UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE BIG HEART PET BRANDS LITIGATION,

This document relates to all actions.

Case No. 18-cv-00861-JSW

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS

Re: Dkt. No. 83

Now before the Court for consideration is the motion to dismiss filed by Big Heart Pet Brands, Inc. ("Defendant"). The Court has considered the parties' papers, relevant legal authority, the record in this case, and it has had the benefit of oral argument. The Court GRANTS, IN PART, AND DENIES, IN PART, Defendant's motion.

BACKGROUND

This is a putative consumer class action filed by Maclain Mullins, Thomas Roupe, Neil Sebastiano, Nancy Sturm, Mark Johnson, Kathy Williamson, Norman Todd, Betty Christian, Aubrey Thomas, Joyce Brown, Roberta Mayo, Jack Collins, Vivian Jilek, and Rosemarie Schirripa, who are citizens of Kentucky, Georgia, Florida, Illinois, California, Ohio, Alabama, Tennessee, West Virginia, Texas, Washington, Maryland, Minnesota, and New York, respectively (collectively Plaintiffs, unless otherwise noted).

On February 8, 2018, a television station in Washington, D.C. reported that some of Defendant's dog food products contained pentobarbital, a barbiturate that can be used as a sedative, an anesthetic, and a euthanizing agent for animals. (Dkt. No. 68, Amended Consolidated Complaint ("ACC") ¶ 11.) The products at issue are listed in paragraph 2 of the ACC, and the

Court shall refer to them either as the "Contaminated Dog Foods" or as "Defendant's Products."

Plaintiffs allege that pentobarbital can cause a number of health problems in pets, including death. (*See, e.g., id.* ¶¶ 2-3, 6-8.) According to Plaintiffs, there is no safe level for pentobarbital in pet foods. (*Id.* ¶¶ 3, 5.) Plaintiffs allege that while the FDA has stated the low level of pentobarbital in the Contaminated Dog Foods was unlikely to pose health risks, it also stated that pet food that contains the drug is "adulterated." (*Id.* ¶ 20.) Plaintiffs allege that testing showed the levels of pentobarbital were "alarmingly high." (*Id.* ¶ 33.)

Defendant issued a number of press releases following this report. (*Id.*¶¶ 13-16, Exs. A-B.) Plaintiffs allege that certain changes to the content of these press releases "suggest that Defendant knew the Contaminated Dog Foods contained pentobarbital." (ACC ¶ 18.) Defendant voluntarily withdrew some of its products, including the Contaminated Dog Foods, from the market. (*Id.* ¶¶ 20-21.) On February 23, 2018, Defendant issued a press release, in which it stated it had conducted independent testing and discovered the source of the pentobarbital, which it identified as "a single ingredient (beef fat)[.]" Defendant also stated that it would "now test all of our products for the presence of pentobarbital as a new quality assurance protocol." (*Id.* ¶¶ 22-23 & Ex. C.) On March 2, 2018, Defendant issued an update, in which it stated that "animal fat was the source of the contamination. Additionally, the laboratory tests indicate that the animal fat was from cow, pig, and chicken and no other animal of the nine types tested." (ACC ¶ 26-28 & Ex. D.)

On March 2, 2018, the FDA announced a formal recall of the Contaminated Dog Foods. (ACC ¶ 30.) According to Plaintiffs, "Defendant claims that the source of contaminated tallow comes from one supplier—JBS USA Holdings, Inc. (a subsidiary of JBS S.A.) and its rendering facility MOPAC located in eastern Pennsylvania (collectively, 'JBS'), [which] … knowingly works with meat by-product recycling, including animal byproducts not suitable for human consumption. In fact, it is publicly disclosed that MOPAC has accepted euthanized horses." (*Id.* ¶¶ 36-37, Ex. E.)[1]

[1] Defendant argues that because Plaintiffs did not request judicial notice of this exhibit, the Court cannot take judicial notice of the document. However, Plaintiffs attach it as an exhibit to

Plaintiffs allege Defendant "wrongfully advertised and sold the Contaminated Dog Foods as complete nutrition, quality, and healthy despite the presence of pentobarbital" and advertised the Contaminated Dog Foods as "100 percent complete and quality nutrition[.]" (ACC ¶¶ 50, 52.) Each Plaintiff alleges that either "because of" or "based on" Defendant's "false and misleading claims, warranties, representations, advertisements, and other marketing[,]" Plaintiffs were "unaware that the Contaminated Dog Foods contained any level of pentobarbital." (*Id.* ¶¶ 71, 74, 78, 81, 84, 87, 90, 94, 97, 100, 102, 105, 108, 111.) Plaintiffs allege they "read and relied upon the labels of the Contaminated Dog Foods in making their purchasing decisions." (*Id.* ¶ 118.)

According to Plaintiffs, Defendant intentionally failed to disclose that the Contaminated Dog Foods are, or were, adulterated. (ACC ¶¶ 50-52.) Plaintiffs also allege that notwithstanding the recall, consumers still can purchase the Contaminated Dog Foods. (*Id.* ¶¶ 65-67.) Although some Plaintiffs allege their pets became ill or died, Plaintiffs do not seek to recover damages for those injuries.

Based on these and other allegations, which the Court shall address as necessary, Plaintiffs originally asserted forty-seven (47) claims for relief premised on negligence, negligent misrepresentation, fraud, fraudulent concealment, breach of express and implied warranty, and violations of state consumer protection laws. As will be discussed in this Order, they have withdrawn one claim and conceded two other claims are barred. Plaintiffs assert the claims on behalf of themselves, a putative nationwide class, and subclasses for most of the jurisdictions in which they reside.

Plaintiffs' prayer for relief includes requests that the Court, *inter alia*: (1) enjoin Defendant from selling the Contaminated Dog Foods until pentobarbital is removed or "in any manner;" (2) require Defendant to engage in a corrective advertising campaign; and (3) require Defendant to pay Plaintiffs restitution, to disgorge or return monies, revenues, and profits, and to pay Plaintiffs actual, statutory damages, and punitive damages on some claims. (Prayer for Relief, ¶¶ B-D, F-I.)

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the ACC, thereby incorporating the information contained in that document by reference. Because Defendant disputes the veracity of the information that supports Plaintiffs' allegations, the Court does not accept those allegations as true.

ANALYSIS

Defendant argues Plaintiffs' claims should be dismissed because: (1) Plaintiffs lack Article III standing to bring claims on behalf of a nationwide class; (2) Plaintiffs lack standing to seek injunctive relief; (3) Plaintiffs' claims are moot; (4) certain Plaintiffs failed to provide notice; (5) Plaintiffs' allegations do not comply with Federal Rule of Civil Procedure 9(b); and (6) Plaintiffs fail to state viable claims for relief.

A. The Standing and Mootness Arguments.

1. Federal Rule of Civil Procedure 12(b)(1).

Defendant argues that Plaintiffs claims are moot and that Plaintiffs lack Article III standing. The Court evaluates those arguments pursuant to Rule 12(b)(1). *See Maldonado v. Lynch,* 786 F.3d 1155, 1160 (9th Cir. 2015) ("Mootness is a jurisdictional issue."); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (motion to dismiss for lack of standing governed by Rule 12(b)(1)). Where, as here, a defendant makes a facial attack on jurisdiction, the factual allegations of the complaint are taken as true. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.") (internal citation and quotations omitted). The plaintiff is then entitled to have those facts construed in the light most favorable to him or her. *Fed'n of African Am. Contractors*, 96 F.3d at 1207.

2. Standing Requirements.

In order for Plaintiffs to establish Article III standing, they must show they: "(1) suffered injury in fact, (2) that is fairly traceable to the challenged conduct of the [Defendants], (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). Plaintiffs must be able to establish standing for each claim, *see DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332, 352 (2006), and for each form of relief, *see Davidson v. Kimberly Clark*, 889 F.3d 956, 967 (9th Cir. 2018); *see also In re Carrier IQ, Inc., Consumer Privacy Litig.*, 78 F. Supp. 3d 1051, 1064-65 (N.D. Cal. 2015). In a

class action, standing exists where at least one named plaintiff meets these requirements. *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014). To demonstrate standing, the "named plaintiffs who represent a class must allege and show they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 347 (1996) (internal quotations omitted). Moreover, at least one named plaintiff must have standing with respect to each claim that the class representatives seek to bring. *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007).

In the context of requests for injunctive relief, the standing inquiry requires Plaintiffs to "demonstrate that [they have] suffered or [are] threatened with a 'concrete and particularized' legal harm, coupled with a 'sufficient likelihood that [they] will again be wronged in a similar way.'" *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (quoting *Lujan*, 504 U.S. at 560, and *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). The latter inquiry turns on whether the plaintiff has a "real and immediate threat of repeated injury." *Id.* The threat of future injury cannot be "conjectural or hypothetical" but must be "certainly impending" to constitute an injury in fact for injunctive relief purposes. *Davidson*, 889 F.3d at 967.

3. Standing to Seek Injunctive Relief.

Defendant argues that Plaintiffs do not have standing to seek injunctive relief. At the hearing, Defendant clarified this argument is premised: (1) on the basis that Plaintiffs cannot satisfy the requirements of Article III standing; and (2) on the basis that there is no Article III case or controversy. With respect to the former, the crux of the dispute centers on whether Plaintiffs allege facts to show that they have a "real and immediate threat of repeated injury." *Bates*, 511 F.3d at 985 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)). Defendant also argues the Court cannot redress those injuries by way of an injunction. Because the issue of whether Plaintiffs' alleged injuries are redressable by an injunction overlaps with the issue of whether this case is moot, the Court will address that issue in Section A.4.

Plaintiffs allege that "should [they] encounter the Contaminated Dog Foods in the future, [they] could not rely on the truthfulness of the packaging, absent corrective changes to the

packaging and advertising of the Contaminated Dog Foods." (*See, e.g.,* ACC ¶¶ 72, 79, 85.) Those allegations standing alone are not sufficient to establish standing to seek injunctive relief. In *Davidson*, the Ninth Circuit recognized that a consumer's "inability to rely on the validity of the information advertised" constituted a concrete harm and set forth two examples of when that harm would arise. *Davidson*, 889 F.3d at 971.

First, the Ninth Circuit explained that a plaintiff may show a threat of future harm because they plausibly allege that they "will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although [they] would like to." *Id.* at 969-70. Second, in some cases, the threat of future injury will arise because a plaintiff can plausibly allege that they "might purchase the product in the future, despite the fact that it was once marred by false advertising or labeling, as [they] may reasonably, but incorrectly, assume the product was improved." *Id.* at 970. In either instance, the threat of future injury arises when a plaintiff's inability to rely on advertising is *combined* with a desire or intent to purchase the product again. Thus, the plaintiff would "face[] the similar injury of being unable to rely on [the defendant's] representations of its product in deciding whether or not she should purchase the product in the future." *Id.* at 971-72.

Here, Plaintiffs allege that Defendant's conduct "is ongoing and continuing, such that prospective injunctive relief is necessary." (ACC ¶ 163.) Plaintiffs also allege they desire to purchase Defendants' Products in the future if they can be assured that that the Contaminated Dog Foods are properly unadulterated pet food and meet the advertising claims." (*Id.*) Those allegations are incorporated by reference into subsequent claims. (*See, e.g., id.* ¶ 165.) Therefore, Plaintiffs meet *Davidson's* requirements for standing; they allege a desire to purchase Defendants' Products and allege why they cannot rely on Defendant's advertising in deciding whether or not to purchase those products.

However, Defendant also argues that Plaintiffs' contention that there is a likelihood that Defendants' Products would be contaminated in the future is speculative. (*See* Dkt. No. 108, Transcript of Hearing ("Tr.") at 7:22-8:7, 12:14-16.) Although Plaintiffs include allegations about past instances of contamination and include allegations to show Defendant knew about the

contamination, the Court concludes that, as drafted, and Plaintiffs' allegations of future advertising injury based on the fact that Defendants' products contain pentobarbital are too speculative to demonstrate they are likely to be injured in the same way. For this reason, the Court GRANTS, IN PART, Defendant's motion to dismiss on the basis that Plaintiffs fail to allege facts to show they have standing to seek injunctive relief.

Defendant also argues that the failure to allege the likelihood of future injury precludes Roupe's claim under the Georgia Uniform Deceptive Trade Practices Act (Claim 9) and Jilek's claim under the Minnesota Deceptive Trade Practices Act (Claim 43). Defendant argues that the only remedy under these statutes is injunctive relief, a point that Roupe and Jilek do not dispute. Although Roupe and Jilek argue that Defendant's conduct continues, for the reasons set forth above, the Court finds the allegations are insufficient to show any future injury is more than speculative. For that reason, the Court also GRANTS, IN PART, Defendant's motion to dismiss Claims 9 and 43.

