265, 275 (1997); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, 680 F. Supp. 2d 780, 791–92 (E.D. La. 2010) (applying various state laws, MDL district court held economic loss rule does not bar tort claims for dry wall which serves its intended purpose but which also poses risks to health and therefore must be replaced).

Defendants fail to analyze each state's law regarding the economic loss doctrine that, according to Defendants, constitutes a complete bar to recovery under Plaintiffs' negligence, product liability, and medical monitoring claims. Determining whether negligence, product liability, and medical monitoring claims are barred by the economic loss doctrine under the common law of multiple states requires a fact-intensive determination that makes "dismissal premature at the 12(b)(6) stage." *In re Valsartan, Losartan, & Irbesartan Prods. Liab. Litig.*, MDL No. 2875 (RBK/KW), 2021 WL 364663, at *22 (D.N.J. Feb. 3, 2021) (in properly limiting its review to the confines of complaint, the court declined to rule on economic loss arguments at the motion to dismiss phase as it lacked adequate information in the pleading stage to assess whether the economic loss rule bars plaintiffs' claims).

Without analyzing the underlying law of the thirteen jurisdictions, Defendants attempt to argue that because Plaintiffs "can only seek economic damages in the Class Action Complaint, the economic loss rule bars their products liability claims." Defs.' Mem. at 20. But this is not the case,

and each state's courts have adopted the position that Plaintiffs here should be able to pursue their negligence, product liability, and medical monitoring claims for economic losses.

Arizona. Defendants rely on a 1984 opinion. Defs.' Mem. at 20 n.11 (citing *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 694 P.2d 198, 209 (Ariz. 1984). Defendants, however, neglect to cite to a much more recent 2010 Supreme Court of Arizona decision, which held that the ruling in *Salt River* does not categorically bar tort recovery of economic losses in products liability cases. *Flagstaff Affordable Hous. Ltd. P'ship v. Design All., Inc.*, 223 P.3d 664, 668 (2010). Instead, *Salt River* requires that Arizona courts adopt a case-by-case examination to determine whether (1) the product defect was "unreasonably dangerous" and (2) the loss occurred in a sudden, accidental manner. *Id*. When these factors are present, a plaintiff may recover in tort for purely economic loss. *Id*. *Salt River* further clarifies that a product may pose an unreasonable danger to its user, even though no sudden accident has occurred, where, for example, it emits a toxic substance or its harmful effects manifest themselves only after a period of many years. In such instances, the other factors—the nature of the defect and the type of economic loss that occurred—assume greater importance and will weigh more heavily in the determination. *Salt River*, 694 P.2d at 207–08.

California. The Ninth Circuit consistently allows plaintiffs to recover for economic loss under California law by alleging that they paid more for a product than they otherwise would have due to a defendants' misrepresentations about the product. *McGee v. S-L Snacks Nat'l,* 982 F.3d 700, 706–07 (9th Cir. 2020). In compliance with *McGee*, the Northern District of California recognizes recovery for economic loss in California for the purchase of unreasonably dangerous products, so long as plaintiffs allege that defendants "made false representations" about the product's safety. *Wilson v. ColourPop Cosms., LLC*, No. 22-CV-05198-TLT, 2023 WL 6787986,

at *5 (N.D. Cal. Sept. 7, 2023), *appeal dismissed*, No. 23-2627, 2023 WL 9112928 (9th Cir. Dec. 20, 2023).[9]

Colorado. Colorado law recognizes recovery for economic loss under tort claims based on misrepresentations made prior to the formation of the contract at issue, so long as plaintiffs allege that Defendants' misrepresentations induced plaintiffs to enter into the contracts and therefore violated an independent duty in tort to refrain from such conduct. *Vyanet Operating Grp., Inc. v. Maurice*, No. 21-CV-02085-CMA-SKC, 2022 WL 4008043, at *4 (D. Colo. Sept. 2, 2022) (denying motion to dismiss based on the economic loss rule where the plaintiff alleged that the defendants "made false representations and concealed facts 'to induce' [the plaintiff] to enter into the Agreement to its detriment"). When applying Colorado law, the Tenth Circuit has concluded that a negligent misrepresentation claim will not be barred by the economic loss rule where the alleged misrepresentation was not "a statement made in fulfilling a specific duty under the contract" but where the defendant instead allegedly "supplied purportedly false information...in the course of a business transaction." *Level 3 Commc'ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1162–63 (10th Cir. 2008); *1881 Extraction Co. LLC v. Kiinja Corp.*, 660 F. Supp. 3d 1059, 1070–71 (D. Colo. 2023).

D.C. Under D.C.'s economic loss doctrine, a plaintiff seeking to recover economic loss were not barred by the economic loss doctrine when defendants are responsible for latent conditions that "presents a threat to the safety and welfare of the owners." *Millennium Square Residential Ass'n v. 2200 M Street LLC*, 952 F. Supp. 2d 234, 245 (D.D.C. 2013) (quoting *Council*

[9] Additionally, the court in *In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prod. Liab. Litig.,* 497 F. Supp. 3d 552 (N.D. Cal. 2020), held that there is no bright-line rule barring all negligence claims for purely economic losses in California either; instead, the economic loss doctrine is part of the duty analysis and deciding whether to impose a duty of care turns on a careful consideration of the sum total of the policy considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors.

of Co-Owners Atlantis Condo., Inc. v. Whiting-Turner Contracting Co., 517 A.2d 336, 338 (1986)). Additionally, D.C. law recognizes an exception to the economic loss doctrine for special relationships, in which the nature of the special relationship depends on the type of damages at issue and is recognized when a defendant's obligations implicate a plaintiff's economic expectancies and the damages sought were caused by an isolated and unexpected occurrence. *Whitt v. Am. Prop. Constr., P.C.*, 157 A.3d 196, 205 (D.C. 2017).

Florida. In Florida, exceptions to the economic loss rule include Florida fraudulent inducement, negligent misrepresentation, and freestanding statutory causes of action. *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 543 (2004). These exceptions to the economic loss rule for product liability actions were reiterated by the Florida Supreme Court in *Tiara Condo. Ass'n., Inc. v. Marsh & McLellan Cos., Inc.*, 110 So. 3d 399, 402 (2013); *see also In re FCA US LLC Monostable Electronic Gearshift Litig.*, 446 F. Supp. 218, 225 (E.D. Mich. 2020) (denying motion to dismiss fraudulent concealment claim and holding that Florida appellate courts have concluded that the economic loss rule does not bar claims of fraudulent inducement where the defendant allegedly concealed facts to encourage a plaintiff to buy its product).

