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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

In re: Syngenta Litigation This Document Relates to: ALL ACTIONS	Case Type: Civil Other Honorable Thomas M. Sipkins File No.: 27-CV-15-3785 **SECOND AFFIDAVIT OF D. SCOTT ABERSON IN SUPPORT OF SYNGENTA'S MOTION TO DISMISS FIRST AMENDED NON-CLASS AND FIRST AMENDED MINNESOTA CLASS ACTION MASTER COMPLAINTS FOR PRODUCERS AND NON-PRODUCERS**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, D. Scott Aberson, state and declare under penalty of perjury the following:

1. I am an attorney in the State of Minnesota, a partner with the law firm of Maslon LLP, and am one of the attorneys representing the Syngenta Defendants in the above-captioned matter. I make this Affidavit based upon my personal knowledge of the matters stated herein and in support of Syngenta's Reply in Support of its Motion to Dismiss First Amended Non-Class and First Amended Minnesota Class Action Master Complaints for Producers and Non-Producers.

2. Pursuant to Minn. Stat. § 480A.08, subd. 3(c), the following unpublished decisions newly cited in Syngenta's Reply In Support of its Motion to Dismiss are attached as exhibits:

(a) **Exhibit A** is a true and correct copy of *County of Anoka v. Petrik*, No. CX-98-574, 1998 WL 531864 (Minn. Ct. App. Aug. 25, 1998).

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(b) **Exhibit B** is a true and correct copy of *Klinge v. Gem Shopping Network, Inc.*, No. 12-cv-2392 (JNE/SER), 2014 WL 7409580 (D. Minn. Dec. 31, 2014).

(c) **Exhibit C** is a true and correct copy of *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, No. 99-MD-1309 (PAM/JGL), 2004 WL 909741 (D. Minn. Apr. 28, 2004).

(d) **Exhibit D** is a true and correct copy of *Lyzhoft v. Waconia Farm Supply*, Nos. A12-2237, A12-2238, 2013 WL 3368832 (Minn. Ct. App. July 8, 2013).

(e) **Exhibit E** is a true and correct copy of *Smith v. Questar Capital Corp.*, No. 12-CV-2669 (SRN/TNL), 2013 WL 3990319 (D. Minn. Aug. 2, 2013).

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated this 22nd day of December, 2015

/s/ D. Scott Aberson
D. Scott Aberson

4838-8396-3180

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EXHIBIT A

1998 WL 531864
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

COUNTY OF ANOKA, Minnesota, Respondent,
v.
Sharlette PETRIK, defendant and third-party plaintiff, Appellant,
v.
CITY OF COLUMBIA HEIGHTS, Minnesota, et al., third-party defendants, Respondents.
The Honorable James Morrow, et al., third-party defendants, Respondents.

No. CX-98-574. | Aug. 25, 1998.
| Review Denied Oct. 29, 1998.

Anoka County District Court, File No. C3969253, H. Richard Hopper, T.J.

Attorneys and Law Firms

Alfred M. Stanbury, Stanbury Law Firm P.A., 2209 St. Anthony Parkway, Minneapolis, MN 55418 (for appellant).

Hubert H. Humphrey, III, Attorney General, Peter M. Ackerberg, Assistant Attorney General, 445 Minnesota Street, Suite 1100, St. Paul, MN 55101-2128 (for respondents Honorable James Morrow, et al.)

Thomas H. Crouch, Jenneane L. Jansen, Meagher & Geer P.L.L.P., 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, MN 55402 (for respondents City of Columbia Heights, et al.)

Robert M.A. Johnson, County Attorney, Thomas Haluska, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Anoka, MN 55303 (for respondent County of Anoka).

Considered and decided by SCHUMACHER, Presiding Judge, SHORT, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

SHORT, Judge.

***1** At 11:20 p.m. on March 7, 1995, Sharlette Petrik was transported to the Anoka Metro Regional Treatment Center and placed on a 72-hour emergency hold pursuant to Minn.Stat. § 253B.05, subd. 1 (1994). In an attempt to obtain her release, Petrik's attorney filed a petition for writ of habeas corpus. That petition was denied and Petrik remained at the detoxification center for three days. As a result of Petrik's stay, the County of Anoka (county) incurred $660 in detoxification costs.

On January 18, 1996, the county sued Petrik in conciliation court to recover those costs. Judgment was entered for Anoka County. Alleging a deprivation of state and federal constitutional rights by the City of Columbia Heights (city), numerous police officers, the state, and two judges and their law clerks, Petrik appealed to the trial court, and counterclaimed for damages and injunctive relief. On September 30, 1996, Petrik removed the state court action to federal court. On October 30, 1996, the state moved to dismiss, or alternatively, for summary judgment. Concluding it had no subject matter jurisdiction, the federal district court remanded the case to state court without considering the dispositive motions. After remand, the city filed a joint answer to Petrik's original complaint. Pursuant to Minn. R. Civ. P. 41.01(a), Petrik filed two notices of voluntary dismissal without prejudice. The court concluded Petrik's voluntary dismissals were ineffective and dismissed Petrik's actions with prejudice. On appeal, Petrik argues[1] the trial court abused its discretion by: (1) concluding her voluntary dismissals were ineffective; (2) deciding issues not properly before it; and (3) sanctioning her and her attorney. Petrik and the state request attorney fees on appeal. We affirm, and deny attorney fees.

DECISION

This court will not reverse a trial court's decision on a Rule 41 motion absent an abuse of discretion. *Paulucci v. City of Duluth*, 826 F.2d 780, 782-83 (8th Cir.1987).

I.

Minn. R. Civ. P. 41.01(a) gives a plaintiff the absolute right to dismiss a case without prejudice during the early stages of a lawsuit. *Rhein v. Rhein*, 244 Minn. 260, 262, 69 N.W.2d 657, 659 (1955).Rule 41.01(a) provides:

> Subject to the provisions of Rules 23.05, 23.06, and 66, *an action* may be dismissed by the plaintiff without order of court (1) *by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs.*

Minn. R. Civ. P. 41.01(a) (emphasis added).

Petrik argues even though she dismissed her action against the state after the state served its motion in the federal court proceeding, her dismissal is effective because the state's motion: (1) was a 12(b)(6) motion; and (2) was not served in state court after the case was remanded. *See* 1A David F. Herr & Roger S. Haydock, *Minnesota Practice* § 41.4 (1998) (providing Rule 12 motion to dismiss does not cut off right of plaintiff to unilaterally dismiss). We disagree. The state's motion was a motion for dismissal, and in the alternative for summary judgment. *See Maras v. City of Brainerd*, 502 N.W.2d 69, 74 (Minn.App.1993) (treating motion for dismissal, or alternatively, summary judgment as summary judgment motion), *review denied* (Minn. Aug. 16, 1993).*Cf. Aamot v. Kassel*, 1 F.3d 441, 443-45 (6th Cir.1993) (concluding federal rule 41(a)(1) notice of dismissal effective even though defendant filed 12(b)(6) motion). In addition, when a case, removed to federal court, is remanded to state court, the state court receives that case in the posture it was in when remanded. *See Doerr v. Warner*, 247 Minn. 98, 105-06, 76 N.W.2d 505, 512 (1956) (concluding when case removed to federal court and subsequently remanded to state court, state court has continuous, though dormant, jurisdiction while case in federal court, but jurisdiction is revived on remand); *see also Williams v. St. Joe Minerals Corp.*, 639 S.W.2d 192, 195 (Mo.Ct.App.1982) (concluding when state court receives case on remand from federal court removal, case is in posture it was in when remanded and failure to re-file pleading after remand is not fatal to state court ruling on pleading). Therefore, once the state served its motion in federal court, it was not required to re-file that motion in state court after remand. *See Hunter, Keith, Indus., Inc. v. Piper Capital Management, Incorp.*, 575 N.W.2d 850, 853 (Minn.App.1998) (concluding in remanding action to state district court, federal court also remanded party's pending motion filed in federal court); *see also Crumpton v. Perryman*, 956 P.2d 670, 672 (Colo.Ct.App.1998) (concluding state court may rule on motions filed in federal court prior to remand); *Citizens Nat'l Bank v. First Nat'l Bank*, 165 Ind.App. 116, 331 N.E.2d 471, 476 (Ind.Ct.App.1975) (concluding when federal court remands case without ruling on motions filed in federal court, those motions were properly ruled on by state court without motions being re-filed). Because the state properly served its summary judgment motion prior to Petrik's voluntary dismissal, the trial court did not abuse its discretion in concluding Petrik's dismissal was ineffective.

***2** Petrik argues even though she dismissed her action against the city after the city served an answer to the original complaint in the state court proceeding, her voluntary dismissal is effective because the city answered the original, instead of amended, complaint. We disagree. Rule 41.01(a) specifically prohibits a plaintiff from voluntarily dismissing an action if an adverse party files an answer or summary judgment motion. *See* Minn. R. Civ. P. 41.01(a) (providing method of voluntarily dismissing case without prejudice). The purpose of Rule 41.01(a) is to allow voluntary dismissals only in the very early stages of litigation, before a defendant has become involved with the case. Herr & Haydock, *supra*, § 41.4; *see Armstrong v. Frostie Co.*, 453 F.2d 914, 916 (4th Cir.1971) (concluding federal rule 41(a)(1)(i) is designed to permit disengagement of parties at behest of plaintiff only in early stages of suit, before defendant has expended time and effort in preparation of his case). By filing an answer to Petrik's original state court complaint, instead of amended complaint filed in federal court, the city expended time and effort in defending against Petrik's cause of action. Thus, even if the city arguably answered the wrong complaint, it still satisfied both the letter and spirit of Rule 41.01(a) and should not be subjected to Petrik's voluntary dismissal. *See Armstrong*, 453 F.2d at 916 (concluding court properly vacated plaintiff's dismissal of action without prejudice because opponent satisfied letter and spirit of federal rule 41(a)(1) by filing answer and motion for summary judgment to plaintiff's original, instead of amended, complaint). Under these circumstances, we conclude the trial court did not abuse its discretion in concluding Petrik's voluntary dismissal of the city was ineffective.

II.

Petrik also argues the trial court abused its discretion and denied her a fair hearing by dismissing officer Michael McGee from the action because his summary judgment motion was not properly before the trial court. We disagree. The record demonstrates: (1) in April 1997, McGee moved for summary judgment on the ground that he was not involved in transporting Petrik to the detoxification center; (2) McGee's motion papers were personally served on Petrik's counsel; (3) McGee's attorney also requested that Petrik dismiss him from the suit, with prejudice; (4) a hearing on all dispositive motions was scheduled for September 10, 1997; (5) Petrik's counsel mistakenly believed only the third-party defendants' motions for summary judgment would be considered at the September 10 hearing; (6) at the hearing, Petrik's counsel stated he had not read McGee's affidavits, but admitted receiving them; (7) McGee submitted information demonstrating he had not been involved in transporting Petrik to the detoxification center; and (8) Petrik's counsel failed to submit information refuting McGee or requesting a continuance. Because Petrik had ample notice of, and opportunity to respond to McGee's summary judgment motion, she was not denied a fair hearing when the trial court considered and granted that motion. *See* Minn. R. Civ. P. 56.03 (providing summary judgment is appropriate where there are no genuine issues of material fact and either party entitled to judgment as a matter of law); *cf. Citizens State Bank v. Wallace,* 477 N.W.2d 741, 743 (Minn.App.1991) (concluding although appellants were able to hastily prepare counter-motion, their right to adequate notice was violated by receiving only two days' notice). Under these circumstances, McGee's summary judgment motion was properly before the trial court.