Because the Court cannot say it would be a futile act, the Court will grant Plaintiffs leave to amend, if they can do so in good faith and in compliance with Federal Rule of Civil Procedure 11.[2]

4. Article III Mootness.

Although raised in the context of its standing argument, Defendant also argues the case is moot under Article III, *i.e.* there no longer is a case or controversy to adjudicate. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969); *see also Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979) (holding a case is moot if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation"). If "an opposing party has agreed to everything the other party has demanded," the case may be considered moot. *GCB Commc'ns, Inc. v. U.S. Commc'ns, Inc.*, 650 F.3d 1257, 1267 (9th Cir. 2011); *see also Tosh-*

[2] The Court is not suggesting that the claims are moot because they are not capable of repetition. The Court concludes that, as drafted, the ACC fails to allege facts to show that it is likely that the Defendant's advertising would be misleading because Defendants Products are likely to be adulterated.

Surryhne v. Abbott Labs., Inc., No. CIV S-10-2603 KJM-EFB, 2011 WL 4500880, at *3 (E.D. Cal. Sept. 27, 2011).

In *Tosh-Surryhne*, the plaintiff alleged defendants sold baby formula adulterated with beetles and beetle larvae, which caused her son to suffer gastrointestinal distress. In that case, the defendant announced a recall of the product "and offers of full refunds" before the plaintiff filed suit. *Id.*, at *1, *4. The defendant also submitted a declaration to support its motion, which established that consumers were provided full refunds and received coupons for future purchases. *Id.*, at *4. The defendants moved to dismiss on the basis that the plaintiff's claims were moot. *Id.*, 2011 WL 4500880, at *1. The court stated that "if a plaintiff seeks only restitution, which had been offered her before the claim was brought, there can be no claim; rather, any claim brought at that time is an unnecessary call upon this court's resources." *Id.*, 2011 WL 4500880, at *3. The court concluded that the plaintiff failed to provide evidence to dispute the defendant's assertions that consumers were reimbursed in full. Therefore, the court held the plaintiff's claims were moot. *Id.*, at *4-*5; *see also Hamilton v. General Mills, Inc.*, No.16-cv-382-MC, 2016 WL 4060310, at *3-5 (D. Or. July 27, 2016) (granting motion to dismiss on basis that claims were mooted by recall and refund program instituted before plaintiff filed suit, but giving plaintiff leave to amend a claim under Oregon's Unlawful Trade Practices Act).[3]

In *Main v. Gateway Genomics, LLC*, the defendant argued that it had offered the two plaintiff's a full refund of the purchase price and, as a result, the plaintiffs' claims for restitution were moot. No. 15-cv-2945 AJB (WVG), 2016 WL 7626581, at *5-6 (S.D. Cal. Aug. 1, 2016). The court rejected the argument for one of the plaintiffs because that plaintiff had not accepted the offer. *Id.* (citing *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016)). However, the court concluded that a plaintiff who had accepted the defendant's refund lacked standing to seek restitution. *Id.*, 2016 WL 7626581, at *4.

[3] At least two courts in neighboring districts that addressed similar claims, which arose out of the same incident, denied motions to dismiss based on mootness on the basis that the facts did not show the defendants offered all of the relief plaintiffs sought. *See Haddix v. General Mills, Inc.*, No. 15-cv-2625-MCE-AC, 2016 WL 2901589, at *6 (E.D. Cal. May 17, 2016); *Lengen v. General Mills, Inc.*, 185 F. Supp. 3d 1213, 1221 (E.D. Cal. 2016).

Here, Plaintiffs do not allege they accepted a refund from Defendant, and Defendant does not put forth any evidence that shows they have done so. Further, in addition to restitution, Plaintiffs seek punitive damages. Although Defendant argues that the allegations are insufficient to demonstrate Plaintiffs have a right to obtain punitive damages, the Court cannot conclude as a matter of law Plaintiffs could not seek such relief. In addition, some of the consumer protection statutes at issue provide for treble damages. Defendant also argues that because it recalled the Contaminated Dog Foods and announced they contained pentobarbital, the Court could not grant meaningful injunctive relief.[4] However, Plaintiffs ask the Court to order Defendant to engage in a "corrective advertising campaign," the scope of which has yet to be defined.

The Court concludes that Plaintiffs seek injunctive relief that goes beyond asking for a recall and seek monetary relief that goes beyond asking for restitution, both of which could be redressed if they were to prevail. For these reasons, to the extent Defendant contends this case is moot under Article III, the Court DENIES the motion to dismiss the ACC in its entirety.

5. Prudential Mootness.

Defendant also argues the Court should dismiss based on the doctrine of prudential mootness. "The Ninth Circuit has never adopted or rejected the doctrine of prudential mootness," but some courts within the Circuit have applied it. *Nasoordeen v. Fed. Deposit Ins. Co.*, No. CV 08-5631 MMM (AJWx), 2010 WL 1135888 (C.D. Cal. Mar. 17, 2010); *see also Maldonado v. Lynch*, 786 F.3d 1155, 1161 n.5 (9th Cir. 2015); *Becerra v. U.S. Dep't of the Interior*, 276 F. Supp. 3d 953, 959 (N.D. Cal. 2017) (finding case not prudentially moot where conduct capable of repetition); *Phillips v. Ford Motor Co.*, No. 14-cv-02989-LHK, 2016 WL 693283, at *6 (N.D. Cal. Feb. 22, 2016) (denying motion to dismiss for prudential mootness where request for relief exceeded scope of relief provided by recall and plaintiffs demonstrated "cognizable danger that recall may fail to provide the relief promised"); *Cheng v. BMW of N. Am., LLC,* No. 12-cv-09262,

[4] Defendant also argues that the Court cannot require it to disclose that its products contain pentobarbital because Defendant is prohibited from selling products that have been adulterated with the drug. It is not clear to the Court that is what Plaintiffs ask for in terms of corrective advertising. The Court denies, in part, the motion to dismiss to the extent it rests on that argument.

2013 WL 3940815, at *2-4 (C.D. Cal. July 26, 2013) (dismissing on the basis that claims were prudentially moot).

"Prudential mootness is an equitable doctrine, under which the [c]ourt should exercise its discretion … and generally depends on whether the court can grant meaningful relief." *Becerra,* 276 F. Supp. 3d at 959 (citation omitted). A case may be considered prudentially moot where the controversy "is so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant." *Nasoordeen*, 2010 WL 1135888, at *6 (internal quotations and citations omitted); *see also Winzler v. Toyota Motor Sales, U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (stating that doctrine often comes into play when a "coordinate branch of government steps in to provide the relief [plaintiff] seeks"). When a court evaluates whether a case is prudentially moot, it should be guided by a "sense of basic fairness." *United States v. Paradise*, 480 U.S. 149, 192 (1987). It also may consider whether the challenged conduct could be repeated or would not provide the requested relief. *See Becerra*, 267 F. Supp. 3d at 960; *Phillips*, 2016 WL 693283, at *10-11.

Defendant argues the claims are prudentially moot because: (1) it is willing to offer a refund to any person who seeks that relief; and (2) it recalled the Contaminated Dog Foods. In the *Winzler* and *Cheng* cases, the recalls at issue were supervised by the National Highway Transportation Safety Administration ("NHTSA"), a government agency. That fact was central to the courts' reasoning on why the prudential mootness doctrine applied. *See Winzler*, 681 F.3d at 1211; *Cheng*, 2013 WL 3948015, at *4. In addition, the plaintiffs did not seek damages or other monetary relief. *Winzler*, 681 F.3d at 1209-10; *Cheng*, 2013 WL 3948015, at *4.

In *Winzler*, the court determined that when the defendant notified NHTSA of the defect, the defendant "set into motion the great grinding gears of a statutorily mandated and administratively overseen national recall process," which included subjecting "itself to the continuing oversight of (and potential penalties imposed by) NHTSA." 681 F.3d at 1211. The court reasoned that even though the government was not a defendant "looking past form to substance, [plaintiff] has in hand a remedial commitment from our coordinate branches all the same." *Id.* Because relief from the court could duplicate or complicate that process and because

the plaintiff had not shown she would be left without a complete remedy, the court held the case was prudentially moot. *Id*. at 1211-15; *see also Cheng*, 2013 WL 3940815, at *4 (finding case prudentially moot where recall conducted with NHTSA oversight).

It is not clear that the FDA's involvement in the recall of Defendant's Products involves the same type of oversight at issue in *Winzler* and *Chung*. Therefore, the Court cannot conclusively determine that it would be treading upon the feet of a coordinate branch of government. In the exercise of its discretion, the Court concludes that this is not a case where basic fairness requires it to conclude the case is prudentially moot. For this reason, the Court DENIES, IN PART, Defendant's motion to dismiss the ACC in its entirety.

B. The Notice Argument.

Defendant also asserts the following claims fail because the Plaintiffs did not provide pre-suit notice: (1) Thomas's claim for alleged violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA") (Claim 27); (2) Sebastiano's claim for breach of express warranty under Florida law (Claim 12); (3) Williamson's claims for breach of express and implied warranty under Ohio law (Claims 16 and 17); (4) Brown's claims for breach of express and implied warranty under Texas law (Claims 28 and 29); and (5) Collins's claim for breach of implied warranty under Maryland law (Claim 35). Sebastiano and Williamson allege they sent Defendant written notices that "its conduct is in violation of the CLRA[.]" (FAC ¶ 154.) There are no other allegations that they, Thomas, Brown, or Collins sent any other written notice to Defendant regarding the conduct alleged in the ACC.

1. Claim 27: WVCCPA.

The WVCCPA provides that no action "may be brought pursuant to the provisions of this section until the person has informed the seller or lessor in writing and by certified mail, return receipt requested, of the alleged violation and provided the seller or lessor twenty days from receipt of the notice of violation but ten days in the case a cause of action has already been filed to make a cure offer: *Provided*, That the person shall have ten days from receipt of the cure offer to accept the cure offer or it is deemed refused and withdrawn." W.Va. St. § 46A-6-106(c) (West) (emphasis in original).

Thomas argues that the letters referring to the CLRA are sufficient to satisfy this requirement. However, courts have dismissed claims where a plaintiff's notice did not refer to the WVCCPA. *Compare Stanley v. Huntington Nat'l Bank*, No. 11-cv-54, 2012 WL 254135, at *7 (N.D. W.Va. Jan. 27, 2012) (dismissing for lack of notice where "correspondence sent to [defendant] by the plaintiff did not assert any alleged violation of the WVCCPA"), *aff'd* 492 Fed. Appx. 456, 461 (4th Cir. 2102), *with Bennett v. Skyline Corp.*, 52 F. Supp. 3d 796, 812 (N.D. W.Va. 2014) (finding notice sufficient where plaintiffs stated "they have several legitimate claims against [defendant]-including probable violations of article six of the" WVCCPA). Thomas is not listed as a signatory to the CLRA letter, and he does not contend the letter references alleged violations of the WVCCPA. Thomas also does not allege that he sent notice after this case was filed. *See, e.g., In re Remicade Antitrust Litig.*, 345 F. Supp. 566, 589 (E.D. Pa. 2018) (addressing WVCCPA claims and concluding that notice sent after case was filed was sufficient to comply with statute).

For this reason, the Court GRANTS, IN PART, the motion to dismiss Claim 27, with leave to amend.

2. Claim 12: Florida Breach of Express Warranty.

To bring a claim for breach of express warranty under Florida law, "[t]he buyer must within a reasonable time after he or she discovers or should have discovered any breach notify the *seller* of breach or be barred from any remedy." Fla. Stat. § 672.607(3)(a) (West) (emphasis added). Defendant argues that although the statute refers to notice to the seller, the rule applies in this case as well. Sebastiano argues that as a purchaser not in privity with Defendant, the manufacturer, he was not required to comply with this notice requirement. There is a split of authority on this issue. *See, e.g., Sebastian v. Kimberly Clark Corp.*, 2017 WL 6497675, at *9 (S.D. Cal. Dec. 18, 2017) (examining Florida law and citing cases).

Sebastiano relies on *Federal Insurance Company v. Lazzara Yachts of North America, Incorporated* ("*Lazzara Yachts*"), in which the plaintiff alleged a fire suppression system had been improperly installed and caused damage to his boat. No. 8:09-CV-607-T-27MAP, 2010 WL 1223126, at *5 (N.D. Fla. Mar. 25, 2010). There, the court held that based on the statutory

definition of seller, "the plain language of the statute … does not require notice to a manufacturer." *Id.* In contrast, in *Jovine v. Abbott Laboratories, Incorporated*, the plaintiff brought claims against the manufacturer of infant formula. The formula had been contaminated with beetles, and the plaintiff alleged the warranties were the product labels and the defendant's advertising. 795 F. Supp. 2d 1331, 1335, 1338 (S.D. Fla. 2011). The court dismissed the claim for breach of express warranty on the basis that the plaintiff failed to allege he had provided notice. *Id.* at 1340; *see also Nichols v. Wm. Wrigley Jr. Co.*, No. 10-80759-CIV, 2011 WL 181458, at *4 (S.D. Fla. Jan. 19, 2011) (dismissing claim for breach of warranty against manufacturer of chewing gum where warranty alleged was representations on labels).