Indiana. Indiana law "focuses on the need to hold manufacturers liable in tort only where their products create unreasonable risks of harm, thus rendering recovery available for economic loss in such circumstances," which allows for recovery in cases, as here, where the defendants' products are alleged to pose such an unreasonable risk of harm. *Mac's Eggs, Inc. v. Rite-Way Agri Distributors, Inc*., 656 F. Supp. 720, 732 (N.D. Ind. 1986).

Maryland. Maryland allows recovery for purely economic loss under product liability claims when plaintiffs allege clear facts that would support a finding of extreme danger and an imminent risk of severe personal injury. *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.,* 795

A.2d 806, 811–12 (2002); *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 631 (Md. 1995) ("[i]t is the serious nature of the risk that persuades us to recognize the cause of action in the absence of actual injury").

Missouri. Missouri courts have rejected the economic loss doctrine and allow plaintiffs to recover economic loss if the particular duty alleged to have been breached arose from the common law. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1016 (E.D. Mo. 2009). To determine whether plaintiffs may recover for their economic loss, Missouri courts must consider both the nature and source of the duty alleged to have been violated and the plaintiffs' rights in the property at issue. *Id.*; *see also, e.g.*, *Sch. Dist. of Independence v. U.S. Gypsum Co.,* 750 S.W.2d 442 (Mo. Ct. App. 1988) (duty to prevent contamination by asbestos); *Bus. Men's Assurance Co. of Am. v. Graham,* 891 S.W.2d 438, 454 (Mo. Ct. App. 1994) (negligence suit against architect); *Laidlaw Waste Sys., Inc. v. Mallinckrodt,* 925 F. Supp. 624 (E. D. Mo.1996) (duty to prevent contamination by hazardous waste).

Montana. Montana does not recognize the economic loss doctrine. *Corp. Air v. Pratt & Whitney Canada Corp.*, No. CV 08-33-BLG-RFC, 2009 WL 10701737, at *8 (D. Mont. Aug. 21, 2009).

Nevada. Under Nevada law, for purposes of the economic loss doctrine, "purely economic loss" is defined as a term of art and does not refer to all economic loss, but only to economic loss that would be recoverable as damages in a normal contract suit. *Giles v. Gen. Motors Acceptance Corp.,* 494 F.3d 865, 879 (9th Cir. 2007). Like Missouri, Nevada allows for the recovery of economic loss in tort claims where defendants had a duty imposed by law rather than by contract, and where the defendants' intentional breach of that duty caused the plaintiff to suffer monetary harm. *Id*.

Pennsylvania. Under Pennsylvania law, economic losses will be imposed upon a defendant for a defective product which is unreasonably ("potentially") dangerous (for example, by causing "some untoward occurrence"), thereby endangering people. *E. River S.S. Corp. v. Delaval Turbine, Inc.*, 752 F.2d 903, 906 (3d Cir. 1985). Pennsylvania courts adopt the majority common-law position that losses caused by qualitative product defects are recoverable in tort if the defect creates ***an unreasonable risk of harm*** to persons or property other than the product. *Id*. (emphasis added); *see also, e.g., Pearl v. Allied Corp.*, 566 F. Supp. 400 (E.D. Pa. 1983) (allowing claims for economic loss from urea formaldehyde contamination, which was allegedly carcinogenic).

Utah. Utah law allows for plaintiffs to recover economic losses in (1) negligent manufacture cases, and (2) defective product cases so long as the seller sold the product in a defective condition which was unreasonably dangerous to the purchaser. *Schafir v. Harrigan*, 879 P.2d 1384, 1388 (Utah Ct. App. 1994); *Maack v. Res. Design & Const., Inc.,* 875 P.2d 570, 581 (Utah Ct. App. 1994).[10]

West Virginia. West Virginia law does not bar recovery for economic loss when a defective product creates a situation potentially dangerous to persons or other property, and when such loss occurs as a result of that danger. *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 858 (1982).

V. PLAINTIFFS ALLEGE PLAUSIBLE HARM WARRANTING MEDICAL MONITORING RELIEF.

Because diseases and injuries caused by the exposure of toxic substances are often latent, relief in the form of medical monitoring has developed as a means to compensate plaintiffs that

[10] Both *Schafir* and *Maack* were abrogated on other grounds by *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234 (Utah 2009).

have been wrongfully exposed to various toxic substances and require medical testing because of that exposure. *See Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824–25 (Cal. 1993). Even if a particular state recognizes medical monitoring as a remedy rather than a separate cause of action, the elements of what Plaintiffs must show are the same. *See, e.g.*, *In re Valsartan, Losartan, & Irbesartan Prods. Laib. Litig.*, MDL No. 2875, 2023 WL 1818922 (D.N.J. Feb. 8, 2023) (certifying a medical monitoring class for jurisdictions recognizing medical monitoring as a cause of action and a separate medical monitoring class for jurisdictions recognizing medical monitoring as a remedy).

Defendants' assertion that medical monitoring relief is unavailable for Plaintiffs' products liability claims is without merit. Without thoroughly analyzing the underlying law of the states at issue, Defendants assert that three jurisdictions—Arizona, the District of Columbia, and Missouri[11]—do not allow for medical monitoring relief on the basis of risk of future harm. Defs.' Mem. at 21.[12] But medical monitoring is not a cause of action for "risk of future harm." Further, each jurisdiction's courts have adopted the position that Plaintiffs here should be able to seek the establishment and funding of a medical monitoring program to pay their current and future medical monitoring expenses or, in the alternative, the costs of that medical monitoring, even without present physical injury. Compl. ¶ 8. Defendants' cited authority is inapposite.

[11] Defendants also include Indiana, but Plaintiffs do not bring a claim for medical monitoring relief under Indiana law. Compl. ¶¶ 163, 1021–87. Indiana's inclusion in the definition of the nationwide Medical Monitoring Class, *id.* ¶ 162, was a scrivener's error.