III.

***3** Petrik further argues the trial court abused its discretion by sanctioning Petrik and her attorney for naming officer Michael McGee, the state, and two judges and their law clerks as third-party defendants. The trial court found: (1) Petrik failed to present any evidence showing officer McGee was at the scene, or even on duty at the time she was taken to the detoxification center; and (2) the suit against the third-party state defendants was baseless, frivolous, and a malicious exercise of litigative harassment. Because the evidence supports those findings, we conclude the trial court did not abuse its discretion in awarding attorneys fees. *See* Minn. R. Civ. P. 11 (providing court may, on own initiative, impose sanctions on party if that party brings action for improper purpose such as to harass, cause unnecessary delay, or needlessly increase cost of litigation); *see also Solon v. Solon,* 255 N.W.2d 395, 397 (Minn.1977) (concluding appellate court will not reverse trial court's award of attorney fees absent clear abuse of discretion).

Finally, Petrik and the state request attorney fees on appeal. *See* Minn.Stat. § 549.211, subds. 2, 3 (Supp.1997) (providing for sanctions against parties who bring action for improper purpose, assert unwarranted or frivolous arguments, or allege factual contentions that lack evidentiary support). Because we conclude none of the parties acted in bad faith during this appeal, we decline to award attorney fees. *See, e.g., Ottman v. Fadden,* 575 N.W.2d 593, 598 (Minn.App.1998) (declining to award sanctions on appeal because court failed to find appeal brought in bad faith).

Affirmed; motions denied.

All Citations

Not Reported in N.W.2d, 1998 WL 531864

Footnotes

1 After the parties filed briefs, Petrik moved to vacate the trial court's judgment and/or strike parts of respondents' briefs because the judgment was based on, and the briefs contain, federal pleadings that were not part of the trial court record. However, Petrik failed to object to the trial court considering those pleadings. *See Thiele v. Stich,* 425 N.W.2d 580, 582 (Minn.1988) (holding reviewing court will only consider issues presented to and considered by trial court). Under these circumstances, we decline to address Petrik's motions. *See, e.g., Pacific Equip. & Irrigation, Inc. v. Toro Co.,* 519 N.W.2d 911, 918 (Minn.App.1994) (concluding courts will not address merits of motion to strike affidavit because affidavit was presented to trial court and therefore constitutes part of record, and appellant should have brought any motion to strike in trial court), *review denied* (Minn. Sept. 16, 1994).

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EXHIBIT B

2014 WL 7409580
Only the Westlaw citation is currently available.
United States District Court,
D. Minnesota.

Ann KLINGE, an individual, Plaintiff,
v.
GEM SHOPPING NETWORK, INC.,
a Georgia Corporation, Defendant.

No. 12–cv–2392 (JNE/SER). | Signed Dec. 31, 2014.

Attorneys and Law Firms

Johnetta G. Paye, J. Paye & Associates, Chicago, IL, Mark Santi, Steven Paul Katkov, Thompson Hall Santi Cerny & Dooley, Minneapolis, MN, for Plaintiff.

ORDER

JOAN N. ERICKSEN, District Judge.

*1 Plaintiff Ann Klinge is a Minnesota resident who purchased goods from Defendant Gem Shopping Network, Inc. (GSN), a Georgia corporation with its principal place of business in Georgia that sells gemstones and jewelry through its 24–hour television channel. Klinge alleges that GSN violated several Minnesota consumer protection and trade practices statutes and committed intentional and negligent misrepresentation. This matter is before the Court on Defendant's motion for summary judgment.

BACKGROUND

Klinge began watching and purchasing items from GSN in July 2009. In the fall of 2009, Klinge spoke with Kenny Brown, a customer service representative for GSN. Brown told Klinge about a customer who bought gemstones from GSN and later, after losing a job, began selling them "a stone here and a stone there" to "stay afloat." Klinge decided to form a business in which she would purchase items from GSN and resell them. Klinge formed Ann Michele's Jewelry and Gemstones, LLC in January 2010. Klinge attended a trade show in Tucson, Arizona in February 2010 to learn how to sell jewelry. At the show, a vendor told Klinge that she had paid too much for some gems and that some of GSN's appraisals were too high. Klinge attended a second trade show in Phoenix in April 2010, where she sold one item. Klinge continued to purchase items from GSN until July 2010, though she never attempted to sell her items after the Phoenix trade show. From July 2009 to July 2010, Klinge purchased and kept approximately $675,334 worth of gemstones and jewelry from GSN. She purchased and periodically returned other gems under GSN's thirty-day, no questions asked return policy.

Klinge filed this lawsuit on September 17, 2012 and an amended complaint on March 6, 2013. GSN moved for summary judgment on October 10, 2014. For the reasons set forth below, Defendant's motion for summary judgment is granted and Plaintiff's claims are dismissed.

SUMMARY JUDGMENT STANDARD

The standards applicable to summary judgment are well established and well known. Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(a). To support an assertion that a fact cannot be or is genuinely disputed, a party must cite "to particular parts of materials in the record," show "that the materials cited do not establish the absence or presence of a genuine dispute," or show "that an adverse party cannot produce admissible evidence to support the fact."Fed.R.Civ.P. 56(c)(1)(A)-(B)."The court need consider only the cited materials, but it may consider other materials in the record."Fed.R.Civ.P. 56(c)(3). In determining whether summary judgment is appropriate, a court must view facts that the parties genuinely dispute in the light most favorable to the nonmovant, *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009), and draw all justifiable inferences from the evidence in the nonmovant's favor, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

DISCUSSION

*2 The first four counts in the amended complaint are for violations of Minnesota's consumer protection and trade practices laws. Counts five and six are for intentional and negligent misrepresentation.

A. Count I—Unfair Trade Practices

Plaintiff alleges that Defendant violated the Minnesota Unfair Trade Practices Act (MUPTA), Minn.Stat. § 325D.09 *et seq,* by holding itself out as a retailer that sells items at approximately wholesale prices or less than usual retail prices. MUPTA states:

> (1) No person engaged in the sale of merchandise at retail shall, in connection with such business, misrepresent the true nature of such business, either by use of the words manufacturer, wholesaler, broker, or any derivative thereof.... (2) No person shall, in connection with the sale of merchandise at retail misrepresent, directly or indirectly, that the price at which such merchandise is sold is an approximately wholesale price, or is less than the usual retail price[.]
>
> Minn.Stat. § 325D.12

MUPTA defines "sale of merchandise at retail" to include "any sale except (1) A sale for the purpose of resale."Minn.Stat. § 325D.10(d). While Plaintiff purchased some items for personal use, this action only concerns items that she purchased for the purpose of resale. When asked at deposition whether "all of the claims in the case, all the stones that you're complaining about in the case are the ones that you purchased for resell [sic] through your business," Plaintiff replied "yes." Thus the transactions at issue were not in connection with sales of merchandise at retail under the statute, and Plaintiff's claim under MUPTA fails.

B. Count II—Deceptive Trade Practices

Plaintiff alleges a violation of the Minnesota Deceptive Trade Practices Act (DTPA), Minn.Stat. § 325D.43 *et seq.* The DTPA provides: "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable."Minn.Stat. § 325D.45. The "sole statutory remedy for deceptive trade practices is injunctive relief," and the statute "provides relief from future damage, not past damage."*Gardner v. First Am. Title Ins. Co.,* 296 F.Supp.2d 1011, 1020 (D.Minn.2003) (quotation marks omitted). The future harm must be to the plaintiff; it is not sufficient if the harm is to other purchasers or customers. *See Damon v. Groteboer,* 937 F.Supp.2d 1048, 1071 (D.Minn.2013).

Plaintiff testified at deposition that her last purchase from Defendant was on July 5, 2010. While Plaintiff asks this Court for injunctive relief, Plaintiff does not assert that she has an ongoing business relationship with Defendant or otherwise intends to purchase gems from Defendant in the future. Thus, Plaintiff has no remedy under the DTPA.

C. Counts III and IV—Consumer Fraud and False Statements in Advertising

Plaintiff alleges violations of the Minnesota Consumer Fraud Act (CFA) and the Minnesota False Statements in Advertising Act (FSAA), Minn.Stat. §§ 325F.67, 325F.69. These Acts do not provide for a private cause of action, but the Minnesota Private Attorney General Statute provides a private civil remedy for persons injured by these and other statutes if they can show a public benefit. Minn.Stat. § 8.31, subd. 3(a); *see also Ly v. Nystrom,* 615 N.W.2d 302, 314 (Minn.2000). A plaintiff does not have a claim under either the CFA or the FSAA if she is a merchant with respect to the goods at issue.*Marvin Lumber and Cedar Co. v. PPG Industries, Inc.,* 223 F.3d 873, 887–88 (8th Cir.2000).

***3** In determining whether a public benefit exists, Minnesota courts look to "the degree to which the defendants' alleged misrepresentations affected the public; the form of the alleged misrepresentation; the kind of relief sought; and whether the alleged misrepresentations are ongoing."*Khoday v. Symantec Corp.,* 858 F.Supp.2d 1004, 1017 (D.Minn.2012). In *Collins v. Minn. Sch. of Bus., Inc.,* 655 N.W.2d 320, 329–30 (Minn.2003), the Minnesota Supreme Court held that claims brought by former students of the Minnesota School of Business, alleging that the school made false statements about its sports medicine program, benefitted the public at large because the defendant "made misrepresentations to the public at large by airing a television advertisement" and through numerous sales and information presentations. *Id.* at 330. Like the plaintiffs in *Collins,* Klinge has alleged that she relied on misrepresentations that were made to the public at large through statements broadcast on television. In particular, Klinge purchased color change garnets "based on what they told me on the air" about their scarcity, statements Klinge asserts were untrue. These allegations are sufficient to show a public benefit.

Nevertheless, Plaintiff's claims are barred because she is a merchant with respect to the goods at issue. In *Marvin Lumber,* the Eighth Circuit stated that "our conclusion that Marvin is a merchant with respect to [the goods at issue] quickly disposes of Marvin's claim under [the CFA]," and held that the same reasoning applied to Marvin's FSAA claim. 223 F.3d at 887–88. Plaintiff attempts to avoid the outcome in *Marvin Lumber* by arguing that she, unlike Marvin, is not

a sophisticated merchant because she never held herself out as someone who had knowledge or skill peculiar to jewelry and gemstones. But specialized expertise is not necessary to become a merchant under Minnesota law or to come within the holding in *Marvin Lumber*. Someone becomes a merchant under Minnesota law either by dealing in goods of the kind or by specialized expertise. Minn.Stat. § 336.2–104 (defining merchant as "a person who deals in goods of the kind or otherwise by occupation holds out as having knowledge or skill peculiar to the practices or goods involved"); *see also Regents of Univ. of Minn. v. Chief Indus., Inc.*, 106 F.3d 1409, 1411 (8th Cir.1997) (discussing the two distinct ways to become a merchant under Minnesota law). Plaintiff became a merchant not by dint of her expertise but by her formation of a business dealing in gems and jewelry. Under *Marvin Lumber*, the CFA and FSAA do not apply to a plaintiff like Klinge who is a merchant with respect to the goods at issue.