In *Lamb v. Graco Children's Products, Incorporated*, the court also dismissed a claim for breach of warranty against a manufacturer for lack of notice. No. 4:11CV477-RH/WCS, 2012 WL 12871963, at *2 (N.D. Fla. Jan. 24, 2012). The *Lamb* court acknowledged the plain language of the statute, which it construed to assume privity between the seller and the buyer. *Id.* The court reasoned that

> if, as the plaintiffs assert, an express warranty claim can be brought in the absence of privity, a buyer who is *not* in privity surely has no *greater* right than a buyer who *is* in privity. To rule otherwise would stand the applicable law on its head. And the point of the notice requirement is to allow the warrantor an opportunity to cure the problem rather than defend a lawsuit. The reason for requiring notice applies to a manufacturer every bit as much as to a seller.

Id.

Given the facts of this case, the Court finds the *Jovine, Nichols*, and *Lamb* cases more persuasive than the *Lazzara Yachts* case, and it concludes that Sebastiano was required to give notice to state a claim. *See also Sebastian*, 2017 WL 6497675, at *9. For this reason, the Court GRANTS, IN PART, Defendant's motion to dismiss Claim 12. If Sebastiano can cure this deficiency, in good faith and in compliance with Rule 11, the Court will grant him leave to amend.

3. Claims 16 and 17: Ohio Breach of Express and Implied Warranty.

To state a claim for breach of express warranty under Ohio law, a plaintiff must "provide[] the defendant with reasonable notice of the defect" and "a manufacturer can be held liable by a purchaser for breach of an express warranty even though there is no privity between the two

parties." *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Enters., Inc.*, 50 N.E.3d 955, 960 (Ohio 2015); *see also* Ohio R.C. § 1302.65(C) (West). Williamson does not dispute that notice is required, and she does not allege that she gave Defendant notice of these claims.

Williamson relies on *Chemtrol Adhesives, Incorporated v. American Manufacturers Mutual Insurance Company*, in which that court stated that "in a proper case the filing of a civil complaint could serve as notice of breach." 537 N.E.2d 624, 638 (Ohio 1989); *see also Lincoln Elec. Co. v. Technitrol, Inc.*, 718 F. Supp. 2d 876, 873 (N.D. Ohio 2010) ("Under *Chemtrol*, Ohio does not have a per se rule that the filing of a complaint cannot constitute notice under § 1302.65(C)(1), but the Ohio Supreme Court was clear that a complaint could only constitute notice in 'a proper case.'"). The court in *Chemtrol* concluded that it was not a proper case because the complaint at issue had been filed two years after the party seeking relief sustained damages. *Id.*

Williamson alleges that she "has been purchasing the Contaminated Dog Foods since approximately August 2016 and her last purchase was in December 2016." (ACC ¶ 87.) She also alleges the facts that give rise her injury did not come to light until February 2018, and she filed her complaint shortly thereafter. In the *Chemtrol* case, the Ohio Supreme Court stated it is a "well-established rule that the determination of a reasonable time and the adequacy of notice to the seller are ordinarily questions of fact." 537 N.E.2d at 51 (internal quotations and citations omitted). At this stage, and based on the facts alleged, the Court concludes Williamson's claims under Ohio law are not subject to dismissal for lack of notice. *Cf. In re MyFord Touch Consumer Litig.*, 46 Fed. Supp. 3d 936, 975-76 (N.D. Cal. 2014) (analyzing Ohio law and concluding, at pleadings phase, filing of complaint could satisfy notice requirement).

For this reason, the Court DENIES, IN PART, Defendant's motion to dismiss claims 16 and 17.

4. Claims 28 and 29: Texas Breach of Express and Implied Warranty.

"To recover on a breach of warranty claim in Texas, 'the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.'" *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 705 (5th Cir. 2014)

(quoting Tex. Bus. & Com. Code § 2.607(c)(1)); *see also U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 200-01 (Tex. App. 2003). In *McKay*, the court noted that the Texas Supreme Court had not decided whether notice must be provided to a remote manufacturer but stated that the "majority of Texas intermediate courts have held" that notice to a manufacturer is required. *Id.* at 706. To support his argument, Brown relies on *Vintage Homes, Incorporated v. Coldiron*, 585 S.W.2d 886, 888-89 (Tex. App. 1979).

However, the *McKay* court noted that an earlier version of Section 2.607 was at issue in *Vintage Homes*. The *McKay* court also noted that courts have disagreed with *Vintage Homes* on the basis that "requiring notice to the manufacturer is consistent with the purposes of § 2.607's notification because if the manufacturer is to be held responsible for the buyer's losses, it needs the protection of timely notice at least as much as the buyer's immediate seller." *McKay*, 715 F.3d at 707 (internal brackets, quotations, and citations omitted). The Court concludes that Brown was required to provide notice under Texas law for her breach of warranty claims.

For this reason, the Court GRANTS, IN PART, Defendant's motion to dismiss Claims 28 and 29. If Brown can, in good faith and in compliance with Rule 11, cure this deficiency, the Court will grant leave to amend.

5. Claim 35: Maryland Breach of Implied Warranty.

Under Maryland law, "[w]here a tender has been accepted ... [t]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." *Firestone Tire & Rubber Co. v. Cannon*, 452 A.2d 192, 194 (Md. App. 1982) (quoting Md. Code Com. Law § 2-607(3)(a)), *aff'd* 456 A.2d 930 (Md. 1983). In *Firestone Tire*, the court construed this provision of the Maryland code to require a buyer to notify the immediate seller. The court also concluded that "[r]emote sellers will have to rely on each successive buyer carrying out his respective obligation under the law, which, in most instances, he will have an economic incentive to do. If there is to be a hardship, it will have to fall on the manufacturer or distributor who placed or maintained the defective goods in the marketing stream." *Id.* at 198.

Although the *Firestone Tire* case suggests that Collins would not be required to give notice

to Defendant to proceed with this claim, Defendant argues it should be dismissed because Collins does not allege that he gave notice to the immediate seller. *See, e.g., Lloyd v. Gen. Motors Corp.*, 575 F. Supp. 2d 714, 723 (D. Md. 2008) (permitting manufacturer to raise failure to provide notice to seller as affirmative defense to breach of warranty claim); *see also In re Carrier IQ, Inc.*, 78 F. Supp. 3d at 1104 (analyzing Maryland law). In the *In re Carrier IQ* case, the court, following *Lloyd*, dismissed breach of warranty claims on the basis that the plaintiffs had not demonstrated that they provided notice to the immediate seller. *Id.* Under the reasoning of *Lloyd* and *In re Carrier IQ*, the Court concludes that Collins's claim for breach of implied warranty under Maryland law fails because he does not allege that he provided notice to the immediate seller of the Contaminated Dog Foods.[5]

For this reason, the Court GRANTS, IN PART, Defendant's motion to dismiss Claim 35. If Collins can, in good faith and in compliance with Rule 11, cure this deficiency, the Court will grant leave to amend.

C. Compliance with Federal Rule of Civil Procedure 9(b).

Defendant moves to dismiss all of Plaintiffs' claims on the basis that the allegations do not comply with Rule 9(b). Claims sounding in fraud or mistake are subject to heightened pleading requirements, which require a plaintiff to "state with particularity the circumstances regarding fraud or mistake." Fed. R. Civ. P. 9(b). However, intent and knowledge "and other conditions of a person's state of mind may be alleged generally." *Id.* In addition, a claim "grounded in fraud" may be subject to Rule 9(b)'s heightened pleading requirements. A claim is "grounded in fraud" if the plaintiff alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of his or her claim. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003).

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[5] Collins also argues the notice requirement does not apply to third-party beneficiaries, citing *Nemphos ex re C.G.N. v. Nestle USA, Inc.*, No. GLR-12-2718, 2013 WL 4501308, at *9 (D. Md. Aug. 21, 2013), *aff'd sub nom. Nemphos v. Nestle Waters N. Am. Inc.*, 775 F.3d 616 (4th Cir. 2015). In that case, the plaintiff did not purchase the products at issue and the record suggests her parents purchased the product and provided it to her. Thus, she was considered to be a third-party beneficiary of the warranties made to her parents. In contrast, Collins alleges that he purchased Defendant's Contaminated Dog Foods. Thus, on the facts of this case, the Court finds Collins' reliance on *Nemphos* unpersuasive.

Rule 9(b)'s particularity requirements must be read in harmony with Rule 8, which requires a "short and plain" statement of the claim. Fed. R. Civ. P. 8(a)(2). The particularity requirement is satisfied if the complaint "identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations." *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). Accordingly, "[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1107 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).[6]

Plaintiffs allege that Defendant "falsely advertises that the Contaminated Dog Foods are healthy and provide complete nutrition and quality while omitting they are adulterated with pentobarbital." (ACC ¶ 48.) Plaintiffs also allege Defendant advertises that Defendant advertises the Contaminated Dog Food Products as "complete nutrition, quality, and healthy," although they contain pentobarbital. (*Id.*, ¶ 50.) Plaintiffs next allege that Defendant represents "the Contaminated Dog Foods are '100 percent complete and balanced nutrition'" but fails to mention that they are adulterated with pentobarbital. (*Id.* ¶ 52.) Plaintiffs further allege that Defendant engaged in a "long-standing campaign" to "market all its products, including the Contaminated Dog Foods as 'providing safe, healthy, and high-quality food' with 'the purest ingredients.'" Plaintiffs allege those statements are either affirmatively false or omit the fact that Defendant's Products are adulterated with pentobarbital. Plaintiffs also allege that "Defendant promises to its consumers that all products meet USDA, AAFCO and FDA standards." (*Id.* ¶¶ 52-56.)

Plaintiffs state they were unaware that the Contaminated Dog Foods contained pentobarbital because of Defendant's "false and misleading claims, warranties, representation, advertisements, and other marketing." (*See id.* ¶ 71, 74, 78, 81, 84, 87, 90, 94, 97, 100, 102, 105, 108, 111.) The only specific items they allege they saw when they made the decision to purchase Defendant's Products were the labels. (*Id.* ¶ 118.) The Court concludes that the allegations

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[6] Defendant does not dispute that Plaintiffs adequately allege "who" engaged in the alleged fraudulent conduct. Defendants does argue that Plaintiffs fail to allege facts about knowledge and intent with the specificity. The Court will address that argument in connection with claims where knowledge and intent are essential elements.

provide Defendant with notice of what statements are at issue and how they are alleged to be false. *See, e.g., Grossman v. Schnell & Kampeter, Inc.*, No. 2:18-cv-02344-JAM-AC, 2019 WL 1298997, at *4 (E.D. Cal. Mar. 21, 2019); *Zeiger v. WellPet LLC*, 304 F. Supp. 3d 837, 849 (N.D. Cal. 2018).

Plaintiffs include depictions of some of the labels on the Contaminated Dog Foods in the ACC. (*Id.* ¶¶ 113(a)-(o).) Of the statements cited in the ACC, the only statement on the labels is the "100% Complete and Balanced Nutrition" statement. In addition, based on the labels depicted in the ACC, that statement appears only on four of the Contaminated Dog Foods. (*Id.* ¶¶ 113(k)-(n).) Plaintiffs allege that the statement "100 percent complete and balanced nutrition" also appeared on Walmart's website. (*Id.* ¶ 52 & n.21.) Plaintiffs allege the following statements appear on Defendant's website: "providing safe, healthy, and high-quality food"; "the purest ingredients"; and representations that its products meet USDA, AAFCO, and FDA standards. (*Id.* ¶ 53 & n.22, ¶ 56 & n.23.) Therefore, Plaintiffs have provided some information about where the alleged statements can be found. *Cf. Grossman*, 2019 WL 1298997, at *4. Plaintiffs' allegations about when the alleged statements were made are less clear, but they do provide allegations about when they began purchasing the products and when they stopped. *See id.* However, if Plaintiffs attempt to pursue claims based on statements on Defendant's website or in other advertisements, they must provide more detail about when they are alleged to have seen those statements.

For the foregoing reasons, the Court DENIES Defendant's motion to dismiss the ACC in its entirety for failure to comply with Rule 9(b). The Court will address whether Plaintiffs can base their claims on statements they do not allege they read, saw, or relied upon in subsequent sections of this Order.

D. Failure to State Claims for Relief.

Defendant also moves to dismiss under Rule 12(b)(6). A motion to dismiss for lack of statutory standing also is evaluated under Rule 12(b)(6). *Maya*, 658 F.3d at 1067. A motion to dismiss is proper under Rule 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch Ltd. v.*

Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

Defendant moves to dismiss, in part, Plaintiffs' first eight claims for relief, which are brought on behalf of a putative nationwide class on the basis that: (1) the non-California Plaintiffs do not have standing to pursue the claims; and (2) Plaintiffs cannot pursue the California claims on behalf of a nationwide class.[7] Defendant attacks Plaintiffs' remaining claims by subject matter.

Defendant submitted charts to support its argument that Plaintiffs cannot pursue a nationwide class action because of variations in state law. It does not incorporate the charts by reference into each section of its motion to dismiss. It is Defendant's burden to demonstrate that Plaintiffs fail to state a claim for relief, and the Court will not scour that chart for authority to support Defendant's arguments. *Cf. Independence Towers of Washington v. Washington*, 350 F.3d

[7] Those claims include claims for: violations of California's UCL, FAL, and CLRA; breaches of express and of implied warranties, in violation of California Commercial Code sections 2313 and 2314; negligent misrepresentation; negligence; and fraudulent concealment. Plaintiffs did not expressly state that the latter claims are brought pursuant to California law. In their opposition, they argued that California law applies to the nationwide class but also stated they could pursue these common law claims based on the state law for each subclass.