[12] Defendants do not clearly specify the states in which they challenge medical monitoring relief; judging by the authorities they cite, however, it appears that they are asserting that no jurisdiction recognizes medical monitoring relief. Plaintiffs dispute the entirety of Defendants' contention concerning the 13 jurisdictions, as all 13 recognize medical monitoring relief as alleged by Plaintiffs. If the Court would like additional state by state analysis, Plaintiffs will provide supplemental briefing on the matter.

Arizona. Arizona law recognizes medical monitoring as a remedy for individuals whose exposure to toxic chemicals creates an increased risk of disease that necessitates diagnostic medical care without requiring a present physical injury. *Burns v. Jaquays Min. Corp.*, 752 P.2d 28, 33–34 (Ariz. Ct. App. 1987). In *Burns*, the Arizona Court of Appeals held in an asbestos contamination case that "despite the absence of physical manifestation" of any asbestos-related diseases, plaintiffs were entitled to such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles applied by physicians experienced in the diagnosis and treatment of these types of injuries. *Id.* Notably, in *Burns*, the Arizona Court of Appeals reversed the prior grant of summary judgment as to plaintiffs' claim for damages under theories of nuisance **and** medical surveillance. *Id*.

In *Quiroz v. ALCOA Inc.*, 416 P.3d 824, 832–33 (Ariz. 2018), the Arizona Supreme Court held that *Burns* specifically addressed damages in a nuisance claim and concluded that damages for medical monitoring may be recovered under such a theory. Defendants' assertion in the corresponding parenthetical that medical monitoring is only available for plaintiffs without present physical injuries under a nuisance claim is therefore incorrect. As the very case Defendants cite to warns, in the context of a nuisance cause of action, the *Burns* court simply affirms the well-established rule that when a landowner creates a nuisance that physically intrudes upon another person's property, it may be liable for the damages caused by the nuisance. *Id*. Defendants fail to identify the relevant holding in *Burns* related to Plaintiffs' claims (medical monitoring relief absent present physical injury recognized in medical surveillance claim for damages).

D.C. The District of Columbia recognizes medical monitoring claims without the need to demonstrate present physical injuries. *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 819, 825–26 (D.C. Cir. 1984) (recognizing, under District of Columbia law, a cause

of action for funding diagnostic examinations "even in the absence of physical injury" when a defendant negligently invades plaintiff's interest). Defendants cite to a single D.C. district court decision, *Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 467 (D.D.C. 1997), to support its argument that D.C. expressly prevents medical monitoring relief for the alleged risk of future harm. In *Witherspoon*, the court relied on an out-of-jurisdiction case applying Kansas law, *Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515 (D. Kan. 1995), and did not elaborate whether a "present injury" is required in D.C., nor did it address or attempt to distinguish the *Friends* decision. 964 F. Supp. at 466-67. Additionally, the injured person in *Witherspoon* was already deceased and thus could not face any irreparable injury absent the medical monitoring. *Id*. at 467.

In *Arias v. DynCorp*, 928 F. Supp. 2d 10, 16 (D.D.C. 2013), the court enumerated the elements of a claim for medical monitoring as: (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent acts of the defendant; (2) as a proximate result of that exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. *Id*. (citing *Reed v. Philip Morris Inc.,* No. 96–5070, 1997 WL 538921, at *16 n.10 (D.C. Super. Aug. 18, 1997)). Plaintiffs have sufficiently alleged all four elements required under D.C. law to establish a well-pled claim for medical monitoring relief. Compl. ¶¶ 229–50.

Missouri. Missouri recognizes that tort law concepts premised upon a present physical injury are ill-equipped to deal with cases involving latent injury and that significant economic harm may be inflicted on those exposed to toxic substances, notwithstanding the fact that the physical harm resulting from such exposure is often latent. *Meyer ex rel. Coplin v. Fluor Corp.*,

220 S.W.3d 712, 718 (Mo. 2007). With this understanding, the Supreme Court of Missouri recognizes (1) recovery for medical monitoring damages that compensate plaintiffs for the costs of periodic medical examinations reasonably necessary for the early detection and treatment of latent injuries caused by the plaintiff's exposure to toxic substances, and (2) that a physical injury requirement is inconsistent with the reality of latent injury and with the fact that the purpose of medical monitoring is to facilitate the early diagnosis and treatment of latent injuries caused by exposure to toxins. *Id.* at 718. *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400 (W.D. Mo. 1994), on which Defendants rely, predates *Meyer* and does not reflect current Missouri law. The Thomas court also misstates medical monitoring—it is neither an "increased risk of cancer" claim nor an "enhanced risk of cancer claim," but seeks the cost of presently necessary diagnostic medical testing. *See, e.g.*, *Meyer*, 220 S.W.3d at 716; *see also In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850 (3d Cir. 1990).

VI. PLAINTIFFS' NEGLIGENCE CLAIMS ARE WELL PLED.

Defendants' challenges to Plaintiffs' negligence claims rehash the same failed arguments they made in moving to dismiss those claims from the master long form complaint. *Compare* Defs.' Mem. at 21–22 *with* Dkt. No. 142 at 16–17. Defendants, again, attempt to challenge Plaintiffs' negligence claims on several grounds: (1) whether "relevant" jurisdictions recognize negligence *per se* claims as a separate cause of action, *see* Defs.' Mem. at 21 and (2) whether Plaintiffs sufficiently pled that the Defendants owed Plaintiffs a duty, Defendants breached such duty, and such breach caused Plaintiffs' alleged injuries, *see id.* at 22.

A. Plaintiffs Sufficiently Plead Negligence *Per Se*.

Defendants ignore this Court's previous motion-to-dismiss ruling, in which this Court held, in light of Defendants' nearly identical argument that some jurisdictions do not recognize gross negligence or negligence *per se* as separate causes of action, "[t]he Court does not find variation

in how states treat negligence claims to be a basis for dismissal at this pleading stage." *Hair Relaxer*, 2023 WL 7531230, at *4.[13] However, Defendants still put forth the argument that "none of the relevant jurisdictions" recognize negligence *per se* claims as a separate cause of action. Therefore, Plaintiffs here restate their clarification from their prior response to defendants' motion to dismiss: "If a Plaintiff pleads negligence *per se* from a jurisdiction that does not recognize it as an independent claim but instead as a way to establish ordinary negligence, it is pleaded as an alternative means to establish negligence. *See, e.g., Dent v. Nat'l Football League*, 968 F.3d 1126, 1130 (9th Cir. 2020) (negligence *per se* recognized to "establish a presumption of negligence")." Dkt. No. 176 at 16 n.18.