D. Count V—Intentional Misrepresentation

Plaintiff asserts a claim for intentional or fraudulent misrepresentation. To establish this claim, Plaintiff must show: (1) the defendant made a false representation about a past or present material fact that was susceptible of knowledge; (2) the defendant knew the representation was false or asserted it without knowing whether it was true or false; (3) the defendant intended to induce the plaintiff to act and the plaintiff was induced to act in reliance on the representation; and (4) the plaintiff was damaged as a result. *See M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 289 (Minn.1992)."A plaintiff's failure to demonstrate a genuine issue of material fact on even a single element of fraud is sufficient for a court to grant summary judgment in defendant's favor."*Shukh v. Seagate Tech., LLC*, No. 10–404, 2013 WL 1197403, at *14 (D.Minn. Mar. 25, 2013) (citing *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368–69 (Minn.2009)).

*4 To satisfy the first element, Plaintiff may show "false descriptions of specific or absolute characteristics of a product."*United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir.1998). Puffery is not actionable.*Id.*"Puffery exists in two general forms: (1) exaggerated statements of bluster or boast upon which no reasonable consumer would rely; and (2) vague or highly subjective claims of product superiority, including bald assertions of superiority."*Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390–91 (8th Cir.2004). Moreover, a plaintiff's reliance on the representations must be both actual and reasonable. *Hoyt Props., Inc. v. Production Resource Group, LLC*, 736 N.W.2d 313, 321 (Minn.2007).

Plaintiff makes many general allegations of misrepresentation. The Court will consider the alleged misrepresentations that are sufficiently specific to be potentially actionable. These misrepresentations involve the appraised value of the gems, the description of the gems, and statements by GSN's customer service representative Kenny Brown. As a general matter, the alleged misrepresentations involving the value and descriptions of the gems do not satisfy the reasonable reliance element of intentional misrepresentation because a reasonable purchaser in Plaintiff's position would have taken advantage of Defendant's liberal thirty-day return policy by having the gems examined once they were in her possession and returning any that did not have the value or qualities represented on television. Although Plaintiff knew of the return policy and used it periodically—Defendant's unrebutted calculation indicates that Klinge returned, voided, or canceled about forty percent of her purchases—she failed to take advantage of it for the purchases that are now in dispute. Each alleged misrepresentation also fails for the more specific reasons stated below.

1. Representations About Appraised Values

Defendant sometimes lists the appraised value of gems that it sells on air. Plaintiff asserts that the appraisals for gems she purchased were substantially inflated.

Defendant argues that valuations are inherently subjective and are not actionable misrepresentations. However, none of the cases cited by Defendant involved representations of valuations based on appraisals. Unlike the puffery of a salesperson suggesting that an item is being sold for a fraction of its value, appraisals suggest valuations performed by experts in the industry who base their valuations on some accepted practice or methodology. *Cf. U.S. v. Kail*, 804 F.2d 441, 446–47 (8th Cir.1986) (holding that evidence of expert's appraisals of coins was reliable because it was based on industry standards). [1] Accordingly, the Minnesota Supreme Court has recognized that an appraisal overstating the value of property is a potentially actionable false statement. *See Hardin Cnty. Sav. Bank v. Hous. & Redevelopment Auth. of City of Brainerd*, 821 N.W.2d 184, 194–95 (Minn.2012) (reversing dismissal of a complaint because it alleged the ultimate facts of the misrepresentation claim with specificity).

*5 Defendant further argues that any claims against it based on appraisals must fail because Defendant used independent appraisers, suggesting that Plaintiff's cause of action lies against the appraisers instead of GSN. However, nothing in Minnesota's misrepresentation law requires that a defendant be the one who created false information if the defendant otherwise knew the information was false and represented that information to induce a plaintiff to act. [2] Here, Plaintiff is suing Defendant for knowingly representing inflated appraisals of goods it sold. Even if Defendant did not produce the appraisal itself, it can be liable for representing that information if the elements of international misrepresentation are met.

As to the elements, Plaintiff's evidence is that the appraisals performed by her expert found lower values than Defendant's appraisals for almost all the gems she purchased. This evidence may show that Defendant's appraisals were false but by itself does not show that Defendant knew the appraisals were false or had the requisite dishonest intent. *See Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn.1986) (intentional misrepresentation requires "dishonesty or bad faith"). Plaintiff asserts in her brief that Defendant's appraiser was not truly independent of Defendant. If this assertion is supposed to suggest that Defendant and its appraiser were in cahoots to inflate appraisals, there is no record evidence of such a scheme and relationship. Defendant's appraiser specifically testified that GSN never questioned the accuracy of his appraisals except with respect to "typos and other nonvalue related" errors. Plaintiff offers no contradictory evidence showing that Defendant pressured its appraiser or collectively worked with him to produce fraudulent appraisals. Plaintiff provides no other evidence that might show Defendant's knowledge of falsity and dishonest intent with respect to the appraisals.

2. Descriptions of the Gems

Plaintiff argues that Defendant's descriptions of the quality, scarcity, color, and desirability of the gems were intentional misrepresentations.

First, Plaintiff argues that Defendant's descriptions of gems as "Top Gem World Class" and "Top Gem Quality" are specific and actionable statements. Plaintiff cites to deposition testimony by Frank Circelli, who coined the phrase "Top Gem World Class" for Defendant and asserts the phrase means a gem that was in the "[u]pper 10 percent of its class." Plaintiff has failed to create a trial-worthy issue with respect to these representations for several reasons. First, a vague statement that a good is in the top ten percent of its class is puffery, unless there is some indication that the percentage is based on an objective measure, which is not the case here. *See Marini v. Adamo*, 995 F.Supp.2d 155, 175–76 (E.D.N.Y.2014) (representations that defendant was selling "top 1 percent of the 1 percent of coins" was "mere puffery"). Second, there is no evidence that the gems were not in fact in the top ten percent of their class by some relevant measure. Third, a reasonable purchaser in Plaintiff's position would have interpreted the phrases as puffery because words like "top" and "world class" are vague assertions of product superiority.

*6 Plaintiff also argues that Defendant misrepresented the rarity of some gems by referring to them as "Super Rare," "Ultra Rare," and "Very Rare." Plaintiff does not assert that the gems are in fact common. Plaintiff's expert examined eight gemstones labeled by Defendant as rare. For seven of the gems, he concluded that the gem was "somewhat rare," had "relative rarity," was "a rare stone," or was "not commonly seen in the market."For one gem described as "very rare" by Defendant, he concluded that it had "good clarity and cut" but was "not particularly rare," though he did not conclude that it was common or state that the gem was in fact not rare. Plaintiff in effect attacks the superlatives—super, ultra, and very—and not the "rare" designations themselves. Superlatives are puffery that no reasonable person would rely on. *See All–Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 868 (7th Cir.1999). Furthermore, even if these gems were in fact common, there is no evidence that Defendant knew this fact.

Plaintiff argues that one gem was misrepresented by Defendant as "Dark Super Neon" when it is in fact "medium to dark violet." Again, "super" is a superlative that is not actionable as misrepresentation. Neon is a gas that is used in brightly colored electric signs and lights. It is not a specific or absolute characteristic of a gem that can be determined to be true or false. The only potentially actionable part of this statement is the description of the color as "dark" instead of "medium to dark." However, Plaintiff points to nothing in the record showing that Defendant knew the color was incorrect, that she relied on the characterization of the gem's color when she purchased it, or that she was damaged by the misrepresentation because medium-to-dark hues are worth less.

One gem—the Neon Candy Apple Red Tourmaline Cut by Sean 10.19ct—was represented by Defendant as "flawless." In the related context of unfair and deceptive trade practices, the Federal Trade Commission has taken the position that "[i]t is unfair or deceptive to use the word 'flawless' as a quality description of any gemstone that discloses blemishes, inclusions, or clarity faults of any sort when examined under a corrected magnifier at 10–power, with adequate illumination, by a person skilled in gemstone grading."16 C.F.R. § 23.26(a). Plaintiff's expert concluded that the gem is "not flawless, but lightly included." Assuming that the expert used the industry standard for magnifying power, this conclusion is evidence that the flawless claim is false. The next element of intentional misrepresentation—knowledge of falsity—could have been satisfied by evidence showing that Defendant knew of the flaw, or with evidence that Defendant had not thoroughly examined the gem and thus could not have confidently claimed the gem was flawless. But Plaintiff does not point to this or any other evidence showing knowledge of falsity. Without this evidence, Plaintiff has not created a trial-worthy issue with respect to Defendant's claim that the gem was flawless.

*7 Plaintiff also asserts that she purchased several color change garnets based on Defendant's misrepresentations about these gems. In particular, Plaintiff argues that Defendant represented that the gems were mined out. However, Plaintiff does not point to specific statements representing that the gems were mined out. In deposition testimony, Plaintiff stated that Defendant "implied that [Defendant] had all of them," but she does not point to a specific factual statement. In her affidavit, Plaintiff quotes extensively from one of Defendant's broadcast about color change garnets, but nothing in the excerpted language is sufficient to support Plaintiff's claim either. The broadcast refers to the gems' recent discovery and the gems "coming out right now," suggesting they were being actively mined, not that they were mined out. Furthermore, if the statement was false, there is no record evidence showing that Defendant knew it was false or had dishonest intent.

Plaintiff also argues that, in a 2009 broadcast, Defendant misrepresented the desirability of color change garnets when a television host stated that "it's already since it's [sic] discovery 9 month ago ... it's already gone up four times in price."Plaintiff provides an expert report finding that prices for color change garnets rose twenty to thirty percent from 1999 to 2009. However, this expert conclusion fails to show that Defendant's statement was false. Defendant referred to a nine-month period and not a ten-year period as used by Plaintiff's expert. Nothing in the record shows that the relevant gems did not quadruple in price during those nine months. Furthermore, Defendant was selling a recently discovered "East African Color Change garnet" when the host made the statement about the price quadrupling since its discovery. The reasonable inference is that the host was referring to this type of garnet and not color change garnets generally, which had been on the market for a decade or more. Nothing in Plaintiff's expert report discusses prices specific to this type of garnet.

Finally, Plaintiff argues that she purchased a gem that Defendant's host misrepresented as "clean as a whistle" and falsely stated that "Germans and Russians were getting $25,000 a carat" for the gemstone. However, Plaintiff points to no record evidence that the statement about the Germans and Russians was false. Plaintiff stated in her deposition that she did not know whether Germans and Russians were paying that figure and that she would check with Charles Carmona, her expert. Carmona's expert report makes no mention of Germans or Russians. As for the "clean as a whistle" statement, it is mere puffery.