925, 929 (9th Cir. 2003) ("[j]udges are not like pigs, hunting for truffles buried in briefs") (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

1. Standing of Non-Resident Plaintiffs to Assert California Claims.

Defendants argue that the non-California Plaintiffs do not have standing to assert the first eight claims for relief. This argument also would appear to apply to Mullins, who alleges he is a resident of Kentucky and purchased Defendant's Products in Kentucky. "State statutory remedies may be invoked by out-of-state parties when they are harmed by wrongful conduct occurring in California." *Norwest Mortg., Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 224-225 (1999); *see also In re iPhone 4S Consumer Litig.*, No. 12-cv-1127-CW, 2013 WL 3829653, at *7-9 (N.D. Cal. July 23, 2013) (denying motion to dismiss claims under UCL, FAL, and CLRA by non-California plaintiffs for lack of standing where they alleged "their injuries were caused by [defendant's] wrongful conduct in false advertising that originated in California").

However, a choice of law analysis might demonstrate that a different state law should apply to a non-resident's California claims. *See, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589-94 (9th Cir. 2012) (applying choice of law analysis in the context of class certification); *Van Mourik v. Big Heart Pet Brands, Inc.*, No. 17-cv-03889-JD, 2018 WL 1116715, at *2-4 (N.D. Cal. Mar. 1, 2018); *Cover v. Windsor Surry Co.*, No. 14-cv-05262-WHO, 2016 WL 520991, at *5 (N.D. Cal. Feb. 10, 2016); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1007 (N.D. Cal. 2014); *see also Forcellati v. Hylands, Inc.*, 876 F. Supp. 2d 1155, 1160-61 (N.D. Cal. 2012) (noting defendant did not attack Article III standing requirements and evaluating whether court should conduct choice of law analysis for nationwide class at the pleadings phase).

Recently, courts within this district, including the undersigned, have granted motions to dismiss based on lack of standing in cases where the named plaintiffs attempted to assert claims under state laws where the plaintiff neither resided nor purchased a defendant's product. *See, e.g., Jones v. Micron Tech., Inc.*, -- F. Supp. 3d --, 2019 WL 4232417, at *5-*6 (N.D. Cal. Sept. 3, 2019); *Van Mourik*, 2018 WL 1116715, at *1-2.[8] In the *Jones* case, an antitrust dispute, the

[8] *See also, e.g., Mollicone v. Universal Handicraft, Inc.*, No. 16-cv-07322-CAS (MRWx), 2017 WL 440257, at *9 (C.D. Cal. Jan. 30, 2017); *In re Capacitors Antitrust Litig.*, 154 F. Supp.

named plaintiffs resided in five jurisdictions (California, Florida, Michigan, Kansas, and New Hampshire). However, in addition to asserting claims under the laws of those jurisdictions, they attempted to assert additional claims under state laws where no named plaintiff resided. This Court held the named plaintiffs lacked "standing to bring claims under the laws of the twenty jurisdictions invoked by the Complaint where they do not reside and have alleged no injury." *Id.*, 2019 WL 4232417, at *5-*6.

The Court concludes that the *Jones* and *Van Mourik* cases, as well as the cases cited in note 7, *supra,* are distinguishable, in part, because the Plaintiffs here do not attempt to bring additional claims for violations of state laws in jurisdictions in which they do not reside or where they did not purchase the Contaminated Dog Foods. Further, there is a named Plaintiff for each jurisdiction at issue in this case. The issue of whether the non-California Plaintiffs can proceed with individual claims under California law is a separate inquiry. *See, e.g., VanMourik*, 2018 WL 1116715, at *2-3.

In *VanMourik*, the plaintiff was a resident of Texas who purchased the defendant's product in Texas and brought claims on behalf of herself and a putative class under the CLRA, the UCL, and the FAL. *Id.*, 2018 WL 1116175, at *1. In addition to moving to dismiss the putative class claims, the defendant argued the plaintiff could not pursue her individual claims under California law. The court engaged in a choice of law analysis, applying California's governmental interest test, and it found that Texas law should govern the plaintiff's claims. Therefore, it dismissed the California claims. *Id.*

Defendant does not contend there are due process issues with applying California law to the non-resident Plaintiffs' claims. Thus, those Plaintiffs "certainly *can* assert a claim under California law, and it is *Defendant's* burden to defeat the presumption that California law applies

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3d 918, 923-27 (N.D. Cal. 2015); *In re Carrier IQ, Inc.*, 78 F. Supp. 3d at 1060, 1075; *Corcoran v. CVS Health Corp., Inc.*, 169 F. Supp. 3d 970, 990 (N.D. Cal. 2016) (dismissing claim under Rhode Island law brought by non-Rhode Island plaintiffs for lack of standing); *cf. Pardini v. Unilever United States, Inc.*, 961 F. Supp. 2d 1048, 1061 (N.D. Cal. 2013) (not dismissing for lack of standing but concluding California plaintiff could not assert claims under other states' consumer protection laws).

and to show a compelling reason justifying displacement of California law." *Forcellati*, 876 F. Supp. 2d at 1160 (emphasis in original, internal quotations and citations omitted); *cf. Van Mourik*, 2018 WL 1116715 at *3 (noting that defendant "has identified a number of differences between Texas and California consumer protection statutes that are material to van Mourik's consumer protection claims" and providing examples of those differences).

The Court agrees that the choice of law analysis could be conducted at the pleadings phase. However, while Defendant argues that the differences in state laws preclude a nationwide class action, it has not focused on the differences between California law and the jurisdictions for each of the thirteen (13) non-resident Plaintiffs. Therefore, the Court concludes Defendant failed to meet its burden on this motion to show that the non-resident Plaintiffs cannot pursue claims under California law. *Cf. In re iPhone 4s Consumer Litig.*, 2013 WL 3829653, at *8-9.

For these reasons, the Court DENIES, IN PART, Defendant's motion to dismiss Claims 1 through 8. Defendant may renew this argument on a subsequent motion to dismiss.

2. The Ability to Assert California Claims on Behalf of a Nationwide Class.

To determine whether the Plaintiffs may pursue California claims on behalf of a nationwide class, the Court also must engage in a choice of law analysis using California's governmental interest test. *Mazza*, 666 F.3d at 589. Defendant does not appear to argue that, under *Mazza*, a plaintiff could never pursue a nationwide class for alleged violations of California's consumer protection laws. This Court also does not read *Mazza* to compel that conclusion. Although the court held "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place" the court also stated that holding was based on "the facts and circumstances" presented. 666 F.3d at 594.

"[T]here is no hard and fast rule" on when a court should address the *Mazza* analysis, and "the Ninth Circuit has yet to address this specific issue." *Zieger,* 304 F. Supp. 3d at 847. Although courts have resolved the issue on motions to dismiss, that view is not universal. Other courts have determined that the application of the choice of law analysis is more appropriate in the context of a motion for class certification. *See, e.g., Gitson v. Trader Joe's Co.*, 63 F. Supp. 3d

1114, 1116 (N.D. Cal. 2014) (declining to strike nationwide class claims at pleading stage and noting that *Mazza* court did not dismiss class claims); *Doe v. Successfulmatch.com*, No. 13-cv-03376-LHK, 2014 WL 1494347, at *7 (N.D. Cal. Apr. 16, 2014) (denying motion to strike class allegations where briefing "lack[ed] the detail necessary to conduct" a *Mazza* choice of law analysis).

In *Frenzel*, *supra*, the court reasoned that it was appropriate to resolve the issue at the pleadings phase, in part, because it found that further development of the record would not "uncover information relevant to whether [the plaintiff] may maintain a national class action asserting claims under California law." 76 F. Supp. 2d at 1008. The *Frenzel* court also found it significant that the only named plaintiff was not a California resident and had not alleged that he purchased the product at issue in California. Here, there is a California Plaintiff, Johnson, and he alleges he purchased the Contaminated Dog Foods in California.

In *Zeiger*, the court determined that the issue should be resolved early because there were no plaintiffs from states other than California. Therefore, allowing the nationwide class claims to go forward would create a significant burden of nationwide discovery. *Id.* (citing *Johnson v. Nissan N. Am., Inc.*, 272 F. Supp. 3d 1168, 1174-75 (N.D. Cal. 2017) and *Cover*, 2016 WL 520991, at *5); *cf. In re Carrier IQ*, 78 F. Supp. 3d at 1074. Here, although Plaintiffs bring claims based on other state laws, there is a named Plaintiff for each jurisdiction at issue, and Plaintiffs do not bring claims based on the laws of states for which there is no named Plaintiff. Thus, this case does not raise the risk that Defendant will be burdened with nationwide discovery. Rather, with respect to the issue of certifying a nationwide class, the Court concludes this case presents a classic choice of law issue. In light of the number of issues presented by Defendant's motion, the Court declines to address it at this stage of the proceedings. However, if Plaintiffs choose to file an amended complaint, the Court urges them to consider whether they can viably maintain a nationwide class action based on the California law.

For these reasons, the Court DENIES, IN PART, Defendant's motion to dismiss Claims 1 through 8 in their entirety.

3. The Consumer Protection Claims.

Defendant moves to dismiss the seventeen (17) consumer protection laws asserted in the ACC fail to state a claim because Plaintiffs: (1) did not see or rely on any of the affirmative misrepresentations cited; (2) fail to allege actionable affirmative misrepresentations; and (3) fail to state claims based on an omission because they fail to show Defendant knew the Contaminated Dog Foods contained pentobarbital.

a. Reliance.

In order to establish statutory standing to pursue claims under the UCL, the FAL, and the CLRA, Plaintiffs must allege facts to show they relied on the alleged misrepresentations.[9] *See In re Tobacco II Cases*, 46 Cal. 4th 289, 326 (2009) ("*Tobacco II*"); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-26 (9th Cir. 2009) (dismissing UCL claims for failure to comply with Rule 9(b) where plaintiff failed to allege on which materials he relied). To show actual reliance, Plaintiffs must demonstrate that the misrepresentation or omission was an "immediate cause of the injury-causing conduct." *Tobacco II*, 46 Cal. 4th at 328; *accord Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015). Plaintiffs need not prove the misrepresentation or omission was the "only," "sole," "predominant," or "decisive" cause of the injury-causing conduct. Rather, they may show that the misrepresentation or omission was a substantial factor in their decision-making process. *Daniel*, 806 F.3d at 1225; *Tobacco II*, 46 Cal. 4th at 328.

A fair reading of Plaintiffs' ACC shows they premise their claims on affirmative misrepresentations and on omissions, *i.e.* Defendant's failure to disclose the presence of pentobarbital in the Contaminated Dog Foods. Defendant's argument focuses on the affirmative misrepresentations. The parties do not adequately brief whether the facts would be sufficient to show reliance based on material omissions. *See, e.g., Sud v. Costco Wholesale Corp.*, 229 F.

[9] The UCL prohibits acts that are fraudulent, unlawful, or unfair. Plaintiffs bring claims under all three prongs. The claims under the unlawful prong are premised on the alleged violations of the FAL and the CLRA. Therefore, if Plaintiffs fail to state a claim under the FAL or the CLRA, their UCL claim under the unlawful prong fails. *See Berryman v. Merit Property Mgmt., Inc.*, 152 Cal. App 4th 1544, 1554 (2007).

Supp. 3d 1075, 1083-84 (N.D. Cal. 2017), *aff'd* 731 Fed. App'x. 719 (9th Cir. 2018). Accordingly, the Court does not reach that issue and both parties are free to renew it in subsequent motion practice.

Plaintiffs allege they relied on the labels. However, the only statement that is alleged to appear on the labels is the statement "100% Complete and Balanced Nutrition." Further, according to the allegations in the ACC, that statement appears on the labels of only four of the many Contaminated Dog Foods at issue. Williamson, Collins, and Schirripa are the only Plaintiffs to allege they purchased those products. The remaining Plaintiffs, including Johnson, fail to sufficiently allege facts to show they relied on the "100% Complete and Balanced Nutrition" statement. Therefore, they cannot state claims under the UCL, the FAL, or the CLRA based on that statement. For this reason, the Court GRANTS, IN PART, AND DENIES, IN PART, the motion to dismiss Claims 2 through 4. Because the Court cannot say it would be a futile act, the Court will grant Plaintiffs leave to amend.

To the extent the Plaintiffs attempt to premise these claims on the other affirmative statements discussed in this Order, none of the Plaintiffs allege they visited or viewed the statements on Defendant's website or that they viewed the statement on Walmart's website. Therefore, they have not shown they relied on those statements. *See, e.g., Grossman*, 2019 WL 1297997, at *5 (concluding that plaintiffs only alleged reliance on statements on labels, packaging or on websites from which they purchased products and limiting claims to those representations); *Stanwood v. Mary Kay, Inc.*, 941 F. Supp. 2d 1212, 1218 (S.D. Cal. 2012) (dismissing claims relating to website and other documents where plaintiff did not allege "that she viewed any of those sources, and therefore cannot link her injuries to those misrepresentations"). For that reason, the Court GRANTS, IN PART, AND DENIES, IN PART, Defendant's motion to dismiss Claims 2 through 4. Because the Court cannot say it would be a futile act, the Court will grant Plaintiffs leave to amend.