If this Court decides to evaluate the variation of how states treat negligence claims at this stage, it should reject Defendants' argument with respect to at least several of the jurisdictions at issue that plainly recognize negligence *per se* as a cause of action. *See, e.g.*, *Stenson v. Edmonds*, No. 18-CV-01968-JLK, 2020 WL 4464614, at *4 (D. Colo. June 25, 2020), *aff'd*, 86 F.4th 870 (10th Cir. 2023) ("party may recover under a claim of negligence *per se* if it is established that the defendant violated the statutory standard and the violation was the proximate cause of the injuries sustained"); *Troth v. Warfield*, 495 F. Supp. 3d 729, 736 (N.D. Ind. 2020) (holding that "the unexcused violation of a statute or ordinance constitutes negligence *per se*") (quoting *Stachowski v. Estate of Radman*, 95 N.E.3d 542, 544 (Ind. Ct. App. 2018) and *City of Fort Wayne v. Parrish*, 32 N.E.3d 275, 277 (Ind. Ct. App. 2015)); *Dibrill v. Normandy Assocs., Inc*., 383 S.W.3d 77, 84 (Mo. Ct. App. 2012) ("[T]he violation of a statute, which is shown to be the proximate cause of

[13] *See also In re Digitek Prods. Liab. Litig*., No. 2:08-md-01968, 2009 WL 2433468, at *11–12 (S.D.W. Va. Aug. 3, 2009) (in an MDL proceeding, denying defendant's motion to dismiss the plaintiffs' negligence per se claims without a state-by-state analysis).

the injury, is negligence *per se*") (quoting *Imperial Premium Fin., Inc. v. Northland Ins. Co*., 861 S.W.2d 596, 599 (Mo. App. W.D. 1993)).

Plaintiffs allege that Defendants conduct is in violation of not just the FDCA, but also the Fair Packaging and Labeling Act, as well as "additional safety laws and regulations shown during discovery." Compl. ¶ 63 n.48, ¶¶ 574–75. Therefore, Defendants' only analysis provided in a parenthetical for Florida case law regarding negligence *per se* under FDCA is irrelevant for purposes of dismissal, given that Plaintiffs allege violations of safety laws and regulations beyond the FDCA. Defs.' Mem. at 21 n.13.

B. Plaintiffs Plausibly Plead Negligence.

Plaintiffs have sufficiently pled all elements of a negligence claim, which are: "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach." *O'Connor v. Ford Motor Co.*, 477 F. Supp. 3d 705, 721 (N.D. Ill. 2020) (cleaned up). Plaintiffs' allegations in the Complaint rest on the same factual foundation as the master long form complaint for personal injury claims, such that the Complaint establishes all elements of general negligence as required at the pleading stage. Defendants, again, ignore this Court's previous motion-to-dismiss ruling, in which this Court held, in light of Defendants' nearly identical argument,[14] "[i]n short Plaintiffs state a negligence claim." *Hair Relaxer*, 2023 WL 7531230, at *5.

[14] For example, Defendants again attempt to erroneously fault Plaintiffs for not providing sufficient evidence in the Complaint to establish Defendants' "knowledge" of the risks and dangers associated with their Toxic Hair Relaxer Product(s). Defendants, once again, fail to recognize that Plaintiffs have sufficiently pled that "Defendants knew or should have known through the exercise of reasonable care of the dangers associated with the normal and/or intended use of their hair relaxer products. In particular, Defendants knew or should have known that their Toxic Hair Relaxer Products significantly increase the risk of uterine and ovarian cancer." Compl. ¶ 187.

First, Plaintiffs allege Defendants had "a duty to" (1) "exercise reasonable care in the manufacturing, designing, researching, testing, producing, supplying, inspecting, marketing, labeling, packaging, selling, and distributing of their hair relaxer products" Compl. ¶ 183, (2) "ensure that the Toxic Hair Relaxer Products it sold in the United States were safe for human consumption, contained only the ingredients stated on the label, and were not adulterated" Compl. ¶ 184, (3) "exercise reasonable care in the advertising and sale of their hair relaxer products included a duty to warn Plaintiffs and the other Class members of the risks and dangers associated with their Toxic Hair Relaxer Products that were known or should have been known to Defendants at the time of the sale of their Toxic Hair Relaxer Products to Plaintiffs" Compl. ¶ 185, and (4) "to remove, recall, or retrofit the unsafe and/or defective Toxic Hair Relaxer Products." Compl. ¶ 186.

Second, Plaintiffs allege Defendants breached these duties in several ways, including by manufacturing, designing, researching, testing, producing, supplying, inspecting, marketing, selling, and/or distributing their Toxic Hair Relaxer Products negligently, recklessly, and/or with extreme carelessness, and by failing to adequately warn of the risks and dangers of their Toxic Hair Relaxer Products. *See* Compl. ¶¶ 188–90.

Finally, when read as a whole,[15] Plaintiffs' allegations give rise to the inference that Defendants' conduct proximately caused Plaintiffs' injuries. *See* Compl. ¶¶ 191–92 ("Each Defendant knew, or should have known through reasonable care, that the aforesaid wrongdoing would foreseeably cause injuries and other damage to Plaintiffs and the other Class members. Each of these acts and omissions, taken singularly or in combination, were a proximate cause of the injuries and damages sustained by Plaintiffs and the other Class members."). As this Court held previously, more is not needed at this stage. *Hair Relaxer*, 2023 WL 7531230, at *5.

[15] *Engel v. Buchan*, 710 F.3d 698, 709 (7th Cir. 2013) (reading complaint as a whole on a motion to dismiss).

VII. PLAINTIFFS' STRICT LIABILITY CLAIMS ARE WELL PLED.

A. Plaintiffs Sufficiently Plead Design Defect.

A design defect claim requires: "(1) a condition of the product as a result of design, (2) that made the product unreasonably dangerous, (3) and that existed at the time the product left the defendant's control, and (4) an injury to the plaintiff (5) that was proximately caused by the condition." *Id.* at *5 (quoting *Clark v. River Metals Recycling, LLC*, 929 F.3d 434, 439 (7th Cir. 2019) (cleaned up)). Plaintiffs have once again sufficiently alleged a design defect claim in the present Complaint.