3. Brown's Statements

Plaintiff's filings in opposition to summary judgment reference three specific conversations with Brown, GSN's customer service representative.

First, Plaintiff asserts that Brown falsely represented to her that Defendant's current "appraisers were the ones that found out the ruby in Queen Elizabeth's crown was actually a spinel."Brown acknowledges making the statement and says that he "thought it to be true" based on "knowledge from the show hosts." A quick internet search would have alerted Klinge to the fact that the gem, known as the Black Prince's Ruby, was reported to be a spinel more than a century ago.[3] Because Klinge could have easily verified the statement before she purchased and kept any gems in reliance on it, any reliance was not reasonable. *See*Restatement (Second) of Torts § 541, Comment a (a plaintiff "cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation"). Even if Klinge could not have verified the statement in the midst of her phone conversation with Brown, she would have had ample time during the thirty-day return period to discover

its falsity and return to GSN any gems that she may have purchased in reliance on Brown's statement.

***8** Second, Brown told Klinge about a customer who bought gemstones from GSN and sold them "a stone here and a stone there" to "stay afloat." Nothing in the record indicates that these representations were false.

Third, Brown represented that a private buyer was coming to Defendant's building to buy a particular gem for his collection, but the gem would be shown on the air first and "we are going to be watching and we are going to say sold on it and we are going to take it" before the private buyer does. Nothing in the record indicates that these representations were false.

In sum, for each alleged instance of intentional misrepresentation, Plaintiff has failed to create a trial-worthy issue.

E. Count VI—Negligent Misrepresentation

Plaintiff alleges negligent misrepresentation. Minnesota law provides: "A buyer may not bring a common law misrepresentation claim against a seller relating to the goods sold or leased unless the misrepresentation was made intentionally or recklessly."Minn.Stat. § 604.101, subd. 4. A "buyer" is "a person who buys or leases or contracts to buy or lease the goods that are alleged to be ... the subject of a misrepresentation."*Id.*, subd. 1(b). A seller is "a person who sells or leases or contracts to sell or lease the goods that are alleged to be ... the subject of a misrepresentation."*Id.*, subd. 1(f). Goods are "tangible personal property, regardless of whether that property is incorporated into or becomes a component of some different property."*Id.*, subd. 1(c).

Under the statute, Plaintiff is a buyer, Defendant is a seller, and the jewels and gems at issue are goods. Thus, the statute bars Plaintiff's negligent misrepresentation claim against Defendant.

CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendant's motion for summary judgment [Docket No. 32] is GRANTED and Plaintiff's claims are DISMISSED with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

All Citations

Slip Copy, 2014 WL 7409580

Footnotes

1 In fact, Defendant's appraiser testified at deposition that he used terminology in his appraisals based on industry standards.

2 *See Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn.1986) ("In ordering one's conduct, what these formulas mean is that a person, aware that a representation is or may be untrue, would disclose doubt or would disclose the source or limitation of the information on which his or her representation relies.").

3 A Google search turned up numerous publications from the early-twentieth and late-nineteenth centuries referring to the Black Prince's Ruby as a spinel. For one example, see Leopold Claremont, *The Gem–Cutter's Craft* 171 (1906), the full text of which is available for free on Google. In any event, the stone is sufficiently valuable that it remains locked in the Tower of London.

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EXHIBIT C

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United States District Court,
D. Minnesota.

In re LUTHERAN BROTHERHOOD VARIABLE INSURANCE PRODUCTS CO. SALES PRACTICES LITIGATION

No. 99–MD–1309(PAM/JGL). | April 28, 2004.

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AMENDED MEMORANDUM AND ORDER

MAGNUSON, J.

*1 The Court has received a report and recommendation from the Special Master in this matter. Based on the Special Master's recommendations, the Court sua sponte amends its Order of July 22, 2003 (Clerk Doc. No. 331). The previous Order is stricken and this Amended Order is substituted for that Order.

This matter is before the Court on four separate Motions. Defendant has brought two Motions for Summary Judgment and one Motion to Decertify the Class, and Plaintiffs move to strike all of these Motions.

BACKGROUND

This multidistrict litigation challenging the sale of "vanishing premium" life insurance policies has been before this Court on several substantive Motions and even more non-dispositive Motions. The facts of the matter have been set forth in the Orders on those Motions. The Court will not plow that ground again here.

DISCUSSION

A. Motion to Decertify the Class

Lutheran Brotherhood first asks the Court to decertify the class. According to Lutheran Brotherhood, discovery has established that there are no common questions of fact among the class members. Specifically, Lutheran Brotherhood contends that Plaintiffs cannot prove either a common misrepresentation, common damages, or common causation. Lutheran Brotherhood also argues that there is no common question of law because the Constitution prohibits applying Minnesota's Prevention of Consumer Fraud Act ("CFA"), Minn.Stat. § 325F.69*etseq.*, to sales that occurred outside Minnesota. Thus, according to Lutheran Brotherhood, the Court must perform a choice-of-law analysis for each non-resident Plaintiff's claim to determine whether the claim may be brought in Minnesota or must be brought under the consumer protection statute of the non-resident's home state. Finally, Lutheran Brotherhood asserts that the class device will deprive Lutheran Brotherhood of its right to a jury trial and right to due process under the Constitution.

1. *Common Questions of Fact*

In making this argument, Lutheran Brotherhood overlooks the alternative nature of the Federal Rule of Civil Procedure 23. Rule 23 provides that a class action may be maintained if there are common questions of fact *or* common questions of law. Fed.R.Civ.P. 23(b)(3). Lutheran Brotherhood reads the "or" out of the Rules and essentially asks the Court to decertify the class if it finds that if there are not common questions of fact, regardless of whether there are common questions of law. Moreover, Lutheran Brotherhood fails to recognize that "[a] finding of commonality does not require that all class members share identical claims."*In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 310 (3rd Cir.1998). Indeed, "not every question of law or fact must be common to every member of the class."*In re Workers' Compensation*, 130 F.R.D. 99, 104 (D.Minn.1990) (Rosenbaum, J.).

a. Common Misrepresentation

Lutheran Brotherhood argues that Plaintiffs have failed to show that Lutheran Brotherhood and/or its District Representatives ("DRs"), used a uniform misleading illustration when selling the vanishing premium policies.

***2** The underlying misrepresentation alleged by Plaintiffs is that the obligation to pay premiums would vanish at some point in the future. This misrepresentation is common to all Plaintiffs. The details that each DR provided to each Plaintiff may have been slightly different and the interest rates used to illustrate the vanishing premium scenario may have been slightly different, but these differences do not change the uniform nature of the basic misrepresentation that Plaintiffs allege. For example, simply because one Plaintiff was told that her obligation to pay premiums would cease in seven to ten years and another Plaintiff was told that his obligation would cease in nine to eleven years does not mean that these Plaintiffs were not given the same misrepresentation or were not mislead in the same way.

Thus, even though Lutheran Brotherhood is correct that the exact alleged misrepresentation varies by Plaintiff, Plaintiffs do allege a uniform type of misrepresentation. *See,e.g.,In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450, 513-14 (D.N.J.1997) (finding common questions of fact because of "common scheme of deception" that was carried out with oral representations that were not identical but were "substantially similar"). It would certainly be the rare case in which a widespread fraud of the sort alleged by Plaintiffs was founded on exactly the same misrepresentation. Moreover, in a case involving life insurance contracts, each misrepresentations would by definition be different because the information given would depend on the potential purchaser's age, health, and the amount of coverage he or she elected. Plaintiffs have succeeded in showing a common misrepresentation sufficient to maintain this action as a class action.

b. Common Damages

Lutheran Brotherhood contends that Plaintiffs cannot prove the fact of damages to each individual class member. This argument ties in to the argument made in support of Lutheran Brotherhood's Motions for Summary Judgment that Plaintiffs are limited to out-of-pocket damages and not benefit-of-the-bargain damages. Putting aside that argument, which is discussed more fully below with respect to the Motions for Summary Judgment, Lutheran Brotherhood's contention in this Motion is two-fold. First, Lutheran Brotherhood asserts that Plaintiffs cannot show that each class member was damaged. Second, Lutheran Brotherhood asserts that Plaintiffs cannot prove any such damage on a class-wide basis.

Lutheran Brotherhood's first contention is simply wrong. Assuming that Plaintiffs can prove the elements of their case, then they clearly have suffered damages. The form of these damages may be the difference between what Plaintiffs thought they were getting and what they actually got, or it may be the amount of money that Plaintiffs paid in premiums after the alleged vanish date. In any case, Plaintiffs can show damages and Lutheran Brotherhood's argument on this point has no merit.

***3** The second part of Lutheran Brotherhood's argument similarly does not mandate decertification. The presence of individual damages will not, by itself, decertify a class. *In re Prudential*, 962 F.Supp. at 517 ("Individual damages do not defeat an otherwise valid certification attempt."). Moreover, although Plaintiffs are responsible for proving the fact of damages, they need not prove the amount of such damages to a mathematical certainty. *Sports Page Inc. v. First Union Mgmt., Inc.*, 438 N.W.2d 428, 433 (Minn.Ct.App.1989); *seealsoRochez Bros., Inc. v. Rhoades*, 527 F.2d 891, 895 (3rd Cir.1975). Indeed, in a class action, it is permissible for plaintiffs to prove damages by an expert witness's testimony regarding aggregation of damages, or by testimony regarding an appropriate formula to use to calculate individual damages. *Seeln re Prudential*, 962 F.Supp. at 517. This is precisely the sort of evidence that Plaintiffs have put forward here. Lutheran Brotherhood's argument on this issue fails.

c. Common Causation

Lutheran Brotherhood insists that Plaintiffs must show that each Plaintiff relied on the alleged misrepresentation to his or her detriment. According to Lutheran Brotherhood, proof of such reliance is unworkable in the class action format. Plaintiffs, under the mantel of *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn.2001) [hereinafter *Group Health I*], contend that proof of individualized reliance is not required.

In *Group Health I*, the Minnesota Supreme Court relaxed the causation requirements for claims under the CFA. As the court stated, "the legislature clearly intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law. The legislature's intent is evidenced by the

elimination of elements of common-law fraud, such as proof of damages or reliance on misrepresentations."*Group Health I*, 621 N.W.2d at 12 (quoting *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn.1993)). It is also clear, however, that some sort of proof of causation is still required. *Id.* at 13 ("[C]ausation remains an element of such a claim."). The court noted that, where damages are alleged to be caused by misleading conduct or statements, proof of reliance will be required to satisfy the causation element. *Id.* However, in cases involving a large group of consumers or a large-scale fraud, the court held that proof of individual reliance was not required. *Id.* at 14 ("[I]n cases such as this, where the plaintiffs' damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of defendants' products."). The court specifically rejected two cases from this District holding that proof of individual reliance was required. *Id.* (citing *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 553 (D.Minn.1999); *Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 345 (D.Minn.1999)). It bears noting that, like the instant matter, *Parkhill* involved a putative class action challenging vanishing premium life insurance policies.