Plaintiffs do allege Defendant had a "long-standing" campaign. (ACC ¶ 53.) In *Tobacco II*, the California Supreme Court held that a plaintiff "is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where … those

misrepresentations and false statements were part of an extensive and long-term advertising campaign." 46 Cal. 4th at 328. In order to state a claim based on a *Tobacco II* theory, a plaintiff must allege facts that demonstrate the "breadth and content" of the campaign. Those facts must demonstrate it would not be "unreasonable to presume that all [putative] class members were exposed to" to the allegedly misleading representations and must demonstrate that it would be unrealistic for a plaintiff to prove reliance on a particular advertisement. *See Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (addressing *Tobacco II* in context of motion for class certification), *abrogated on other grounds by Microsoft v. Baker*, 137 S.Ct. 1702 (2017).

To the extent Plaintiffs attempt to plead Claims 2 through 4 based on a long-standing advertising campaign, the Court concludes that they have not alleged sufficient facts, with the requisite specificity, to show that Defendant's advertising campaign was similar to the campaign at issue in *Tobacco II*. *Cf. Yastrab v. Apple, Inc.*, 173 F. Supp. 3d 972, 980 (N.D. Cal. 2016) (accepting that "under appropriate factual circumstances, … a representative consumer plaintiff may not be able to pinpoint the exact portion of a long-standing, widespread advertising campaign he or she relied on when purchasing a product," but finding that *Tobacco II* "does not, and indeed could not, supplant a federal plaintiff's obligation to describe that campaign with the particularity prescribed by Rule 9(b)"); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976-77 (N.D. Cal. 2015) (setting forth factors to consider to determine whether a plaintiff has alleged reliance on a *Tobacco II* type theory). Therefore, the Court concludes Plaintiffs fail to allege facts showing reliance for this reason as well. Because the Court cannot say it would be a futile act, the Court will grant them leave to amend Claims 2 through 4 to proceed on such a theory.[10]

Defendant also argues that a plaintiff must allege reliance to establish claims under Illinois' Consumer Fraud and Deceptive Business Practices Act ("Illinois CFDBPA") (Claim 14) and Minnesota's Prevention of Consumer Fraud Act ("Minnesota CFA") (Claim 44). To state a claim under the Illinois CFDBPA, a plaintiff must allege facts showing "(1) a deceptive act or

[10] To the extent reliance is required under other consumer protection laws and those states would permit a claim to proceed under a *Tobacco II* type theory, the Court will grant Plaintiffs leave to amend to plead reliance on that theory.

practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in a course of conduct involving trade or commerce, and (4) actual damage to the plaintiff that is (5) a result of the deception." *De Bouse v. Bayer*, 922 N.E.2d 309, 313 (Ill. 2009) (citing *Zekman v. Direct American Marketers, Inc.*, 695 N.E.2d 853, 860 (Ill. 1998)).

The *DeBouse* court held that "[i]f a consumer has neither seen nor heard [a] statement, then she cannot have relied on the statement and, consequently, cannot prove proximate cause." *Id.* at 316. Here, Sturm alleges she relied on the labels when she decided to purchase the Contaminated Dog Foods. (ACC ¶ 118.) However, she does not allege that she purchased products with the "100% Complete & Balanced Nutrition" statement on the label. (ACC ¶¶ 80, 113.) For that reason, the Court GRANTS, IN PART, Defendant's motion to dismiss Claim 14. Because the Court cannot say it would be a futile act, the Court grants Strum leave to amend.

In *Duxbury v. Spex Feeds, Inc.*, the court stated that one of the elements in claim under Minnesota's CFA is that a plaintiff's "reliance on false information or deceptive practice harmed" them. 681 N.W.2d 380, 393-94 (Minn. Ct. App. 2000). There also is authority to suggest that it is only necessary to prove reliance when the plaintiff seeks damages. *See Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 552-53 (D. Minn. 1999) (noting that "the legislature fashioned a consumer fraud regime that does not always require individual proof of reliance" and finding reliance required when plaintiff seeks damages). Jilek alleges that she seeks damages under the Minnesota CFA claim. (ACC ¶ 586).

Jilek alleges she relied on the labels when she decided to purchase Defendant's Products, but she does not allege she purchased a product with the statement "100% Complete and Balanced Nutrition" on the label. Although Jilek relies on *Laughlin v. Target Corporation*, to argue the allegations are sufficient, the Court does not find her argument persuasive. In *Laughlin,* the plaintiff alleged she saw the representations at issue and alleged she relied on them in making her decision to purchase the product. No. 12-cv-489, 2012 WL 3065551, at *5 (D. Minn. July 27, 2012). To the extent Jilek seeks damages for the alleged violations Minnesota's CFA, the Court concludes Jilek fails allege facts that show reliance. For that reason, the Court GRANTS, IN

PART, Defendant's motion to dismiss Claim 45.

The Court addresses the FDUPTA claim in Section D.3.d, because Defendant raises the issue of reliance in its separate argument about the merits of that claim.

The Court concludes Defendant has not met its burden to show reliance is required to state a claim under the remaining state consumer protection claims. For that reason, the Court DENIES, IN PART, Defendant's motion to dismiss Claims 9, 10, 27, 31, 36, 42, 43, 45, 46 and 47. This ruling is without prejudice to Defendant renewing the argument in subsequent motion practice.

b. Actionable Misrepresentations.

Defendant also argues that Plaintiffs fail to allege any actionable misrepresentations. Plaintiffs' claims under the UCL, the CLRA, and the FAL are governed by the "reasonable consumer" test, which requires Plaintiffs to show that "members of the public are likely to be deceived." *See, e.g., Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995) (quoting *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1267 (1992)).[11] Because there are no allegations that Plaintiffs relied on statements other than what is on the Defendants' Products' labels, the Court's analysis is limited to the representation: "100% Complete and Balanced Nutrition." Defendant contends this statement is non-actionable puffery.

> A statement is considered puffery if the claim is extremely unlikely to induce consumer reliance. Ultimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim. The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions. Thus, a statement that is quantifiable, that makes a claim as to the specific or absolute characteristics of a product, may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery.

[11] In *Bruton v. Gerber Products Company*, the Ninth Circuit stated that "[t]he best reading of California precedent is that the reasonable consumer test is a requirement under the UCL's unlawful prong only when it is an element of the predicate violation." 703 Fed. App'x 468, 471-72 (9th Cir. 2017). As noted, Plaintiffs assert Defendant violated the unlawful prong of the UCL by violating the FAL and the CLRA. The parties agree the reasonable consumer standard applies to those claims. Accordingly, the Court concludes it applies to Plaintiffs' claim under the unlawful prong of the UCL.

Newcal Indus., Inc. v. IKON Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008) (internal quotations and citations omitted).

To support this argument, Defendant relies on *Blue Buffalo Company Ltd. v. Nestle Purina Petcare Company*, No. 4:15 CV 384 RWS, 2015 WL 3645262 (E.D. Mo. June 10, 2015). In that case, the plaintiff challenged a variety of representations regarding the defendant's pet foods, which pertained to whether the products contained real ingredients. Defendant argued that many of the statements, including the statement "100% Complete & Balanced Nutrition," were non-actionable puffery. *See, e.g.,* 2015 WL 3645262, at *5-*9. The plaintiff argued that statement was false and misleading because the products were made with inferior ingredients. *Id.*, 2015 WL 3645262, at *9. The court concluded that the term "100%" was a potentially quantifiable metric. However, it reasoned the phrase as a whole was puffery "because whether something is complete or balanced nutrition is merely an opinion about quality and is not capable of being proven true or false." *Id.*, 2015 WL 3645262, at *10. The court dismissed the plaintiff's claim "to the extent it allege[d] the advertisements falsely imply superiority[.]" *Id.*

In contrast, in *Grossman*, the plaintiffs brought UCL claims regarding pet food products, which they alleged contained heavy metals, pesticides, and other ingredients that posed health risks to pets. Among the representations they contended were false or misleading were statements that the products provided the "balanced diet that nature intended," "the best nutrition available today," and helped to maintain "overall good health." *Grossman*, 2019 WL 1298997, at *4. The court noted that some of the statements were "close calls" but ultimately concluded they "go beyond mere puffery, into assertions of fact." *Id.* The court reasoned that the statements implied that the products were "nutritious and safe" but, under the plaintiffs' theory, they had been tainted by unhealthy ingredients. *Id.*

In *Zeiger*, the court concluded that where the plaintiffs were proceeding on a theory that the defendant's pet food contained unsafe levels of lead, arsenic, and BPA, certain health representations could not be considered puffery. 304 F. Supp. 3d at 850-51. Similarly, in *Williams v. Gerber Products Company*, the Ninth Circuit noted that the word nutritious, "were it standing on its own, could arguably constitute puffery, since nutritiousness can be difficult to

measure concretely." 552 F.3d 934, 939 n.3 (9th Cir. 2008). The Ninth Circuit, however, examined the statement in context of the products' packaging as a whole and declined to give "the defendant the benefit of the doubt by dismissing the statement as puffery." *Id.*

Unlike the plaintiff in *Blue Buffalo*, Plaintiffs here do not contend the statement "100% Complete and Balanced Nutrition" is false or misleading because Defendant's Products contain inferior ingredients. Rather, their claims are akin to the claims at issue in *Zieger* and *Grossman*, where the products were alleged to be inherently unhealthy and non-nutritious because of the presence of, *inter alia*, arsenic, lead and other heavy metals, and BPA. In light of Plaintiffs' theory, the Court cannot conclude as a matter of law that the statement "100% Complete and Balanced Nutrition" would be extremely unlikely to induce consumer reliance. *Newcal*, 513 F.3d at 1053.

For this reason, the Court DENIES, IN PART, Defendant's motion to dismiss.

c. Omissions.

Defendants also argue Plaintiffs cannot proceed on the consumer protection claims under California law (Claims 2, 3 and 4), Maryland law (Claim 31), and New York law (Claims 46 and 47) based on omissions. Defendant argues that Plaintiffs' allegations regarding Defendant's knowledge about the presence of pentobarbital in the Contaminated Dog Foods are "speculative and conclusory." (Mot. at 20:17.)[12]

A plaintiff may base a UCL claim or a CLRA claim "in terms constituting fraudulent omissions, [but] to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact that the defendant was obliged to disclose." *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835 (2006); *see also Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 & n.5 (9th Cir. 2012).[13] "California courts have generally rejected a

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[12] Defendant did not expressly move to dismiss the Minnesota claims. Plaintiffs argued in their opposition that at least some of those claims are viable based on an omissions theory (Claims 42 and 44). Defendant has addressed that argument on reply. Accordingly, the Court evaluates those claims as well.

[13] Based on the language of California's FAL, courts have required plaintiffs to allege at least some affirmative misrepresentations to state a claim where an omission is involved. *See, e.g.,*

broad obligation to disclose." *Wilson*, 668 F.3d at 1141. "California federal courts have generally interpreted *Daugherty* as holding that a manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue" that is known to the manufacturer. *Id.* (internal quotations and citations omitted).

Under Maryland's Consumer Protection Act, "omissions proscribed by § 13–301(9) clearly require that the 'concealment, suppression or omission of any material fact' be 'knowing,' as well as made 'with the intent that a consumer rely on the same.'" *Luskin's, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 717 (Md. 1999). Under New York GBL Sections 349 and 350, a plaintiff can proceed on an omissions theory by showing "the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Oswego Laborers Local Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. 1995); *see also Kommer v. Ford Motor Co.*, No. 117CV296LEKDJS, 2017 WL 3251598, at *4 (N.D.N.Y. July 28, 2017). If a plaintiff can allege the defendant "has special knowledge of material facts to which the [plaintiff] does not have access," Minnesota law also appears to conclude claims under the Unlawful Trade Practices Act and the False Statements in Advertising Act can be premised on fraudulent omissions. *Podpeskar v. Makita, U.S.A., Inc.*, 247 F. Supp. 3d 1001, 1011 (D. Minn. 2017) (quoting *Execute Bancorp v. Kemper Sec. Grp.*, 58 F.3d 1306, 1314 (8th Cir. 1995)).[14]

According to Plaintiffs, Defendant had "exclusive knowledge of the physical and chemical make-up of the Contaminated Dog Foods." (ACC ¶ 120.) Based on allegations addressed earlier in the ACC, Plaintiffs state this is so because Defendant: (1) claims to have rigorous quality and supplier standards; to follow "strict food safety and quality control procedures;" (2) claims its ingredients meet various federal standards; and (3) claims that when a supplier is approved, "a comprehensive testing program is in place to assess the safety and quality of the ingredients upon

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Dana v. Hershey, 180 F. Supp. 3d 652, 668 (N.D. Cal. 2016) (citing cases and dismissing FAL claim based on "pure omissions"). In this case, Plaintiffs do allege that Defendant made some affirmative misrepresentations. Therefore, the Court applies the same standards to Plaintiffs' California FAL claim.