As discussed above in Section I.B., contrary to Defendants' contention, in its previous motion-to-dismiss ruling, this Court held that Plaintiffs did in fact sufficiently identify specific products and the toxicity defects in those products for purposes of a design defect claim. *Hair Relaxer*, 2023 WL 7531230, at *12.[16] The allegations this Court found sufficient for these purposes previously are also included in the present Complaint. *See* Compl. ¶¶ 1–2, 116–126, 233–236, 456 ("Defendants' Toxic Hair Relaxer Products were defectively designed because they caused serious injuries and death, including but not limited to uterine cancer and ovarian cancer"), and ¶ 466 ("Plaintiffs and the other Class members have been significantly exposed to Toxic Hair Relaxer Products, have sustained a significantly increased risk of developing serious and potentially fatal Subject Cancers, and have suffered and will continue to suffer economic losses and expenses associated with medically necessary medical monitoring.").

[16] "Plaintiffs allege that Defendants' products contained toxic chemicals. Specifically, they allege harmful and carcinogenic ingredients in Defendants' hair relaxer products 'are known to disrupt and/or harm a woman's endocrine system.' Such harmful, toxic and carcinogenic ingredients have included over time, but are not limited to, phthalates, parabens, cyclosiloxanes, di-(2-ethylhexyl), octamethylcyclotetrasiloxane, lye, formaldehyde, and other toxic chemicals. The phthalates and other EDCs in Defendants' hair relaxer products, Plaintiffs claim, 'significantly increase the risk of cancers and other negative health conditions.'" *Id.* (citations omitted).

Defendants erroneously contend that Plaintiffs' allegations are conclusory, attempting to construe Plaintiffs' robust and thorough allegations as "simply alleg[ing]" that "unidentified" Toxic Hair Relaxer Products were in an unsafe, defective, and unreasonably dangerous condition at the time they left Defendants' possession because of their design. Defs' Mem. at 23. Defendants fail to acknowledge, however, the entire allegation specified in Compl. ¶ 254, which also provides: "[I]n particular, Defendants' Hair Relaxer Products were defectively designed because they caused serious injuries and death, including but not limited to uterine cancer and ovarian cancer." Additionally, Plaintiffs allege, in much more detail than the complaint in the authority cited by Defendants, *Tsavaris v. Pfizer*, No. 1:15-cv-21826-KMM, 2016 WL 375008 (S.D. Fla. Feb. 1, 2016), that: "The Toxic Hair Relaxer Products contain constituent chemicals and active ingredients which include chemicals that disrupt the endocrine system, alter hormonal balance, cause inflammation, alter immune response, and cause other toxic responses that both initiate and promote cancer. The Toxic Hair Relaxer Products, as they are intended to be used, are unsafe, toxic, and carcinogenic." Compl. ¶ 2; "The strong risks of cancers demonstrated by the Chang and White studies are biologically plausible, as Defendants' Toxic Hair Relaxer Products have contained ingredients that are themselves toxic compounds, or lead to the formation and release of toxic compounds. Such toxic compounds include, but are not limited to, Phthalates, parabens, cyclosiloxanes, metals, lye and formaldehyde. These chemicals can alter the body's delicate hormonal balance, causing spikes or drops in levels of estrogens and progesterones (as well as other hormones), and cause other pro-cancerous phenomena in the tumor microenvironment" Compl. ¶ 116–17, and "EDCs can block hormone stimulus by inducing epigenetic changes (modifications to DNA that regulate whether genes are turned on or off), or by altering the structure of target cells' receptors. Natural and synthetic EDCs are present in some of Defendants' Toxic

Hair Relaxer Products under the guise of 'fragrance' and 'perfumes.' They enter the body when these products are applied to the hair and scalp." Compl. ¶ 121–22.

These allegations sufficiently establish that the Toxic Hair Relaxer Products, as designed, include toxic ingredients that pose a substantial likelihood of harm and that proximately caused Plaintiffs economic injury (a) in paying for a toxic, unreasonably dangerous product they otherwise would not have purchased if the carcinogenic risk of product use were properly disclosed, and (b) due to the costs of diagnostic testing necessitated by their increased risk of disease. Furthermore, Plaintiffs also sufficiently tie well-pled design defect allegations to products manufactured by Defendants, as set forth in ¶¶ 1–2 and reiterated throughout the Complaint. These allegations, taken as a whole, are more than sufficient at this stage to establish, at minimum, a plausible set of facts that gives effective notice to Defendants about how their products are alleged to be defective and caused Plaintiffs' economic injuries. *See Mahler v. Vitamin Shoppe Indus., Inc*., No. 19-CV-03848, 2020 WL 419414, at *2 (N.D. Ill. Jan. 27, 2020).

B. Plaintiffs Sufficiently Plead Failure to Warn.

Defendants' criticisms in the present class action Complaint regarding Plaintiffs' failure to warn claim once again parrot the same unsuccessful ones they made in moving to dismiss the master long form complaint. Difference being only that Defendants this time cite to inapposite case law at the motion to dismiss stage.[17] *Compare* Defs.' Mem. at 24–25 *with* Dkt. No. 142 at 20–21.

[17] Defendants' cited authority is distinguishable. *Dero Roofing, LLC v. Triton, Inc.*, No. 2:21-CV-688-SPC-MRM, 2022 WL 2104287, at *4 (M.D. Fla. June 10, 2022) ("shotgun" complaint consisting of 45 paragraphs was dismissed for failure to discern what Defendants' relationships were to the products at issue*); Frere v. Medtronic, Inc*., 2016 WL 1533524, at *7 (C.D. Cal. Apr. 6, 2016) (plaintiff's claim was dismissed with leave to amend given inconsistencies between the actual product at issue and relevant documents cited to by plaintiff that dealt with a different product than that implanted in plaintiff).

A duty to warn exists "when there is unequal knowledge and the defendant, possessed of such knowledge, knows or should know that harm might occur if no warning is given." *Proctor v. Davis*, 682 N.E.2d 1203, 1211 (Ill. App. Ct. 1997) (cleaned up). In arguing Plaintiffs' allegations are not adequate, Defendants once again contend that Plaintiffs do not identify specific products or timeframes. This Court has ruled against this very argument multiple times before, and should again find that Defendants' arguments are without merit and Plaintiffs have sufficiently alleged a failure to warn claim. *See Hair Relaxer*, 2023 WL 7531230, at *6.