***4** The court left it up to the trial courts to determine how plaintiffs might prove the required "causal nexus," and offered only general suggestions to guide those courts. The court cited with approval cases under the Lanham Act, 15 U.S.C. § 1125(a), which permit the use of circumstantial evidence such as consumer surveys or, in extreme cases, burden-shifting, to allow plaintiffs to prove causation. *Id.* at 15 n. 11.

Plaintiffs urge the Court to apply a burden-shifting scheme and find that evidence of the deceptive nature of Lutheran Brotherhood's alleged scheme gives rise to a presumption of causation. Although such a presumption is explicitly permitted by the opinion in *Group Health* I, this Court rejected a similar argument in *Group Health Plan, Inc. v. Philip Morris Inc.*, 188 F.Supp.2d 1122 (D.Minn.2002) [hereinafter *Group Health II*]. Stating that shifting the burden on causation to defendants would amount to a "radical sea change in Minnesota consumer protection law," the Court determined that it would not "elevate the examples in footnote 11 [of *Group Health I*] to a burden-shifting rule in consumer fraud cases."*Group Health II*, 188 F.Supp.2d at 1126–27. Similarly, the Court does not believe that the extreme remedy of burden-shifting is appropriate in this case.

Plaintiffs have presented sufficient evidence of both the alleged misrepresentations and their own reliance to establish that genuine issues of fact remain to be resolved as to whether there is a causal nexus between those misrepresentations and Plaintiffs' purchase of vanishing premium policies. There is evidence that Lutheran Brotherhood knew that some of what its members were being told about vanishing premiums was misleading and that members were buying contracts based on the misleading information. Although much of Plaintiffs' evidence is from the 1980s and is thus only tangentially relevant, there are several damning documents from the class period that establish what Lutheran Brotherhood thought about these vanishing premium contracts. For example, a March 1994 memo lists "ten strategies that have caused, are causing and will cause us problems in the future."(Bloodgood Aff. Tab 83 at LBE 1369739.) Number one on this list is "Vanishing Premium." The memo goes on to describe the problems with illustrations used to sell vanishing premium contracts: "client rarely understands" (and "it is often misunderstood in the field") that the illustration is valid only under current dividend scale and that premiums may reappear in the future. (*Id.* at LBE 1369740.)

In February 1996, Lutheran Brotherhood drafted a letter to its field representatives. (*Id.* Tab 84). The draft letter told the representatives that the language used in sales pitches and illustrations "led customers to become confused and angry when premiums don't 'vanish' in the number of years that were originally projected."(*Id.* at LBE 1373574.)

In April 1996, Lutheran Brotherhood's "Underfunded Contract Committee" wrote in a memo that Lutheran Brotherhood "provided to our District Representatives flexible illustrations that allowed the illustration of minimum premium payments. This was accomplished through vanishing premium illustrations.... This illustration capability both encouraged replacements and gave a false sense of certainty to the numbers shown. Many of these illustrations resulted in sales...."(*Id.*Tab 124 at LBE 1010677.) This memo goes on to state that some contracts were sold "improperly without disclosure or where misleading or incorrect information was provided by the DR."(*Id.* at LBE 1010678.) The Committee recognized that some members "were mislead [sic] and entered into a contract under false pretenses. The contract performance was either intentionally or unintentionally misrepresented and our members are left with unmet expectations."(*Id.* at LBE 1010679.)

*5 Evidence of what the defendant knew or thought about the sales practice involved is evidence that the sales statements were misleading. Further, evidence of what the defendant knew or thought about the effect its sales practices on consumers were having is evidence that the consumers relied on the sales practices. Because this case involves direct sales, there can be no question that simply by virtue of the fact that the allegedly misleading illustrations were sales illustrations, Lutheran Brotherhood intended that potential customers rely on the illustrations. Lutheran Brotherhood cannot formulate illustrations seeking to convince customers to buy products, observe that those illustrations are indeed convincing customers to buy, and then argue that the record contains no evidence of reliance.

Taken in the light most favorable to Plaintiffs, the evidence in this case shows that Lutheran Brotherhood knew that sales illustrations used by DRs were misleading and that these illustrations influenced the customers' decisions to purchase vanishing premium policies. Further, there is no dispute that Plaintiffs can prove that they purchased vanishing premium policies. On summary judgment, Plaintiffs must establish only that genuine issues of fact exist on the elements of their prima facie case. The evidence proffered by Plaintiffs establishes that there is indeed a genuine issue of fact on the elements of Plaintiffs' CFA claim.

2. *Common Questions of Law*

Lutheran Brotherhood couches this argument in terms of a challenge to the constitutionality of the extraterritorial application of the CFA. The Court notified the Minnesota Attorney General of the challenge and the Attorney General submitted an amicus brief on this issue.

Lutheran Brotherhood contends that the Court must perform a choice-of-law analysis for each non-resident Plaintiff to determine whether Minnesota has sufficient interest in the transaction at issue to warrant the application of the CFA, or whether the Court must apply the consumer protection statute of the non-resident's home state. Because the class Complaint does not purport to raise consumer protection statutes generally but rather makes a claim only under the Minnesota CFA, however, the choice-of-law analysis presumes that the Court has sua sponte amended the Complaint to insert claims under other states' consumer protection statutes. The Court is neither inclined nor empowered to do this.

Even assuming that the Court should do a choice-of-law analysis for each class member's claim, Minnesota has the most significant interest in the claims at issue here, requiring the Court to apply Minnesota law to those claims. As the class certification Order noted, Lutheran Brotherhood is organized under the laws of Minnesota and is headquartered in Minnesota, and according to Plaintiffs, much of the conduct occurred in or emanated from Minnesota. *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 201 F.R.D. 456, 461 n. 1 (D.Minn.2001) (Magnuson, J.). There is no constitutional impediment to applying the Minnesota CFA to the claims of non-resident class members. *See In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. 01–MDL–1396, 2003 WL 1589527, at *18 n. 22 (D.Minn. Mar.27, 2003) (Tunheim, J.) (holding, in context of class certification motion, that applying CFA to non-resident plaintiffs is not unconstitutional). Thus, the Minnesota CFA may be applied to all class members' claims.

*6 However, the choice-of-law analysis is unnecessary. As the Attorney General argues, the CFA is intended to apply both to the conduct of foreign corporations that injures Minnesota residents and to the conduct of Minnesota companies that injures non-residents. Because Lutheran Brotherhood was a Minnesota company during the relevant time period and because Plaintiffs claim that the genesis of the misrepresentations at issue was Lutheran Brotherhood's home office, Plaintiffs can properly bring a Minnesota CFA claim.

3. *Constitutionality of Class Device*

Lutheran Brotherhood argues that using the class action device in this situation will unconstitutionally deprive Lutheran Brotherhood of its Seventh Amendment right to a jury trial and its Due Process rights, and will deprive absent class members of their Due Process rights. In essence, Lutheran Brotherhood contends that, because Plaintiffs are attempting to rely on "class-wide" proof, Lutheran Brotherhood will not have a jury determine each Plaintiff's claim and each Plaintiff's damages individually.

This argument is merely another way to look at Lutheran Brotherhood's challenges to the existence of common questions of fact and law. Rule 23 provides that, if a group of plaintiffs have sufficiently common questions of fact or law among them, then they will be permitted to resolve those claims in a single action. Because the Court has concluded that sufficient common questions exist for this case to proceed as a class action, Lutheran Brotherhood's argument on this point has no merit.

B. Motion for Summary Judgment Against the Class

Several of Lutheran Brotherhood's arguments in this Motion are the same as those made in the decertification Motion. Lutheran Brotherhood contends that summary judgment against the class is appropriate because Plaintiffs cannot prove that each class member received a misrepresentation, that each class member was damaged, or that each class member relied on the alleged misrepresentations. In addition, Lutheran Brotherhood seeks summary judgment on Plaintiffs' claim for punitive damages.

This Order has previously discussed the damage and reliance arguments raised by Lutheran Brotherhood in this Motion. However, the argument in this Motion regarding whether each Plaintiff received a misrepresentation is slightly different than the argument discussed above regarding whether there was a common misrepresentation. The Court will also address Lutheran Brotherhood's argument regarding punitive damages.

1. *Misrepresentations*

Lutheran Brotherhood contends that because Plaintiffs now base their claims on oral misrepresentations, as opposed to some uniform contract language or sales illustration, Plaintiffs must show that each member of the Plaintiff class received such an oral misrepresentation. According to Lutheran Brotherhood, Plaintiffs cannot make this showing and summary judgment is appropriate against every Plaintiff who cannot prove that he or she received a misrepresentation.

*7 This argument is akin to Lutheran Brotherhood's decertification argument that, because each representation is allegedly different, the misrepresentations are incapable of class-wide proof. The Court concluded above that, for class certification purposes, Plaintiffs need only show that the same type of misrepresentation was made, not that the exact same words were used with each Plaintiff. Because the Court determined that class action treatment is appropriate, Lutheran Brotherhood's argument here necessarily fails. As in any class action, Plaintiffs are entitled to proceed by establishing that the class representatives can prove the elements of their cases. In certifying the class, the Court determined that the claims of the class representatives are representative of the claims of every other class member. Thus, Plaintiffs are not required to put forward evidence as to each individual class member and Lutheran Brotherhood's contentions on this point are without merit.

2. *Punitive Damages*

Lutheran Brotherhood makes four different arguments against allowing Plaintiffs to recover punitive damages. It bears noting that Plaintiffs have not yet amended, or sought to amend, their Complaint to add a punitive damages claim, although Plaintiffs' opposition memorandum makes clear that they intend to seek punitive damages.

Lutheran Brotherhood contends that punitive damages for violations of the CFA are not available under the Private Attorney General ("Private AG") statute, Minn.Stat. § 8.31. The Minnesota Supreme Court recently revisited the scope of the statute. *Ly v. Nystrom,* 615 N.W.2d 302 (Minn.2000). Although the *Ly* court was not faced with the precise question at issue here, that court's discussion of the remedies allowed by the Private AG statute is instructive. The court stated that "the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws must define the limits of the private claimant under the statute."*Id.* at 313.Implicit in this finding is that the remedies available to the attorney general and any additional remedies spelled out in the Private AG statute define the limits of what remedies are available to a private plaintiff in a CFA action.

The Private AG statute provides that private plaintiffs may get relief in the form of "damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court."Minn.Stat. § 8.31, subd. 3a. The statute makes no mention of punitive damages. Because the statute that gives rise to Plaintiffs' cause of action contains no authorization for punitive damages, the Court finds that punitive damages are not available in actions based on the CFA.

3. *Other Arguments*

Lutheran Brotherhood makes other arguments in this Motion, including an argument that the CFA does not apply to insurance contracts. This argument has no merit. Lutheran Brotherhood also brings a challenge to one of Plaintiffs' expert witnesses, Dr. Wayne D. Hoyer. At this juncture, Dr. Hoyer's opinions meet the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and will be allowed. However, a final resolution of the admissibility of Dr. Hoyer's testimony is better left to motions in limine and more complete briefing on the issue. Thus, the Court denies this portion of Lutheran Brotherhood's Motion without prejudice.