[14] Defendant questions whether this rule is applicable to the Minnesota consumer protection statutes at issue but has not presented any contrary authority.

receipt" that includes "laboratory analysis and physical inspection of the ingredients." (ACC ¶ 43.) Plaintiffs also allege Defendant's supplier has had issues relating to contamination that "should have alerted Defendant it needs to confirm the safety, quality, and reputation of" that supplier and the products purchased from it. They also allege that information was publicly available to Defendant. (ACC ¶¶ 36-44.) Finally, Plaintiffs allege this is not the first time Defendant's products have been tainted with pentobarbital. (*Id.* ¶¶ 41, 121.)

In *Burdt v. Whirlpool Corporation*, the plaintiff alleged the defendant sold ovens with racks that dislodged easily. No. 15-cv-1563-JSW, 2015 WL 4647929, at *1 (N.D. Cal. Aug. 5, 2015). Although the plaintiff alleged the defendant conducted pre-release testing, this Court found he did not allege facts to show when the testing occurred or allege facts that would show how that testing would have disclosed the defect in products at issue. *Id.*, 2015 WL 4647929, at *4. This Court reasoned that "[p]rerelease testing is common and Plaintiff must allege more than an undetailed assertion that testing must have revealed the alleged defect. Otherwise, any consumer could bring a CLRA claim merely by asserting that a manufacturer had knowledge of an alleged defect from its prerelease testing." *Id.*, 2015 WL 4647929 at *5.

In the *Wilson* case, the Ninth Circuit held that the plaintiff's allegation that the defendant had access to data about the alleged defect was "speculative and does not suggest how tests or information could have alerted [it] to the defect." 668 F.3d at 1147. In contrast, in *In re Seagate Technology LLC Litigation*, the plaintiffs alleged the defendant engaged in pre-market testing of the products and alleged the failure rates would have disclosed the alleged defect. 233 F. Supp. 3d 776, 795 (N.D. Cal. 2017) ("*Seagate I*"). The court, "taking into account Rule 9(b)'s instruction that 'knowledge… may be alleged generally'" found that plaintiffs had plausibly alleged defendant "knew of and failed to disclose information contrary" to its public representations. *Id.*

Plaintiffs do not rely solely on the allegation that Defendant, as the manufacturer, had exclusive knowledge of the Contaminated Dog Foods's ingredients to support the inference that Defendant knew that the products had been tainted with pentobarbital. In contrast to the plaintiffs in *Burdt*, Plaintiffs allege the Defendant's pre-release testing included a laboratory analysis of ingredients. Because the problem with Defendants' Products in this case relates to the ingredients,

the Court concludes those allegations would show how the testing would make Defendant aware of the presence of pentobarbital. Plaintiffs also rely on incidents about contaminated meat products from Defendant's supplier that Plaintiffs contend should have raised red flags, some which took place before Plaintiffs purchased Defendant's Products.

This is a close case, but in light of the fact that Rule 9(b) allows knowledge to be alleged generally, the Court concludes Plaintiffs have plausibly alleged facts from which it would be reasonable to infer Defendant knew or should have known that the products contained pentobarbital. *See, e.g., Long v. Graco Children's Products, Inc.*, No. 13-cv-1257-WHO, 2013 WL 4655763, at *6-*7 (N.D. Cal. Aug. 26, 2013); *Podpeskar*, 247 F. Supp. 3d at 1011.

For these reasons, the Court DENIES, IN PART, Defendant's motion to dismiss Claims 2, 3, 4, 31, 42, 44, 46, and 47. The Court DENIES the motion to dismiss the remaining state consumer protection claims on the basis that Defendant failed to meet its burden as the moving party to show the Plaintiffs cannot proceed on an omission theory. This ruling is without prejudice to Defendant renewing that argument in subsequent motion practice.

d. Claim 11: FDUPTA.

Defendant raises additional arguments to dismiss Sebastiano's claim under the FDUPTA. The essential element of a claim for damages under the FDUPTA are: "(1) a deceptive act *or* unfair practice; (2) causation; and (3) actual damages." *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006) (emphasis added). Under the FDUPTA, "[a] deceptive practice is one that is likely to mislead consumers[,]" while "[a]n unfair practice is one that offends established public policy and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.* (internal quotations and citations omitted); *see also Casa Dimitri v. Invicta Watch Co. of America*, 270 F. Supp. 3d 1340, 1353 (S.D. Fla. 2017). The *Casa Dimitri* case, on which Defendant relies, resolved an FDUPTA claim at summary judgment and found that the plaintiff failed to produce evidence to support its claim. *Id.* at 1353. Defendant also relies on *Exim Brickell, LLC v. Bariven, S.A.*, No. 09-CV-20195, 2011 WL 13131263 (S.D. Fla. Aug. 16, 2011). *Exim Brickell* involved a contract dispute involving commercial installment contracts. The court addressed the plaintiff's FDUPTA claim following a bench trial and

concluded there was insufficient evidence to show the defendant had engaged in immoral, unethical, oppressive, or unscrupulous behavior. *Id.*, at *1, *41. The *Casa Dimitri* and *Exim Brickell* cases are in a different procedural posture than this case, and the Court finds them distinguishable on that basis. Further, the FDUPTA provides for relief for unfair *or* deceptive practices. Whether or not the allegations are sufficient to show Defendant's conduct is "unfair," Sebastiano could state a claim if he can show Defendant's conduct is deceptive.

Defendant argues Sebastiano has not made that showing. Under the FDUTPA "the question is not whether the plaintiff actually relied on the alleged deceptive trade practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstance." *Moss v. Walgreen Co.*, 765 F. Supp. 2d 1363, 1367 (S.D. Fla. 2011) (quoting *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. Dist. Ct. App. 2000)). In *Moss*, the plaintiff did not allege he relied on any particular statements when he purchased the defendant's product. However, he argued the defendant's misleading advertising enabled it to charge a significant price premium. The court determined those allegations were sufficient to show the plaintiff had been injured by the defendant's practice. *Id.* at 1367-68 & n.1 (discussing interplay of reliance and causation).

Here, Sebastiano alleges that he was exposed to Defendant's advertising and marketing, although the only specific item he claims to have relied on was the label. Unlike the plaintiff in *Moss,* he does not argue that Defendant's advertising enabled it to charge a premium price. Instead, he contends that he was deceived by Defendant's advertising into paying for a product that had no value or had *di minimis* value because it was adulterated with pentobarbital. At this stage, the Court concludes Sebastiano states a claim for deceptive practices under the FUDPTA.

For these reasons, the Court DENIES Defendant's motion to dismiss Claim 11. However, Defendant may renew its argument that its conduct cannot be considered "unfair" in subsequent motion practice. *See, e.g., Marketran, LLC v. Brooklyn Water Enters., Inc.*, No. 9:16-cv-81019-WPD, 2016 WL 8678548, at *3-*4 (S.D. Fla. Aug. 31, 2016).

e. Claim 41: Minnesota Commercial Feed Law.

Defendant argues there is no private right of action for violations of Minnesota's

Commercial Feed Law ("CFL"). Jilek argues that she can pursue this claim under Minnesota's private attorney general statute. Neither party provided the Court with case law on this issue, and the Court did not locate any authority on point during its research.

Minnesota's private attorney general statute provides:

> In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

Minn. Stat. Ann. 8.31, subd. 3(a) (West) (emphasis added).

Subdivision 1 of the private attorney general statute provides, in part, that "[t]he attorney general shall investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade," which is followed by a non-exclusive list of statutory provisions. Although the CFL is not included in that list, the private attorney general statute expressly states the list is non-exclusive. Jilek argues that a claim for violation of the CFL would constitute a violation of "unlawful business practices in business, commerce or trade." In light of the fact that Subdivision 1's list of laws that may be enforced is non-exclusive, the Court DENIES Defendant's motion to dismiss Claim 41. *Cf. Duxbury*, 681 N.W.2d at 389 (approving negligence per se instruction based on conduct that allegedly violated CFL). However, the Court shall require Jilek to amend Claim 41 to expressly provide that she is asserting that pursuant to Minnesota's private attorney general statute.

4. The Negligent Misrepresentation Claims.

Plaintiffs assert claims for negligent misrepresentation under the following state laws: California (Claim 1), Tennessee (Claim 20), Texas (Claim 30), Maryland (Claim 33), and Washington (Claim 38).

a. Economic Loss.

Defendant argues that the economic loss rule bars Claims 1, 30, 33 and 38. The California Supreme Court has explained, "[e]conomic loss consists of damages for inadequate value, costs of

repair and replacement of [a] defective product or consequent loss of profits – without any claim of personal injury or damages to other property." *Robinson Helicopter Co., Inc v. Dana Corp.*, 34 Cal. 4th 979, 988 (internal quotations and citations omitted); *see also So. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 398 (2019) (referring to phrase "purely economic losses" as "shorthand for pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property") (hereinafter "*Gas Leak Cases*").

It is undisputed that Plaintiffs do not seek to recover for losses other than the cost of the Contaminated Dog Foods, which the parties agree would constitute "economic loss." Further, the underlying factual allegations that support the negligent misrepresentation claims are substantially similar to the factual allegations that support the claims for breach of express warranty in California, Texas, Maryland, and Washington. In particular, each of these claims is premised on the manner in which Defendant's Products were advertised and marketed and on the Defendants' Products' labels.

The economic loss rule is designed "to prevent[] the law of contract and the law of tort from dissolving one into the other." *Robinson Helicopter*, 34 Cal. 4th at 988.; *see also United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1180 (C.D. Cal. 2009) ("The economic loss rule generally bars tort claims for contract breaches, thereby limiting contracting parties to contract damages.").

> Simply stated, the economic loss rule provides: Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses. This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, *unless he can demonstrate harm above and beyond a broken contractual promise.*

Robinson Helicopter, 34 Cal. 4th at 988. (internal quotations, brackets, and citations omitted, emphasis added).

The issue of whether the economic loss rule bars claims for negligent misrepresentation

claims under California law is unsettled. For example, California courts have stated that negligent misrepresentation is "a species of the tort of deceit." *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 407 (1992); *see also* Cal. Civ. Code § 1710(2). In *Robinson Helicopter*, the California Supreme Court determined that the economic loss rule did not bar claims for fraud and misrepresentation but stated that its holding was "narrow in scope and limited to a defendant's affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff's economic loss." *Id.* at 993.

The Ninth Circuit has addressed the issue in unpublished decisions. There are also numerous opinions from district courts within the Circuit. Those decisions vary in their reasoning and in their holdings. *See Linde, LLC v. Valley Protein, LLC*, No. 16-cv-00527-DAD-EPG, 2019 WL 3035551, at *17 (E.D. Cal. July 11, 2019) (citing cases); *Broomfield v. Craft Brew Alliance, Inc.*, No. 17-cv-012027-BLF, 2017 WL 3838453, at *9-*10 (N.D. Cal. Sept. 1, 2017). In *Broomfield*, the court noted that "reasonable minds can and do differ on the applicability of the economic loss rule to negligent misrepresentation claims, and this issue is ripe to be revisited by the California Supreme Court." *Broomfield,* 2017 WL 3838453, at *9. In that case, the court concluded the economic loss rule would not bar the claims because negligent misrepresentation is a species of fraud. *Id.*

Some courts, relying on *Robinson Helicopter*'s "narrow holding", have dismissed claims either where the claim did not involve product liability or where the plaintiff failed to allege that they could be exposed to any additional personal liability. *See, e.g., Crystal Springs Upland School v. Fieldturf USA, Inc.*, 219 F. Supp. 3d 962, 969-70 (N.D. Cal. 2016) (citing cases). Other courts have permitted such claims to proceed even in the absence of allegations that plaintiffs could be exposed to additional liability. *See, e.g., Arabian v. Organic Candy Factory*, No. 17-cv-05410-ODW-PLA, 2018 WL 1406608, at *7 (C.D. Cal. Mar. 19, 2018) (denying motion to dismiss negligent misrepresentation claim based on economic loss rule where the plaintiff alleged the "[d]efendant fraudulently induced [p]laintiff to enter into contract [*sic*] for the purchase of the Gummy Cubs, by affirmatively misrepresenting the Class Products … contained Real Ingredients").

In *Linde*, the court determined the appropriate analysis was to evaluate whether the allegations that support a negligent misrepresentation claim "closely parallel" a concurrent breach of contract claim so that the negligent misrepresentation claim "is in actuality a breach of contract claim in disguise." 2019 WL 3035551, at *17 (following *Lincoln Gen. Ins. Co. v. Access Claims Adm'rs, Inc.*, No. CIV. S-07-1015 LKK/EFB, 2007 WL 2492436 (E.D. Cal. Aug. 30, 2007)). The *Crystal Springs* court reached a similar conclusion, but also applied the limitation from *Robinson Helicopter*, stating:

> [t]he clear pattern that emerges from these cases is that a negligent misrepresentation claim paralleling a contract claim that prays only for economic damages will be barred by the economic loss rule unless the plaintiff alleges both that the defendant made an affirmative misrepresentation, *and* that the defendant's misrepresentation exposed the plaintiff to independent personal liability.