As discussed above in Section III., Plaintiffs allege that Defendants did not satisfy their duty to warn of the products' "unsafe, defective, and unreasonably dangerous condition" and that the products "could cause serious injuries and death when used in an intended or reasonably foreseeable manner, including but not limited to uterine and ovarian cancer." Compl. ¶¶ 269–70. Plaintiffs specifically describe EDCs and identify the EDCs alleged to be in the products, *id.* ¶¶ 118–25, and claim they would not have purchased or used Defendants' hair relaxer products had they known the true facts about the products, *e.g.*, *id.* ¶ 6. Contrary to Defendants' characterization, the complaint does not allege or raise the inference that the first time Defendants were aware of the possible association between hair straightening products and cancer was in 2021 and 2022 when the Chang and White articles were published. Instead, the complaint describes the long history of Black and Brown women being compelled to conform to Eurocentric beauty standards of straight hair, leading up to the manufacture of the first lye relaxer in 1971. *Id.* ¶¶ 38–47, 53–55. Plaintiffs explain that particular defendants began marketing their first hair relaxer products in the 1970s and 1980s, and by the 1990s were making representations and omissions about chemicals in their products in advertisements and packaging. *Id.* ¶¶ 57–59. The complaint states that "[f]or decades and to present…[Defendants] marketed their hair relaxer products

without ever disclosing known health risks of the toxic chemicals contained in these products." *Id.* ¶ 55. Plaintiffs allege that Defendants "were aware or should have been aware of both the potential for harm and the increased risk of developing uterine and ovarian cancer from the use of the hair relaxer products based on the evolving scientific studies, on-going research, and various government standards and regulations." *Id.* ¶ 70.

This Court, in taking the factual allegations as true and drawing reasonable inferences in Plaintiffs' favor at this stage, should find once again that Plaintiffs have sufficiently stated a failure to warn claim.

VIII. PLAINTIFFS' MISREPRESENTATION/OMISSION CLAIMS ARE WELL PLED.

A plaintiff who provides a "general outline of the fraud scheme" sufficient to "reasonably notify the defendants of their purported role" in the fraud satisfies Rule 9(b). *In re Rust-Oleum Restore Mktg., Sales Pracs. & Prod. Liab. Litig.*, 155 F. Supp. 3d 772, 812 (N.D. Ill. 2016) (quoting *Judson Atkinson Candies, Inc. v. Latini–Hohberger Dhimantec*, 237 F.R.D. 173, 175 (N.D. Ill. 2006). The particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 446 (7th Cir. 2011).

A. Plaintiffs Sufficiently Plead Fraudulent Omission and Negligent Misrepresentation/Omission Claims.

As with the master long-form complaint, Plaintiffs intend to proceed with their fraudulent omission and negligent misrepresentation/omission claims on a class-wide basis stressing the omissions that they allege Defendants have made concerning the dangerous nature of the Toxic Hair Relaxer Products. *See Hair Relaxer*, 2023 WL 7531230, at *7 ("Plaintiffs ask the Court to focus on Defendants' alleged omissions, and not reach the issue of affirmative misrepresentations…."). Plaintiffs acknowledge that this Court dismissed related claims in its

earlier ruling, but respectfully submit that their omission-based claims in the present Complaint merit a different result.

The Complaint's allegations overcome this Court's earlier concern that Plaintiffs "do not identify specific omissions of material fact or support these allegations with additional detail." *Id.* The Complaint states that "Defendants systematically omitted…and continue to omit…the significant health impacts of Toxic Hair Relaxer Product use." Compl. ¶ 3. These health impacts include that the "chemicals in the products significantly increase the risk of ovarian and uterine cancer." *Id.* ¶ 99.g. The Complaint discusses these increased cancer risks in detail. *Id.* ¶¶ 103–26. The Complaint further alleges that Defendants knew of these risks. *Id.* ¶¶ 101–03; *see also* Fed. R. Civ. P. 9(b) (providing that "knowledge…may be alleged generally"). Defendants argue that their knowledge cannot have predated the Chang and White studies; however, Defendants have known at all relevant times what ingredients they were putting into their Toxic Hair Relaxer Products. These allegations are sufficient to plead omissions under Rule 9(b). *See In re Testosterone Replacement Therapy Prod. Liab. Litig.*, No. 14 C 1748, 2014 WL 7365872, at *7 (N.D. Ill. Dec. 23, 2014) (sustaining omission-based claims based on "alleg[ations] that defendants failed to disclose the risks of stroke, pulmonary embolism, and cardiovascular events and that they knew or should have known about these side effects").

Plaintiffs have also alleged facts giving rise to Defendants' duty to disclose the health risks that their products posed. *See Hair Relaxer*, 2023 WL 7531230, at *7 (requiring a showing that Defendants were "under a duty to disclose" the omitted information) (quoting *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 571 (7th Cir. 2012)). There are various grounds in the laws of the states at issue giving rise to such a duty, including whether defendants have knowledge of material facts that the plaintiffs do not and whether defendant has knowledge that the product is

unsafe. *See, e.g.*, *Chapman v. Gen. Motors LLC*, 531 F. Supp. 3d 1257 (E.D. Mich. 2021) (finding, in case involving alleged safety defect, a duty to disclose the defect under the laws of nine different states); *Rust-Oleum*, 155 F. Supp. 3d 772, 828 (N.D. Ill. 2016) (finding a duty to disclose under the laws of five different states where defendant "was in the unique position of having information not readily ascertainable to customers about the alleged hidden defect"). The potentially deadly dangers of Defendants' products, that were known only to Defendants, created a duty to speak distinct from the typical business transaction, such as the mortgages in cases such as *Wigod*.

B. Plaintiffs Plausibly Plead Statutory Consumer Protection Claims.

Defendants contest the viability of Plaintiffs' consumer protection claims, arguing dismissal is warranted because several statutes at issue preclude the assertion of claims through a class action. Defendants explicitly challenge the claims brought under Alabama, Mississippi, Louisiana, Virginia, and Tennessee law. Defs' Mem. at 31. Defendants also attempt to argue that claims under California, Iowa, Mississippi, and Texas law should be dismissed under the basis of an erroneous contention that "a majority of courts have held that class action bars and pre-suit notice provisions are substantive laws that control in federal litigation." Defs' Mem. at 32 (citing *Effexor*, 357 F. Supp. 3d at 390).[18] This Court should find that Plaintiffs' class claims under these state statutes can proceed in federal court, as was held in *In re Takata Airbag Prods. Liab. Litig.*, 462 F. Supp. 3d 1304, 1322 (S.D. Fla. 2020).