C. Summary Judgment Against Named Plaintiffs and Class Representatives

*8 Lutheran Brotherhood also moves for summary judgment against the individual named Plaintiffs and the individual class representatives. Lutheran Brotherhood contends that summary judgment should be granted not just as to these Plaintiffs' CFA claims, but also as to their claims for common-law fraud and breach of fiduciary duty. There is a difference in this case between class representatives and named Plaintiffs. The named Plaintiffs are the original ten Plaintiffs, nine of whose claims the statute of limitations Order rendered untimely. There are five class representatives, only one of which, Barbara Watson, is also a named Plaintiff. In this Motion, Lutheran Brotherhood seeks summary judgment against the named Plaintiffs and against the class representatives.

Lutheran Brotherhood attacks the prima facie case of the individual Plaintiffs. First, Lutheran Brotherhood contends that, because the computer printout illustrations that the individual Plaintiffs received contained a disclaimer about fluctuating interest rates, the class representatives cannot prove that a misrepresentation was made and cannot show that they reasonably relied on the illustrations. Second, Lutheran Brotherhood also argues that the class representatives cannot prove that they were damaged by the allegedly misleading statements. Third, Lutheran Brotherhood asserts that the common-law fraud claims of the individual Plaintiffs are barred by the statute of limitations. (There is no dispute that the CFA claims of the named Plaintiffs who are not class representatives are barred by the statute of limitations.) Fourth, Lutheran Brotherhood argues in the alternative that the common-law fraud claims fail on their merits. Finally, Lutheran Brotherhood contends that the individual Plaintiffs cannot establish the elements of their claims for breach of fiduciary duty.

1. *Misrepresentations and Reliance*

Again, some of Lutheran Brotherhood's argument in this Motion rehashes arguments made in the decertification Motion. In addition to the proof of individualized reliance argument discussed previously, Lutheran Brotherhood also contends that the individual Plaintiffs' CFA and common-law fraud claims fail because these Plaintiffs cannot show that a misrepresentation was made to them and, in any event, cannot establish that they reasonably relied on the alleged misrepresentations.

Much of Lutheran Brotherhood's argument on this point rests on what it characterizes as "prominent" disclaimers in the computer printout illustrations given to class members. Taking the evidence in the light most favorable to Plaintiffs, the Court finds that, while the disclaimers are not printed in type smaller than that used in the body of the illustration, they are not in any way "prominent." Nor are the disclaimers particularly helpful. For example, the illustration for Barbara Watson shows zeros in the "Annual Premium" column for years two through 18. The illustration shows that, even if she paid no annual premiums, under both the "guaranteed" and the "assumed" rates of return, her policy would remain in force at least through year 18. Moreover, the "assumed" rate of return illustrates a cash value of more than $35,000 in year 18, even if Ms. Watson were to make no annual premium payments. The disclaimer trumpeted by Lutheran Brotherhood is at the bottom of the page and is not written in particularly clear language. What stands out on the illustration is the column of zeros in the "Annual Premium" column, not the small paragraph of legal disclaimers at the bottom.

*9 The individual Plaintiffs who were shown illustrations similar to those shown to Ms. Watson have raised a genuine issue of fact as to whether they received a misrepresentation and whether their reliance on what they received was reasonable.

2. *Damages*

Lutheran Brotherhood contends that summary judgment is appropriate because Plaintiffs have failed to show damages. Specifically, Lutheran Brotherhood contends that in Minnesota, a plaintiff attempting to recover for fraudulent conduct is limited to recovering her out-of-pocket damages. In contrast, according to Lutheran Brotherhood, here Plaintiffs are attempting to recover benefit-of-the-bargain damages, and such damages are not allowed under Minnesota law.

Lutheran Brotherhood reads Minnesota law too narrowly. As the Eighth Circuit has explained, Minnesota courts take "a broad view of what constitutes out-of-pocket losses" such that Minnesota's damages rule "lies somewhere between a strict application of the out-of-pocket rule and the more liberal benefit-of-the-bargain rule." *Commercial Prop. Inv., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 647–48 (8th Cir.1995). Thus, Minnesota courts strive to "compensate actual losses, not prospective gains." *Id.* at 648.The Minnesota Supreme Court put it this way: "[P]laintiff may recover for any injury

which is the direct and natural consequence of his acting on the faith of defendant's representations."*Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 235 N.W.2d 831, 835 (Minn.1975).

Much of the damages Plaintiffs claim here arise directly from Lutheran Brotherhood's alleged misrepresentations. Some Plaintiffs surrendered other policies to purchase a vanishing premium policy, only to find that the cash value of the new policy was well below that promised by the DR. These Plaintiffs' damages must include the difference between the value of that prior policy and the value of the new policy. Moreover, when a Plaintiff had to make premium payments after the time that the DR promised that the premium would vanish, that Plaintiff was damaged. Summary judgment on this issue is not warranted.

3. *Statute of Limitations*

Lutheran Brotherhood contends that the named Plaintiffs' common-law fraud and breach of fiduciary duty claims are untimely, but cites to no authority to support that argument. Indeed, Lutheran Brotherhood does not even cite the relevant statutes of limitations for these claims.

Lutheran Brotherhood's argument on this point is without merit. It is undisputed that both common-law fraud and breach of fiduciary duty claims are subject to the discovery rule. Thus, Lutheran Brotherhood's reliance on the Court's previous statute of limitations ruling is misplaced. In that ruling, the Court determined that claims under the CFA were not subject to the discovery rule or to equitable tolling. The Court did not hold that the discovery rule was inapplicable to the common-law fraud or breach of fiduciary duty claims. Although the previous ruling found that some Plaintiffs might have had the opportunity to discover the fraud prior to the limitations period, this finding does not preclude the application of the discovery rule to different claims. Nor could that dicta have definitively decided the issue: whether a plaintiff knew or should have known of the existence of his or her claim is a question of fact that cannot be resolved on a motion for summary judgment.*Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507, 512 (Minn.1976). Until those facts are decided, the statute of limitations does not bar these claims. The Court determines that the individual Plaintiffs' common-law fraud and fiduciary duty claims are not barred by the statute of limitations and that the individual Plaintiffs may avail themselves of the discovery rule to establish the timeliness of these claims.

4. *Common–Law Fraud*

***10** Lutheran Brotherhood contends that the individual Plaintiffs' common-law fraud claims fail on their merits because Plaintiffs cannot show an actionable misrepresentation, causation, or damages. This memorandum has previously addressed the damages issue.

a. Misrepresentation

Both in this Motion and in the Motion against the class, Lutheran Brotherhood argues that there is no actionable misrepresentation because the statements at issue were statements of future performance, not of a past or existing fact. While it is true that the alleged misrepresentations regarding vanishing premiums were representations that something would happen in the future, the alleged misrepresentations are not the sort of speculative statements that Minnesota courts have found insufficient to support a claim for fraud.

Lutheran Brotherhood cites two cases in support of this argument, *Cady v. Bush*, 283 Minn. 105, 166 N.W.2d 358 (Minn.1969), and *Exeter Bancorp., Inc. v. Kemper Sec. Group, Inc.*, 58 F.3d 1306 (8th Cir.1995). The representations at issue in *Cady* were statements to a potential purchaser of a hotel that he would have no trouble renting rooms and that the hotel was a moneymaking proposition. *Cady*, 166 N.W.2d at 360. Similarly, in *Exeter Bancorp.*, the defendant stated that it would use its nationwide network for the plaintiff's benefit and that the defendant had an investor "locked up" to by the plaintiff's stock. *Exeter Bancorp.*, 58 F.3d at 1310. These statements are quite different from computer printouts that show zero premium payments resulting in increasing cash values and oral statements that the policyholder's obligation to pay premiums would cease in a certain number of years. The representations Plaintiffs allege are sufficient to satisfy the misrepresentation element of their for common-law fraud claims.

Next, Lutheran Brotherhood challenges each individual Plaintiffs' prima facie case. In the main, Lutheran Brotherhood contends that the disclaimer language on the contracts and the policy notices belies any claim that any individual Plaintiff received a misrepresentation. Lutheran Brotherhood cites to each individual Plaintiff's deposition to support this argument. The Court has examined the record and reaches a different conclusion. Each individual Plaintiff testified that they were told something that was ultimately false, and although some Plaintiffs' testimony is more specific

than others, taking the evidence in the light most favorable to Plaintiffs, there is at least a question of fact as to whether they received a misrepresentation.

b. Causation

Lutheran Brotherhood's arguments with respect to causation are similar to the arguments about the misrepresentation element of the individual Plaintiffs' prima facie case. Lutheran Brotherhood picks out select deposition testimony to support its claim that Plaintiffs cannot show that they relied on the alleged misrepresentation. Other testimony, however, shows that Plaintiffs did rely on what their DRs told them about their policies. Thus, there is a question of fact as to the causation element.

5. *Fiduciary Duty*

***11** Analysis of the individual Plaintiffs' breach of fiduciary duty claims is complicated by the fact that it is not clear which state's law applies to their claims. Lutheran Brotherhood argues that each individual Plaintiff's residence provides the common law for the fiduciary duty claims. Plaintiffs claim that Minnesota law may be applied to the fiduciary duty claims. Neither party specifies the differences between the substantive law of the various states—Minnesota, Ohio, and Wisconsin—that could potentially supply the law on the breach of fiduciary duty claims. However, at least with respect to Minnesota and Ohio, it appears that there is little difference between the two states' fiduciary duty laws. (*See* Def .'s Supp. Mem. at 21 (noting that "Ohio sets the same standard [as Minnesota].").) There is no need to conduct a lengthy choice-of-law analysis if the different states' laws do not differ in a way that is outcome-determinative. *SeeMeyers v. Gov't Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238, 241 (Minn.1974). Because Lutheran Brotherhood does not argue that the application of Wisconsin or Ohio law will affect the ultimate outcome of the fiduciary duty claim, the Court may apply Minnesota law.

The existence of a fiduciary relationship is usually a question of fact. *SeeToombs v. Daniels*, 361 N.W.2d 801, 809 (Minn.1985). Under Minnesota law, a fiduciary duty between an insured and insurer arises in "special circumstances." *Parkhill v. Minn. Mut. Life Ins. Co.*, 174 F.Supp.2d 951, 959 (D.Minn.2000) (Doty, J.). Plaintiffs have failed to show that there is a genuine issue of fact as to whether Lutheran Brotherhood and its agents owed Plaintiffs a fiduciary duty.