219 F. Supp. 3d at 970 (emphasis added).[15]

In the absence of a clear statement from the California Supreme Court or the Ninth Circuit regarding the applicability of the economic loss rule in negligent misrepresentation such as this one, the Court finds the reasoning and the approach set forth in *Linde* persuasive. Here, Johnson's negligent misrepresentation claims and breach of warranty claims rely on allegations that are substantially similar to one another. Therefore, as currently alleged, the Court construes Johnson's negligent misrepresentation claim to be a claim for breach of express warranty in disguise. For that reason, the Court GRANTS Defendant's motion to dismiss Claim 1. Because the Court cannot say it would be a futile act, the Court will grant Johnson leave to amend this claim.

For these same reasons, the Court GRANTS Defendant's motion to dismiss Claims 30 and 38, and the Court will grant leave to amend those claims. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 415-19 (Tex. 2011) (explaining that application of the rule may

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[15] The court in *Bret Harte Union High Sch. Dist. v. Fieldturf, USA, Inc.*, permitted a negligent misrepresentation claim based the same alleged product defects at issue in the *Crystal Springs* case to proceed. No. 16-cv-00371-DAD-SMS, 2016 WL 3519294, at *4-5 (E.D. Cal. Jun. 27, 2016). The court reasoned the negligent misrepresentation claim "sounds more in deceit/fraud than it does in negligence," *i.e.* the allegations supporting the breach of contract claim and the allegations supporting the negligent misrepresentation claim were not "closely parallel."

depend upon the facts and circumstances of given case); *Eastwood v. Horse Harbor Found., Inc.*, 241 P.3d 1256, 1264 (Wash. 2007) (to evaluate whether economic loss rule will bar claim, "[t]he test is not simply whether an injury is an economic loss arising from breach of contract, but rather whether the injury is traceable also to a breach of a tort law duty of care arising independently of the contract").

The essential elements of Collins's claim for negligent misrepresentation are: "(1) the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement; (2) the defendant intends that his statement will be acted upon by the plaintiff; (3) the defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury; (4) the plaintiff, justifiably, takes action in reliance on the statement; and (5) the plaintiff suffers damage proximately caused by the defendant's negligence." *Griesi v. Atl. Gen. Hosp. Corp.*, 756 A.2d 548, 553 (Md. 2000) (quoting *Weisman v. Connors*, 540 A.2d 783, 791 (Md. 1988)).

Under Maryland law, when a claim for negligent misrepresentation seeks economic loss, "the injured party must prove that the defendant owed him or her a duty of care by demonstrating an intimate nexus between them," which can be established by "contractual privity or its equivalent." *Id.* at 554; *cf. Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP*, 155 A.3d 445, 451 (Md. 2017) (holding that "the economic loss doctrine bars recovery when the parties are not in privity with one another or the alleged negligent conduct did not result in physical injury or risk of severe physical injury or death"). The Court concludes resolution of whether Collins can state a claim rests on what duty, if any, Defendant owed to him. In opposition, Collins argues only that Defendant appears to concede the parties are in privity. Defendant does not, however, make such a concession. However, Defendant does not address whether the facts alleged would demonstrate an "intimate nexus" between Defendant and Collins.

For this reason, the Court DENIES the motion to dismiss Claim 33. Defendant may renew this argument in subsequent motion practice.

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b. Failure to Allege Facts that Defendant Supplied Information to Guide Others in Their Business Transactions.

Defendant also argues that the claims negligent misrepresentation claims under Tennessee law (Claim 20), Texas law (Claim 30) and Washington law (Claim 38) fail because Plaintiffs do not allege it supplied information to guide them in their business transactions. Under Tennessee law, the essential elements of a claim for negligent misrepresentation are: "(1) the defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary (as opposed to gratuitous) interest; and (2) the defendant supplies faulty information meant to guide others in their business transactions; and (3) the defendant fails to exercise reasonable care in obtaining or communicating the information; and (4) the plaintiff justifiably relies upon the information." *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn. 1991). The elements are substantially similar under Washington and Texas, and the cases cited draw the rule from the Restatement (Second) of Torts section 552. *See Ross v. Kirner*, 172 P.3d 701, 704 (Wash. 2007); *Willis v. Marshall*, 401 S.W.3d 689, 698 (Tex. App. 2013).

Defendant argues that these claims cannot succeed because the courts in these three jurisdictions have limited this theory of liability to claims asserted against professionals, such as lenders, auditors, or accountants. In *Ritter v. Custom Chemicides, Incorporated*, the court concluded a claim for negligent misrepresentation was not limited to professionals and could be applied to "non-professionsals involved in certain business activities or transactions." 912 S.W.2d 128, 131 (Tenn. 1995). However, the court concluded the plaintiffs' claim failed because the plaintiffs did not demonstrate that the defendant provided false information, including information contained in advertisements. The court also noted that the plaintiffs' claim appeared to be a claim that the product failed to perform as expected, which could not survive because they did not seek damages beyond economic loss. *Id.* at 132-33.

The allegations supporting Christian's negligent misrepresentation claim are substantially similar to her claim for breach of express warranty, and she appears to seek relief on the basis that Defendants' Products did not perform as expected. For this reason, the Court GRANTS

Defendant's motion to dismiss Claim 20. Because the Court cannot say it would be a futile act, the Court will grant Christian leave to amend.

Brown and Mayo have not provided the Court with any authority from Washington or Texas that addressed this issue in a case where a consumer plaintiff asserted negligent misrepresentation claims premised on false advertising. For that additional reason, the Court GRANTS Defendant's motion to dismiss Claims 30 and 38. Because the Court cannot say it would be a futile act, the Court will grant Brown and Mayo leave to amend.[16]

5. Claim 5: Negligence.

Defendant argues this claim also is barred by the economic loss rule. The California Supreme Court recently revisited the economic loss rule and negligence claims in the *Gas Leak Cases*, albeit in a different factual context. There, the plaintiffs – a group of local business owners – sued the defendant in negligence for losses to income they suffered as a result of a gas leak. The defendant demurred and argued the economic loss rule applied. 7 Cal. 5th at 391, 397. The Court's stated its decision "turn[ed] on whether the [defendant] had a tort duty to guard against" purely economic losses. *Id.* at 394. The Court held the defendant did not. Therefore, it held "the claims before us are best not treated as compensable in negligence." *Id.* at 395. The Court reasoned that "liability in negligence is 'the exception, not the rule'" and the "primary exception … is where the plaintiff and the defendant have a 'special relationship.'" *Id.* at 400 (quoting *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 58 (1998) and *J'Aire v. Corp. v. Gregory*, 24 Cal.3d 799, 804 (1979)). That special relationship will exist, for example, if "the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out." *Id.*

Although Johnson alleges that he is an intended beneficiary (*see* ACC ¶¶ 122-126, 174), the Court concludes the allegations are insufficient to establish this type of a special relationship.

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[16] Defendant also moved to dismiss these claims for failure to comply with Rule 9(b). To the extent Rule 9(b) applies, Plaintiffs incorporate their prior allegations by reference. For the reasons set forth in Section C, the Court concludes that Plaintiffs' allegations are sufficient to satisfy Rule 9(b). As the Court also noted, the only representations Plaintiffs allege they saw were statements on Defendant's Products' labels. That limitation also may impact the viability of these claims, but Defendant did not move to dismiss on that basis.

The Court also concludes, on the facts of this case, that to apply the exception discussed in *Robinson Helicopter* would subsume Plaintiffs' claim for negligence into his claim for negligent misrepresentation. For these reasons, the Court GRANTS Defendant's motion to dismiss Claim 5. In light of this ruling, the Court does not reach the issue of whether Plaintiffs have alleged facts to satisfy each element of the claim or whether the allegations are sufficient to invoke the evidentiary presumption of negligence per se. *See, Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1285 (2006); Evid. Code § 669(a).[17] Because the Court cannot say it would be a futile act, the Court will grant leave to amend this claim.

6. The Fraud Claims.

Plaintiffs bring claim for common law fraud under the following state laws: California (Claim 8, fraud by concealment), Tennessee (Claim 22), West Virginia (Claim 26, by affirmative misrepresentation), Maryland (Claim 32), and Washington (Claim 37). Plaintiffs allege they relied on the labels when they made the decision to purchase Defendant's Products. To the extent the fraud claims are premised on the theory that the statement "100% Complete and Balanced Nutrition" is an affirmative misrepresentation, the Court concludes the only Plaintiff from these jurisdictions who alleges facts to show he could have relied on that statement is Collins, who resides in Maryland.

For that reason, the Court DENIES, IN PART, the motion to dismiss Claim 32, and the Court GRANTS, IN PART, any fraud claims based on affirmative misrepresentation asserted by Johnson (Claim 8), Christian (Claim 22), Thomas (Claim 26), and Mayo (Claim 37). Because the Court cannot say it would be a futile act, the Court will grant leave to amend.

Defendant also moves to dismiss these claims on the basis that these Plaintiffs fail to allege

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[17] Plaintiffs argued that if they could not pursue this claim under California law, they could pursue a claim for negligence under the laws of the other jurisdictions in which the named Plaintiffs reside. Christian asserted a negligence claim under the laws of Tennessee (Claim 21) and Thomas asserted a negligence claim under West Virginia law (Claim 25). Christian and Thomas concede those claims are barred by the economic loss rule. For that reason, the Court GRANTS the motion to dismiss those claims. Because the parties did not brief the viability of negligence claims in other jurisdictions, the Court does not address the issue. It shall not prevent those Plaintiffs from amending to assert those claims, if the economic loss rule would not prevent them from doing so.

facts that show Defendant acted knowingly or intentionally. Plaintiffs do not dispute they would be required to plead knowledge and intent in these jurisdictions to state a claim based on omissions. They argue, however, that they have alleged facts that are sufficient to show Defendant's knowledge and intent. For the reasons set forth above in Section D.3.c, the Court concludes Plaintiffs' allegations are sufficient. For that reason, the Court DENIES, IN PART, Defendants' motion to dismiss Claims 8, 22, 26, 32, and 37.

7. The Breach of Express Warranty Claims.[18]

Plaintiffs bring claims for breach of express warranty under the following state laws: California (Claim 6), Florida (Claim 12), Ohio (Claim 16), Tennessee (Claim 18), West Virginia (Claim 23), Texas (Claim 28), Maryland (Claim 34), and Washington (Claim 39).[19] Defendant acknowledges that the elements of this claim vary by state. In addition to the notice argument addressed in Section B, Defendant argues that the Court must dismiss these claims because Plaintiffs fail to allege: (1) an express and affirmative statement of fact about Defendant's Products; and (2) facts that demonstrate reliance.[20]

Plaintiffs argue that Defendant's reliance argument fails because they premise this claim, in part, on the statement "100% Complete and Balanced Nutrition," which appears on Defendant's Products' labels. Plaintiffs argue that each individual claim can proceed based on that statement. The Court disagrees. As discussed above, Plaintiffs only identify four products with labels on

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[18] Defendant argues that all of Plaintiffs' breach of warranty claims are moot because they cannot show they incurred damages. Plaintiffs do not allege they accepted a refund as part of Defendant's recall and refund program. For that reason, the Court DENIES, IN PART, Defendant's motion to dismiss the breach of warranty claims.

[19] Plaintiffs have withdrawn their claim for breach of express warranty under Alabama law. The Court DENIES, as moot, the motion to dismiss that claim.

[20] Defendant incorporated by reference one of the charts regarding differences in state law to support these arguments, although it cites the incorrect column for reliance. Plaintiffs objected to these exhibits on the basis that they permitted Defendant to exceed the Court's page limitations. The Court will not scour those exhibits for relevant cases where they have not been incorporated by reference to a specific argument. Further, while Defendant's charts might be acceptable as exhibits to address differences in state laws when moving for class certification, the Court will require Defendant to include all relevant authority in its briefing on a subsequent motion to dismiss. If the parties require additional pages to be able to comply with this directive, the Court will allow it.

which that statement appears. Plaintiffs allege they read and relied on the labels, but the only Plaintiffs who assert breach of warranty claims and purchased products with that statement on the labels are Williamson and Collins. Because the Court has determined that, on the facts of this case, that statement is not puffery, the Court DENIES, IN PART, the motion to dismiss Claims 16 and 34.

Under West Virginia law "no particular reliance on … statements need to be shown in order to weave them into the fabric of the agreement." *Michael v. Wyeth, LLC*, No. , 2011 WL 2150112, at *8 (S.D. W.Va. May 25, 2011). In *Michael*, the court "anticipate[d] that West Virginia's high court would follow [a] rebuttable presumption approach," which would presume that a seller's representations about goods became part of the bargain unless a seller could rebut that presumption. *Id.* The court found support for its conclusion in the official comments to West Virginia Code section 46-2-13, which stated that "[i]n actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact." *Id.* (quoting W. Va. Code § 46-2-13, Official Comment 3.)