In *Takata*, the Southern District of Florida held that Rule 23 trumps the procedural provisions of state statutes. *Id.*;[19] *see also Cardenas v. Toyota Motor Corp.*, 418 F. Supp. 3d 1090,

[18] The authority on which Defendants rely is distinguishable due to its procedural posture; the ruling was filed "[a]fter the pleadings are closed…but early enough not to delay trial." *In re Effexor Antitrust Litig.*, 357 F. Supp. 3d 363, 380 (D.N.J. 2018).

[19] *See Carter v. L'Oreal USA, Inc.*, No. 16-00508-CG-B, 2017 WL 4479368, at *3 (S.D. Ala. Sept. 21, 2017) ("Clearly, the fact that Alabama has deemed ADTPA's limitation on class actions a 'substantive limitation' does not mean that permitting Rule 23 class actions under ADTPA has affected a substantive

1106–07 (S.D. Fla. 2019) (ruling Rule 23 permitted federal class action under Tennessee Consumer Protection Act, despite class action bar under state law); *In re Dealer Mgmt. Sys. Antitrust Litig.*, 362 F. Supp. 3d 510, 553 (N.D. Ill. 2019) (ruling same as to the Arkansas Deceptive Trade Practices Act, Georgia's Fair Business Practices Act, and the South Carolina Unfair Trade Practices Act); *In re Hydroxycut Mktg. & Sales Practices Litig.*, 299 F.R.D. 648, 652–54 (S.D. Cal. 2014) (ruling same as to Georgia's Fair Business Practices Act, Louisiana's Unfair Trade Practices and Consumer Protection Law, the South Carolina Unfair Trade Practices Act, and the Tennessee Consumer Protection Act); *In re MyFord Touch Consumer Litig.*, No. 13-cv-03072-EMC, 2016 WL 7734558, at *27 (N.D. Cal. Sept. 14, 2016) (ruling same as to the Virginia Consumer Protection Act).

Therefore, this Court should find that Rule 23 controls whether a plaintiff can assert a class action claim under a state statute that forbids class actions. Consequently, this Court should decline to dismiss these class action claims on this basis. *See Boyd v. FCA US LLC (In re Takata Airbag Prods. Liab. Litig.)*, 464 F. Supp. 3d 1291, 1310 (S.D. Fla. 2020).

IX. PLAINTIFFS' BREACH OF WARRANTY CLAIMS ARE WELL PLED.

Defendants challenge Plaintiffs' breach of express and implied warranty claims on several grounds: (1) whether any applicable privity requirements have been satisfied, *see* Defs.' Mem. at 32, (2) whether Plaintiffs pled the elements of their breach of express and implied warranty claims, *see id.* at 32–35, and (3) whether Plaintiffs have pled damages, *see id.* at 35. Each of these challenges fail for the reasons discussed below, and Plaintiffs' warranty claims should be sustained.

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right provided by the state."), *report and recommendation adopted*, 2017 WL 4478008 (S.D. Ala. Oct. 6, 2017).").

First, this Court previously declined to undertake a state-by-state survey of privity requirements at this stage, *see Hair Relaxer*, 2023 WL 7531230, at *8, and it would be appropriate to do so again here. However, should this Court decide to reach these issues at this time, it should reject each of Defendants' privity arguments. Defendants do not clearly specify the states in which they challenge privity; they merely assert that privity is not met "in several jurisdictions." Defs.' Mem. at 32. Judging by the authorities they cite, however, it appears that Defendants are only challenging whether Plaintiffs have pled the requisite privity in California, Florida, Illinois, and Indiana for both express and implied warranty claims and in Alabama and Arizona for implied warranty claims only.[20] Plaintiffs do not contest privity for purposes of implied warranty claims under Alabama, Arizona, Florida, or Illinois law; indeed, the plaintiffs asserting claims under the laws of those states did not even bring claims for breach of implied warranty. However, Plaintiffs have sufficiently pled privity for their California and Indiana breach of express and implied warranty claims, as well as for their Florida and Illinois express warranty claims.

With respect to California, Defendants disregard that California Plaintiffs' breach of warranty claims are not the UCC breach of warranty claims discussed in *Blanco v. Baxter Healthcare Corp.*, 70 Cal. Rptr. 3d 566, 582 (Cal. Ct. App. 2008), but are rather breach of warranty claims stated under the Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 *et al. See* Compl. ¶¶ 645–77. There is no privity requirement for claims for breach of either express or implied warranty under the Song-Beverly Act. *In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 974, 982 (N.D. Cal. 2014). Defendants also fail to mention that, as the same Indiana authority on which they rely holds, **"**privity is not required for a claim of breach of the implied

[20] Defendants also challenge privity for breach of warranty claims arising under Connecticut, Georgia, New York, North Carolina, and Washington law, but no Plaintiff has brought claims arising under the laws of those states.

warranty of merchantability**."** *Atkinson v. P & G-Clairol, Inc.*, 813 F. Supp. 2d 1021, 1026 (N.D. Ind. 2011)**.**

For the remaining Florida, Illinois, and Indiana express warranty claims, contractual privity is not required because the express warranties at issue take the form of statements that Defendants made directly to Plaintiffs. Plaintiffs base these claims on Defendants' explicit representations that "the Toxic Hair Relaxer Products were safe and fit for the purposes intended, that they were of merchantable quality, and that they did not pose dangerous health risks." Compl. ¶¶ 955, 1001, 1047. Defendants directed these statements to Plaintiffs as end consumers "through their written literature, packaging and labeling, and through their advertisements." Such allegations satisfy express warranty privity requirements in all three states. *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1343 (S.D. Fla. 2009) (finding no privity requirement where "the express warranty the manufacturer allegedly breached is contained on the packaging of" the allegedly defective product); *Bakopoulos v. Mars Petcare US, Inc.*, 592 F. Supp. 3d 759, 766 (N.D. Ill. 2022) (holding that the defendant's "written affirmations in its marketing materials gave rise to an express warranty, and so plaintiffs weren't required to allege privity"); *Bayer Corp. v. Leach*, 153 N.E.3d 1168, 1191 (Ind. Ct. App. 2020) ("[A] remote purchaser was 'not precluded from suing [a manufacturer] because of lack of privity of contract, where [the manufacturer] allegedly made express warranties' directly to the remote purchaser.") (quoting *Prairie Prod., Inc. v. Agchem Div.-Pennwalt Corp.*, 514 N.E.2d 1299, 1302 (Ind. 1987)).