A fiduciary relationship does not arise between an insurance agent and an insured merely because the agent and insured have known each other for a long time or because the insured has "faith and confidence" in the agent. *Stark v. Equitable Life Assurance Soc. of U.S.*, 205 Minn. 138, 285 N.W. 466, 470 (Minn.1939). An insured "should know that [the agent] is representing adverse interests."*Id.* In *Stark,* the Minnesota Supreme Court found that an insurance company owed its insured a fiduciary duty only because of a provision in the insurance contract that encouraged the insured not to hire counsel but instead to rely on the advice of the agent when settling claims under the insurance contract. *Id.* There is no similar contractual provision here, nor is there any evidence that any of the DRs encouraged Plaintiffs not to seek outside advice before purchasing their policies. Plaintiffs' evidence is confined to general assertions that Lutheran Brotherhood viewed itself as having a fiduciary relationship with its insureds. This type of evidence does not create a question of fact as to whether the special circumstances required to impose a fiduciary duty on Lutheran Brotherhood exist in this case.

Lutheran Brotherhood's Motion for Summary Judgment is granted as to the individual Plaintiffs' breach of fiduciary duty claims.

D. Motion to Strike

***12** Plaintiffs ask the Court to strike all of the above Motions because of Lutheran Brotherhood's alleged failure to disclose information about the cases of two named Plaintiffs, Sandra Rost and Gerald Zimmerman. According to Plaintiffs, Lutheran Brotherhood knew that the CFA claims of these Plaintiffs were not time-barred but did not disclose that information to Plaintiffs, instead letting Plaintiffs believe that their claims were time-barred.

Even assuming that Plaintiffs' allegations are true, the Court finds that the conduct in question is not egregious enough to justify the severe sanctions that Plaintiffs seek. The Court will therefore deny the Motion to Strike.

CONCLUSION

For the reasons set forth above, the Court concludes that summary judgment is appropriate only as to the punitive damages claim and the individual Plaintiffs' breach of fiduciary duty claims. Similarly, the Court declines to decertify the class.

Accordingly, IT IS HEREBY ORDERED that:

1. The Court's Order of July 22, 2003 (Clerk Doc. No. 331) is stricken and this Amended Order is substituted for that Order;

2. Defendant's Motion to Decertify the Class (Clerk Doc. No. 276) is DENIED;

3. Defendant's Motion for Summary Judgment Against the Class (Clerk Doc. No. 280) is GRANTED in part and DENIED in part as follows:

a. Summary Judgment is GRANTED as to Plaintiffs' claim for punitive damages under the Minnesota Consumer Fraud Act;

b. Summary Judgment is DENIED without prejudice as to Defendant's challenge to Plaintiffs' expert witness; and

b. Summary Judgment is DENIED as to the remainder of Plaintiffs' class claims;

4. Defendant's Motion for Summary Judgment Against the Individual Plaintiffs (Clerk Doc. No. 285) is GRANTED in part and DENIED in part as follows:

a. Summary Judgment is GRANTED as to the individual Plaintiffs' breach of fiduciary duty claims; and

b. Summary Judgment is DENIED as to the remainder of the individual Plaintiffs' class claims; and

5. Plaintiffs' Motion to Strike (Clerk Doc. No. 310) is DENIED.

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EXHIBIT D

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Court of Appeals of Minnesota.

Richard T. LYZHOFT, individually, and Richard T. Lyzhoft, as father and natural guardian of Jeremiah R. Lyzhoft, Appellant (A12–2237), Respondent (A12–2238),

v.

WACONIA FARM SUPPLY, Respondent (A12–2237), Appellant (A12–2238).

Brian T. Donahue, individually and d/b/a Donahue Mechanical, Inc., Respondent.

Thomas M. Donahue, individually and d/b/a Donahue Mechanical, Inc., Respondent.

Nos. A12–2237, A12–2238. | July 8, 2013.

Carver County District Court, File No. 10–CV–11–951.

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Considered and decided by SMITH, Presiding Judge; SCHELLHAS, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

*1 In this consolidated appeal, appellants challenge the district court's summary-judgment dismissal of their strict products-liability and negligence claims against respondents. We affirm the court's dismissal of the products-liability claim but reverse its dismissal of appellants' negligence claims and remand for further proceedings consistent with this opinion.

FACTS

Appellant Richard Lyzhoft contracted with respondent Brian Donahue to perform work at Lyzhoft's home including installation of a heating, ventilation, and air-conditioning unit in or around May 2009. During the course of Brian Donahue's work, his father, respondent Thomas Donahue, stopped by the home several times to check on the progress and, on one occasion, purchased two items for installation in the home. Lyzhoft reimbursed Thomas Donahue for the items but did not pay him for his time.

On June 10, 2009, knowing that Lyzhoft needed propane to obtain a certificate of occupancy, the Donahues told Lyzhoft that they had a propane cylinder that he could use, and that it was located at Brian Donahue's home. The Donahues also told Lyzhoft that appellant Waconia Farm Supply "would be the place to fill" the cylinder with propane. Lyzhoft and Brian Donahue went to Brian Donahue's home, where Lyzhoft's son and Brian Donahue's son obtained the available propane cylinder and placed it in the bed of Lyzhoft's truck. At that time, Brian Donahue cracked open the valve on the propane cylinder for a few seconds, sniffed, and said that it smelled like propane. Lyzhoft and his son then drove to Waconia Farm Supply to fill the tank with propane. After they arrived, Lyzhoft went to Waconia Farm Supply's shed, while his son remained in the truck. At the shed, Lyzhoft met Waconia Farm supply employee, Ryan Samuelson, who began to fill the cylinder with propane. Lyzhoft left the shed to pay for the propane. Approximately five seconds later, before Lyzhoft reached the store, the propane cylinder exploded, killing Samuelson, allegedly causing Lyzhoft's son to sustain first-degree burns on his arms and neck and initial symptoms of posttraumatic stress disorder, and allegedly causing Lyzhoft to suffer moderately severe hearing loss, depression, and posttraumatic stress disorder. Subsequent chemical tests of the propane cylinder revealed that it had contained acetylene, which can be extremely unstable. In this case, the cylinder detonated when it received pressure while being filled with propane.

The Donahues came into possession of the propane cylinder more than a year before the accident, after Thomas Donahue's

tenant committed suicide, leaving the cylinder on the leased premises. During the tenant's possession of the leased premises, at least one person regularly sold "meth" on the premises, and someone on the premises had been "transferring oxygen and acetylene into propane tanks."

For injuries suffered by himself and his son, Lyzhoft asserted claims of strict liability and negligence against the Donahues and claims of strict liability for ultrahazardous activities, negligence, negligence per se, and res ipsa loquitur against Waconia Farm Supply, and sought damages in excess of $100,000 against respondents, jointly and severally. Waconia Farm Supply cross-claimed against the Donahues, alleging negligence and entitlement to contribution and/or indemnity.

***2** The district court denied the Donahues' motions to dismiss, reasoning that facts could be introduced to support Lyzhoft's claims against the Donahues. The court granted partial summary judgment in the case, dismissing all of Lyzhoft's claims against the Donahues, and therefore dismissing Waconia Farm Supply's cross-claims against the Donahues. At the request of Waconia Farm Supply, the court ordered the immediate entry of judgment without a stay under Minn. R. Civ. P. 54.02.

These consolidated appeals follow. [1]

DECISION

An appellate court "review[s] the district court's grant of summary judgment to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law."*Langston v. Wilson McShane Corp.*, 828 N.W.2d 109, 113 (Minn.2013) (quotation omitted). An appellate court "view[s] the evidence in the light most favorable to the party against whom summary judgment was granted."*McKee v. Laurion*, 825 N.W.2d 725, 729 (Minn.2013)."No genuine issue for trial exists when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party."*Id.* (quotations omitted).

Strict–Liability Claim against Donahues

Lyzhoft challenges the district court's dismissal of his strict-products-liability claim against the Donahues. He argues that the Donahues should be held strictly liable for damages caused by the propane-cylinder explosion because the Donahues were commercial bailors, who distributed the cylinder in connection with Brian Donahue's heating, ventilation, and air-conditioning business.

"Products liability is a manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product."*Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 581 (Minn.2012) (quotation omitted). A plaintiff may premise a products-liability claim on a strict-liability theory. *Id.* In *McCormack v. Hankscraft Company*, 278 Minn. 322, 340, 154 N.W.2d 488, 501 (1967), the supreme court "declare[d its] agreement with the principles underlying the rule of strict tort liability and ... record[ed its] intention of applying that rule" in products-liability cases. Those principles are embodied in the Restatement (Second) of Torts section 402A (1965), which provides that a person is liable for "*sell[ing]* any product in a defective condition unreasonably dangerous to the user or consumer ... for physical harm thereby caused to the ultimate user or consumer." (Emphasis added.); *see Minn. Min. & Mfg. Co. v. Nishika Ltd.*, 565 N.W.2d 16, 21 (Minn.1997) (citing *McCormack* as authority for the court's adoption of the Restatement (Second) of Torts section 402A (1965)); *Lee v. Crookston Coca–Cola Bottling Co.*, 290 Minn. 321, 327, 188 N.W.2d 426, 431 (1971) (observing that the purposes of imposing strict liability on defective-product manufactures and sellers include promoting "[t]he public interest in safety ... by discouraging the marketing of defective products"). The Minnesota Supreme Court has extended a manufacturer's strict liability to "retailers and distributors" because "[t]he same policy considerations apply, since both retailers and manufacturers are engaged in the business of distributing goods to the public."*Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 97 n. 1, 179 N.W.2d 64, 72 n. 1 (1970).

***3** A "[b]ailment" is a "legal relation arising upon delivery of goods without transference of ownership under an express or implied agreement that the goods be returned,"*Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 437 (Minn.1990) (quotation omitted), in which the "bailor" delivers the goods and the "bailee" receives the goods, *Nat'l Fire Ins. Co. v. Commodore Hotel, Inc.*, 259 Minn. 349, 351, 107 N.W.2d 708, 709 (1961). Thomas Donahue challenges the existence of a bailment as to him, arguing that he never owned the propane cylinder or delivered it to Lyzhoft. Thomas Donahue testified at his deposition that, after he and Brian Donahue found the propane cylinder on his rental property, Brian Donahue took it to his home as "a reserve." Brian Donahue testified that he retained the

propane cylinder for approximately one year until his son and Lyzhoft's son placed it in Lyzhoft's truck, and Lyzhoft testified that he did not know who owned the cylinder and that Thomas Donahue was not present when Lyzhoft received the cylinder from Brian Donahue. Lyzhoft testified that, on the day of the explosion, he learned that a propane cylinder existed that he could borrow and get filled with propane at Waconia Farm Supply when Brian *and* Thomas Donahue told him, "*[W]e* got a[ ] [propane cylinder] at Brian's place." (Emphasis added.) As to delivery of the propane cylinder to Lyzhoft, "[t]he law relating to delivery and change of possession is flexible, accommodating itself to the nature of the property and the situation and circumstances of each case."*Coulter v. Meining*, 143 Minn. 104, 107–08, 172 N.W. 910, 911–12 (1919) (discussing bailment and stating that a "delivery through a third person is sufficient if such person holds the property for the donee"); *cf. Fenrick v. Olson*, 269 Minn. 412, 422, 131 N.W.2d 235, 241–42 (1964) (discussing deed delivery, stating that "[d]elivery is a question of fact" (quotation omitted)).