Although Thomas may not need to establish reliance, the Court concludes that the facts in the ACC do not support his breach of warranty express warranty claim because they do not include facts that show the statement "100% Complete and Balanced Nutrition" became part of the basis of *his* bargain with Defendant. (*See* ACC ¶¶ 95, 113.) The Court concludes the same is true for Johnson's claim for breach of express warranty under California law. *See, e.g., Weinstat v. Denstply Int'l, Inc.*, 180 Cal. App. 4th 1213, 1229 (2010); *cf. Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1106 (N.D. Cal. 2017) (stating that "an express warranty claim requires that the statements be part of the 'basis of the bargain,' and the 'basis of the bargain' for each product would only include the statements made on the packaging for that specific product variant). For these reasons, the Court GRANTS the motion to dismiss Claims 6 and 23. Because the Court cannot say it would be a futile act, the Court grants Thomas and Johnson leave to amend these

claims.

Under Washington law, "[r]ecovery for breach of an express warranty is contingent on a plaintiff's knowledge of the representation." *Touchet Valley Grain Growers, Inc. v. Opp. & Siebold Gen. Constr., Inc.*, 831 P.2d 724, 731 (Wash. 1992). Although Mayo incorporates by reference allegations about statements other than the statement "100% Complete and Balanced Nutrition," the facts are insufficient to establish how she knew about those representations. Further, although Mayo alleges that she relied on the labels when she purchased Defendant's Products, she does not allege that she purchased a product with the statement "100% Complete and Balanced Nutrition" on the label. Therefore, the Court concludes she has not alleged sufficient facts to show she knew of that representation. For that reason, the Court GRANTS Defendant's motion to dismiss Claim 39. Because the Court cannot say it would be a futile act, the Court will grant Mayo leave to amend.

The remaining Plaintiffs allege a number of other affirmative statements that they contend can constitute an express warranty that relate to Defendant's products ingredients and its safety, quality, and nutritional standards. (*See* ACC ¶¶ 42-43, 45.) However, they do not allege they read or saw those statements. Therefore, they have not alleged facts that show those statements could have become the basis of their bargain with Defendant. *See, e.g., State Farm Ins. Co. v. Nu Prime Roll-A-Way of Miami, Inc.*, 557 So. 2d 107, 1083 (Fla. Dist. Ct. App. 1990) ("A seller's representations in newspaper advertisements, catalogues, circulars, etc., may become a part of the contract of sale and constitute an express warranty for breach of which the seller will be liable for damages to one who, in making the purchase, relies thereon to his injury."); *Coffee v. Dowley Mfg.*, 187 F. Supp. 2d 958, 973 (M.D. Tenn. 2002) (dismissing breach of warranty claims where it was not clear the plaintiff read or relied on express representations); *American Tobacco Co., Inc. v. Grinnel,* 951 S.W.2d 420, 436 (Tex. 1997) ("Though not a fraud-based claim, an express warranty claim also requires a form of reliance. … Basis of the bargain loosely reflects the common-law express warranty requirement of reliance.") (internal quotations and citations omitted), *superseded by statute on other grounds*.

For that reason, the Court GRANTS, IN PART, Defendant's motion to dismiss Claims 12,

18, and 28. Because the Court cannot say it would be a futile act, the Court will grant leave to amend those claims.

8. The Breach of Implied Warranty Claims.

Plaintiffs bring claims for breach of implied warranty under the following state laws: California (Claim 7), Florida (Claim 13), Ohio (Claim 17), Tennessee (Claim 19), West Virginia (Claim 24), Texas (Claim 29), Maryland (Claim 35), and Washington (Claim 40).

These claims are based, in part, on allegations that Defendants' Products fail to conform with representations made on the labels. Defendant argues that these claims fail for the same reasons the express warranty claims fail. Plaintiffs respond that the claims are sufficient for the same reasons they argued the breach of express warranty claims are sufficient. Because the parties do not dispute that, on this theory, Plaintiffs' implied warranty claims rise and fall with their breach of express warranty claims, the Court GRANTS, IN PART, AND DENIES, IN PART, in part Defendant's motion for the reasons set forth in Section D.7. Because the Court cannot say it would be a futile act, the Court will grant leave to amend.

a. Fitness for Ordinary Purpose.

Defendant also argues that Plaintiffs fail to allege facts under California and Ohio law to that show Defendants' Products were not fit for their ordinary purpose.[21] Defendant notes that Plaintiffs allege the FDA's preliminary investigation suggested the low levels of pentobarbital in Defendants' Products were "unlikely to pose a health risk to pets." (ACC ¶ 21.) However, Plaintiffs also allege that the FDA has stated "pentobarbital should never be present in pet food and products containing any amount of pentobarbital are considered to be adulterated." (*Id.* ¶ 20.) Plaintiffs also allege that pets were repeatedly exposed to the pentobarbital because they were fed Defendants' Products multiple times per day. (*Id.* ¶ 62.) Defendant argues Plaintiffs' citations to California Health and Safety Code sections 113075 and 113090 and Ohio Revised Code Annotated section 923.48(A) in the ACC are not relevant. Plaintiffs note these statutes prohibit

[21] Plaintiffs allege in their other breach of implied warranty claims that Defendants' Products were not fit for their ordinary purpose. (*See, e.g.*, ACC ¶¶ 254, 320, 364, 408-09, 471, 527.) Although Defendant did not expressly move to dismiss those claims on this basis, the Court's ruling applies equally to those claims.

the sale of adulterated pet food. Although a violation of those statutes might not give rise to a breach of implied warranty claim, Plaintiffs appear to rely on them to provide support for a conclusion that the Contaminated Dog Foods do "not possess even the most basic degree of fitness for ordinary use." *Moeck v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003).

At this stage, the Court concludes Plaintiffs have alleged sufficient facts to suggest they could proceed on a theory that the Contaminated Dog Foods were not fit for their ordinary purpose. For that reason, the Court DENIES, IN PART, the motion to dismiss Claims 7 and 17.

b. Privity.

Defendant also moves to dismiss the breach of implied warranty claims under California, Florida, Ohio, Tennessee, and Washington law on the basis that the parties are not in privity. It is undisputed that the Plaintiffs did not purchase the Contaminated Dog Foods from Defendant, and each of these jurisdictions generally requires a showing of privity to state a claim for breach of an implied warranty. *See, e.g., Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008) (privity requirement exists with "particularized exceptions"); *Intergraph Corp. v. Stearman*, 555 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 1990); *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Sons Ents., Inc.*, 50 N.E.3d 955, 962 (Ohio Ct. App. 2015) (stating implied warranty claims can be brought either in contract or in tort and stating that contract-based claims require privity); *see also Bobb Forrest Prods., Inc. v. Morbark Indus., Inc.*, 783 N.E.2d 560, 575 (Ohio Ct. App. 2002) (tort-based theory of implied warranty is indistinguishable from strict liability in tort and a plaintiff may be able to recover against a defendant pursuant to this theory despite the lack of privity of contract); *In re Seagate Tech. LLC Litig.*, No. 16-cv-00523-JCS, 2017 WL 3670779, at *10 (N.D. Cal. Aug. 25, 2017) ("*In re Seagate II*") ("Tennessee law generally requires privity between the plaintiff and defendant to support an implied warranty claim, with an exception for personal injury or property damage caused by an unreasonably dangerous product.") (citing *Leach v. Wiles*, 429 S.W.2d 823, 832 (Tenn. Ct. App. 1968)); *Baughn v. Honda Motor Co., Ltd.*, 727 P.2d 127, 150-52 (Wash. 1986) (privity generally required to bring breach of implied warranty; "requirement is relaxed, however, when a manufacturer makes express representations, in advertising or otherwise, to a plaintiff").

Christian does not dispute that privity is generally required under Tennessee law, and she has not argued that an exception applies. For that reason, the Court GRANTS Defendant's motion to dismiss Claim 19. Because the Court cannot say it would be a futile act, the Court will grant leave to amend.

Johnson, Sebastiano, Williamson, and Mayo argue that exceptions to the general rule apply and permit them to bring these claims in the absence of direct privity. First, they rely on a "foodstuffs" exception, which has been recognized in their jurisdictions. *See, e.g., Klein v. Duchess Sandwich Co.*, 14 Cal.2d 272, 282 (2011); *Esborg v. Bailey Drug Co.*, 378 P.2d 298, 301-03 (Wash. 1963); *Blanton v. Cudahy Packing Co.*, 19 So. 2d 313, 315-16 (Fla. 1944); *Ward v. Baking Co. v. Trizzino*, 161 N.E. 557, 559 (Ohio Ct. App. 1928). Defendant contends that this exception does not apply in this case. To support their argument, Plaintiffs rely on *In re Milo's Dog Treats Consolidated Cases,* 9 F. Supp. 3d 523, 545-46 (W.D. Pa. 2014). In that case, the court noted "it is likely that the exception was created to protect humans from tainted or defective food products[.]" *Id.* at 545. The court did not find "cases that have definitively rejected [the exception's] application to food consumed by animals, particularly household pets." *Id.* However, it also noted there was some non-binding authority, which was not recent, that provided some support to show the foodstuffs exception could be applicable. *Id.* (citing *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547, 550-51 (Mo. 1959) and *Larson v. Farmers' Warehouse Co.*, 161 Wash. App. 640, 646-47, 297 P. 753 (1931)).

Relying on those cases, the court concluded "it would appear that the jerky treats are properly considered foodstuffs for which no privity of contract is necessary to proceed on a claim for breach of an implied warranty of merchantability under the Magnuson-Moss Warranty Act." *Id.* at 545-46. There is not a great deal of authority on this issue. However, as the *In re Milo's* court noted, there is some support for extending the foodstuffs exception to products that will be consumed by animals. *See, e.g., McAfee v. Cargill*, 121 F. Supp. 5, 6 (S.D. Cal. 1954). In addition, the policy behind the foodstuffs exception is to safeguard public health and to ensure "only wholesome food may be sold for human consumption." *Klein*, 14 Cal. 4th at 282 (*citing Ketterer v. Armour & Co.*, 200 F. 322 (S.D.N.Y. 1912) and *Ward Baking*, 161 N.E. at 560). It

may be appropriate to apply those policies to food intended to be consumed by animals. *See, e.g., McAfee*, 121 F. Supp. at 6. At this stage, the Court is not willing to conclude as a matter of law that Johnson, Sebastiano, Williamson, and Mayo cannot rely on the foodstuffs exception to the privity requirement. For that reason, the Court DENIES, IN PART, Defendant's motion to dismiss Claims 7, 13, 17, and 40.

Johnson, Williamson, and Mayo also rely on a third-party beneficiary exception to the privity requirement. *See, e.g., Bobb Forrest Prods.*, 783 N.E.2d at 576 (recognizing exception). In addition to the general allegations regarding privity at paragraphs 122 through 126, Plaintiffs allege that "[p]rivity exists because Defendant impliedly warranted to Plaintiffs and the Classes that the Contaminated Foods were unadulterated and fit for their ordinary purpose." (ACC ¶ 199.) Mayo alleges "[p]rivity exists because Defendant fraudulently and/or deceitfully expressly warranted to [her] that the Contaminated Dog Foods were pure, quality, healthy, safe for consumption, unadulterated, and provided 100 percent complete and balanced nutrition." (*Id.* ¶ 532.)

Plaintiffs' allegations about their status as intended third-party beneficiaries are conclusory. For that reason, the Court concludes that these Plaintiffs fail to allege facts showing that exception could apply. *See In re Carrier IQ*, 78 F. Supp. 3d at 1106 (addressing exception under California law); *Traxler v. PPG Indus., Inc.*, 158 F. Supp. 3d 607, 624-25 (N.D. Ohio 2016) (evaluating Ohio law and finding allegations insufficient to establish third-party beneficiary status). Because Plaintiffs do not allege sufficient facts to show this exception could apply to their breach of warranty claims, the Court GRANTS, IN PART, Defendant's motion to dismiss Claims 7, 17, and 40 on this basis. The Court grants Plaintiffs leave to amend to include additional facts regarding this exception.

CONCLUSION

For the foregoing reasons, the Court GRANTS, IN PART, and DENIES, IN PART, Defendant's motion to dismiss and GRANTS Plaintiffs leave to amend. If Plaintiffs file an amended complaint, they shall do so by no later than November 1, 2019. Plaintiffs also shall file a redline version of any amended complaint. As the Court has noted, many of the issues raised by

Defendant's motion prove difficult to untangle because this case melds claims for false advertising with assertions that Defendant's product is adulterated and, in that way, defective. However, Plaintiffs do not assert claims for product liability and do not seek damages for injuries their pets suffered. Plaintiffs may wish to consider whether it would be appropriate to narrow the claims presented in an amended complaint.

If Plaintiffs file an amended complaint and if, after reviewing it, Defendant intends to move to dismiss, the Court ORDERS the parties to meet and confer as that term is defined in the Northern District Civil Local Rules, to determine whether they can narrow the issues to be presented in that motion. To allow for this meet and confer process, Defendant may answer or otherwise respond within forty-five (45) days after Plaintiffs file and serve the amended complaint.

Although the Court previously ordered the parties to file a joint proposed case management statement within fourteen (14) days after it resolved Defendant's motion, the Court extends that deadline to December 2, 2019, so that they may account for briefing schedules on a subsequent motion to dismiss. (*See* Dkt. No. 112, Order Extending Dates at 2:4-5.)

IT IS SO ORDERED.

Dated: October 4, 2019

JEFFREY S. WHITE
United States District Judge