Second, Plaintiffs properly allege the other elements of their breach of warranty claims. This Court has already found that Plaintiffs sufficiently pled their breach of warranty claims in the personal injury complaint, *see Hair Relaxer*, 2023 WL 7531230, at *8; the same result should follow here. As discussed above in Section I.B. and VII.A., Plaintiffs each allege the product(s)

they purchased to the requisite specificity. In support of their express warranty claims, they describe the statements in Defendants' marketing for Toxic Hair Relaxer Products warranting that the products are safe and healthy. Compl. ¶¶ 93–102. And they allege that Defendants breached those warranties "because their Toxic Hair Relaxer Products are not safe," contrary to such statements. *Id.* ¶ 310. These allegations more than sufficiently make out an express warranty claim. *See, e.g.*, *Johnson v. Eisai, Inc.*, 590 F. Supp. 3d 1053, 1064 (N.D. Ohio 2022) (noting that several jurisdictions "have found that '[a]ffirmations of fact regarding the safety of a product are actionable on a claim for breach of express warranty'") (quoting *Williamson v. Stryker Corp.*, No. 12 Civ. 7083(CM), 2013 WL 3833081, at *9 (S.D.N.Y. July 23, 2013)).[21] Plaintiffs' allegations that these hair relaxer products "have dangerous propensities when used as intended" further establish that they were unmerchantable for purposes of their implied warranty claims.[22] *See Hair Relaxer*, 2023 WL 7531230, at *8 (sustaining implied warranty claims founded on the same allegations).

Third, Plaintiffs allege that they were damaged by Defendants' breaches of warranty because they would not have purchased them if Defendants had disclosed the true nature of the products. *See, e.g.*, Compl. ¶ 334. This financial injury is actionable. *Aqua Dots*, 654 F.3d at 748; *see further* Section I.A.

[21] The statements in *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 687 F. Supp. 2d 897 (W.D. Mo. 2009), by contrast, were "not even statements about the products in question," yet the court held that they still "might give rise to a warranty claim." *Id.* at 904.

[22] Defendants' arguments regarding whether Plaintiffs' adequately allege breach of fitness for a particular purpose may again be deferred given the state law variations on that issue. *See Hair Relaxer*, 2023 WL 7531230, at *8.

X. PLAINTIFFS' UNJUST ENTRICHMENT CLAIMS ARE WELL PLED.

Defendants once again seek a general dismissal of Plaintiffs' unjust enrichment claims on the grounds that "not all jurisdictions recognize unjust enrichment as an independent cause of action." Defs' Mem. at 35. In doing so, Defendants refuse to adhere to the Court's prior ruling on the Defendants' same failed argument they made in moving to dismiss the master long form complaint. *Compare* Defs.' Mem. at 35–36 *with* Dkt. No. 142 at 31–32. In this Court's previous motion-to-dismiss ruling, the Court declined to rule, at the pleading stage, on a case-wide basis that no plaintiff may pursue an unjust enrichment claim, *see Hair Relaxer*, 2023 WL 7531230, at *8, and it would be appropriate to do so again here.

Dismissal of the Complaint's unjust enrichment claims is also not warranted here because there is authority undercutting both of Defendants' assertions. As to whether there exists an independent cause of action for unjust enrichment, this Court previously noted that in *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 516 (7th Cir. 2011), the Seventh Circuit delineated the elements of an unjust enrichment claim under Illinois law. *Id.* at 516, cited in *Hair Relaxer*, 2023 WL 7531230, at *8. *See also Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753 (9th Cir. 2015) (sustaining unjust enrichment claim under California law as a "quasi-contract" claim seeking restitution). A line of cases also permits unjust enrichment to be pled in the alternative even where plaintiffs simultaneously assert that an adequate remedy at law is available. *See, e.g.*, *In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp. 2d 867, 918 (E.D. Pa. 2012) ("den[ying] the Defendants' motion to dismiss the 10 state unjust enrichment claims on the grounds of the availability of an adequate remedy at law"); *In re Light Cigarettes Mktg. Sales Pracs. Litig.*, 751 F. Supp. 2d 183, 191 (D. Me. 2010) ("Although an adequate remedy at law might prevent plaintiffs from eventually prevailing on equitable claims, nothing prevents the plaintiffs from pleading both types of causes of action.").

CONCLUSION

Defendants' motion to dismiss should be denied.

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Respectfully submitted,

/s/ Diandra "Fu" Debrosse Zimmermann
Diandra "Fu" Debrosse Zimmermann
DICELLO LEVITT LLP
505 20th Street North - Suite 1500
Birmingham, Alabama 35203
Tel.: 312-214-7900
Email: fu@dicellolevitt.com

Plaintiffs' Co-Lead Counsel

Fidelma L. Fitzpatrick
MOTLEY RICE LLC
40 Westminster Street, Fifth Floor
Providence, Rhode Island 02903
Tel.: 401-457-7700
Email: ffitzpatrick@motleyrice.com

Plaintiffs' Co-Lead Counsel

Michael A. London
DOUGLAS & LONDON, P.C.
59 Maiden Lane, Sixth Floor
New York, New York 10038
Tel.:212-566-7500
Email: mlondon@douglasandlondon.com

Plaintiffs' Co-Lead Counsel

Benjamin L. Crump
BEN CRUMP LAW FIRM
122 South Calhoun Street
Tallahassee, Florida 32301
Tel.: 850-224-2020
Email: ben@bencrump.com

Plaintiffs' Co-Lead Counsel

WALLACE MILLER
Edward A. Wallace

150 N. Wacker Dr., Suite 100
Chicago, Illinois 606060
Tel: (312) 261-6193
Email: eaw@wallacemiller.com

Plaintiffs' Liaison Counsel