Viewing the record in the light most favorable to Lyzhoft, we conclude that the evidence shows that, although Thomas was not present during the delivery, Thomas and Brian co-delivered the cylinder to Lyzhoft and a bailment existed between the Donahues and Lyzhoft as to the propane cylinder.

Other jurisdictions have extended strict products liability to commercial bailors, lessors, or both, due to the same policy considerations that support strict products liability for commercial sellers. *See Bachner v. Pearson*, 479 P.2d 319, 327–28 (Alaska 1970) (both); *Price v. Shell Oil Co.*, 466 P.2d 722, 727 (Cal.1970) (both); *Samuel Friedland Family Enters. v. Amoroso*, 630 So.2d 1067, 1070–71 (Fla.1994) (lessor); *Crowe v. Pub. Bldg. Comm'n of Chicago*, 370 N.E.2d 32, 34–35 (Ill.App.Ct.1977) (lessor), *aff'd and remanded*, 383 N.E.2d 951 (Ill.1978); *Allenberg v. Bentley Hedges Travel Serv., Inc.*, 22 P.3d 223, 228–29 (Okla.2001) (lessor); *Kemp v. Miller*, 453 N.W.2d 872, 878–79 (Wis.1990) (lessor); *see also Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581, 582 (Del.1976) (bailment-lease of a motor vehicle). Although the extension of strict products liability to commercial bailors appears to be consistent with Minnesota law, the law in other jurisdictions, and the Restatement (Third) of Torts, no Minnesota appellate court has extended strict liability to commercial bailors, lessors, or both.[2] *See Wagner v. Int'l Harvester Co.*, 611 F.2d 224, 232 n. 10 (8th Cir.1979) (stating that the Eighth Circuit Court of Appeals "believe[d] the Minnesota Supreme Court *would hold* that [section 402A] encompasses an equipment lessor" (emphasis added)); *cf. Wegscheider v. Plastics, Inc.*, 289 N.W.2d 167, 170 (Minn.1980) (declining to address "whether strict liability as stated in § 402A should be applied to cases ... where the defective product was not sold but merely supplied by defendant to plaintiff' because doing so would not have affected that case's outcome); *Buckey v. Indianhead Truck Line*, 234 Minn. 379, 384 n. 4, 48 N.W.2d 534, 537 n. 3 (1951) (noting that "[s]ometimes it makes no difference whether the relationship be treated as a lease or a bailment"); *but cf. Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 387–88 (Minn.App.2004) (concluding that "a manufacturer and supplier" was subject to products liability, reasoning in part that "Restatement (Third) of Torts § 1 (1998) takes a broad approach, imposing liability on any party who is 'engaged in the business of selling or otherwise distributing products' " (quoting Restatement (Third) of Torts: Products Liability § 1)), *review denied* (Minn. Aug. 25, 2004);[3] *compare Federated Mut.*, 456 N.W.2d at 437 (defining "[b]ailment" as "the legal relation arising upon delivery of goods without transference of ownership under an express or implied agreement that the goods be returned" (quotation omitted)), *with Black's Law Dictionary* 970 (9th ed.2009) (defining "lease" as a "contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration").

***4** Because "[t]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court," we decline to extend strict liability to commercial bailors. *State v. Grigsby*, 806 N.W.2d 101, 110 (Minn.App.2011) (quotation omitted), *aff'd*, 818 N.W.2d 511 (Minn.2012); *see also Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 690 (Minn . App.2010) (declining to recognize "broadly stated fraud theory"); *Tester v. Am. Standard, Inc.*, 590 N.W.2d 679, 681 (Minn.App.1999) (declining to extend aggregation-of-fault doctrine), *review denied* (Minn. June 16, 1999).

Brian Donahue argues that, even if this court were to extend strict products liability to commercial bailors, the Donahues would not be subject to such liability because a "one-time bailment by a non-distributor can[not] result in the imposition of strict liability."We agree. Under the third torts restatement on products liability, strict products liability extends to commercial bailors and lessors who are "*engaged in the business of* selling or otherwise distributing products who sell[ ] or distribute[ ] a defective product." Restatement (Third) of Torts: Products Liability § 1 (emphasis added).

A comment to that restatement explains that "[i]t is not necessary that a commercial seller or distributor be engaged exclusively or even primarily in selling or otherwise distributing the type of product that injured the plaintiff, so long as the sale of the product is *other than occasional or casual.*" Restatement (Third) of Torts: Products Liability § 1, cmt. c (1998) (emphasis added). Other jurisdictions have likewise limited strict products liability. *See Bachner,* 479 P.2d at 328 ("Just as strict liability has not been imposed in cases of single transaction, non-commercial sales, no such liability will result where the lease in question is an isolated occurrence outside the usual course of the lessor's business."); *Price,* 466 P.2d at 728 ("[F]or the doctrine of strict liability in tort to apply to a lessor of personalty, the lessor should be found to be in the business of leasing, in the same general sense as the seller of personalty is found to be in the business of manufacturing or retailing."); *Amoroso,* 630 So.2d at 1071 ("The strict liability cause of action is not applicable to those leases which are isolated or infrequent transactions not related to the principal business of the lessor.").

No record evidence indicates that the Donahues ever distributed a propane cylinder other than loaning the subject cylinder to Lyzhoft, who agrees that the Donahues are not sellers or retailers of propane and that no evidence exists to show that they professionally delivered or transported propane or offered themselves to the public as propane cylinder retailers. Therefore, although we conclude that the Donahues and Lyzhoft had a bailment as to the propane cylinder, even if we were to extend strict products liability to bailments, we would conclude that the Donahues would not be strictly liable to Lyzhoft or his son because the Donahues were not engaged in the business of distributing propane cylinders. The district court did not err by dismissing Lyzhoft's strict-products-liability claim against the Donahues.

Negligence Claims Against Donahues

***5** "To recover for a claim of negligence, a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury."*Domagala v. Rolland,* 805 N.W.2d 14, 22 (Minn.2011). Lyzhoft argues that the district court erred by dismissing Lyzhoft's negligence claims against the Donahues on the basis that the Donahues had no duties to inspect the propane cylinder or warn Lyzhoft and his son about the propane cylinder. Lyzhoft argues that genuine issues of material fact exist as to whether the Donahues bailed the propane cylinder to Lyzhoft and his son within the scope of their work and for consideration and therefore owed the Lyzhofts a duty of care. We agree.

A bailor-bailee relationship is a special relationship from which duties may arise. *See Ferraro v. Taylor,* 197 Minn. 5, 9, 265 N.W. 829, 831 (1936) (observing that a "special relation" arose from a lessor's leasing of a car to a lessee, giving rise to duties including a duty "to furnish [the lessee] a safe and manageable car"); *see also Bjerke v. Johnson,* 742 N.W.2d 660, 665 (Minn.2007) (including in examples of special relationships relationships that "arise[ ] from the status of the parties, such as ... masters and servants"); *Black's Law Dictionary* 1402 (9th ed.2009) (defining "special relationship" as a "nonfiduciary relationship having an element of trust, arising esp[ecially] when one person trusts another to exercise a reasonable degree of care and the other knows or ought to know about the reliance" (emphasis omitted)); *cf. Buckey,* 234 Minn. at 384 n. 4, 48 N.W.2d at 537 n. 3 (noting that "[s]ometimes it makes no difference whether the relationship be treated as a lease or a bailment" in case in which "[i]t [was] obvious that the relationship between the parties here has the elements of both a bailment and a lease").

Duty to Inspect

A gratuitous bailor owes to the bailee no duty to inspect a bailed good whereas a bailor for consideration owes to the bailee a duty to reasonably inspect the bailed good. *See Ruth v. Hutchinson Gas Co.,* 209 Minn. 248, 256, 296 N.W. 136, 140 (1941) (stating that a gratuitous bailor owes to the bailee no duty to "take ... measures to see that the chattel is free from danger," "guard[ ] and protect[ ]" the bailee, or "communicate [to the bailee] anything which he did not in fact know, whether he ought to have known it or not"); *Butler v. Nw. Hosp. of Minneapolis,* 202 Minn. 282, 285, 287, 278 N.W. 37, 38–39 (1938) (stating that bailor must conduct reasonable inspection of bailment to ensure it is "reasonably fit and suitable for the purpose for which it is expressly let out" and that bailor "is liable for injuries to the bailee or third persons for injuries proximately resulting from any defect due to his want of due care"); *see also Thill v. Modern Erecting Co.,* 272 Minn. 217, 225, 136 N.W.2d 677, 683 (1965) ("Modern had breached its duty as a bailor for hire-which was to supply equipment reasonably safe for its intended use and competent operators...."); *Miller v. Macalester Coll.,* 262 Minn. 418, 429, 115 N.W.2d 666, 673 (1962) (stating that scaffold bailor had "duty ... to exercise reasonable care to furnish equipment which could be used with safety in the work for which it was intended"); 131 A.L.R. 845–46, § 24 (1941) (citing *Butler* as supporting rule that "bailor for hire ...

is liable for personal injuries to, or the death of, the bailee or third persons proximately resulting from the dangerous or defective condition of the chattel while it is being used for the purpose known by the bailor to be intended, where the bailor has not used reasonable care to see that the chattel, as of the time of its letting, was free from any defects or weaknesses rendering it unfit for its known intended use").

Duty to Warn

***6** A gratuitous bailor owes to the bailee "the duty of warning him of only those defects to which the [bailor] is aware and which might imperil the [bailee] by the intended use of the chattel,"*Ruth,* 209 Minn. at 256, 296 N.W. at 140, in contrast to the general rule that "a supplier has a duty to warn end users of a dangerous product if it is reasonably foreseeable that an injury could occur in its use,"*Gray v. Badger Min. Corp.,* 676 N.W.2d 268, 274 (Minn.2004).*See Ruth,* 209 Minn. at 257–58, 296 N.W. at 141 (holding that the rule that "a supplier is responsible for facts which he ought to know by the exercise of reasonable care" did not apply to a gratuitous bailor and that Restatement (First) of Torts § 388 (1934) "sustains [that] rule"); *see also Gray,* 676 N.W.2d at 274 (stating that, in context of supplier's duty to warn, "we have endorsed the broad statement of principles contained in the Restatement (Second) of Torts § 388"); *but see*Restatement (Second) of Torts § 388, cmt. c (1965) (defining suppliers as including all kinds of bailors, "irrespective of whether the bailment is for a reward or gratuitous").

An appellate court "[g]enerally ... regard[s] the existence of the duty as a question of law, which [the appellate court] review[s] de novo."*Bjerke,* 742 N.W.2d at 664. But "this would not foreclose the possibility that there may be situations in which the facts necessary to establish a special relationship are in dispute and should be submitted to the jury."*Id.* at 667 n. 4. Similarly, "[f]oreseeability of injury is a threshold issue related to duty that is ordinarily properly decided by the court prior to submitting the case to the jury," but, "[i]n close cases, the issue ... should be submitted to the jury."*Domagala,* 805 N.W.2d at 27. And whether a bailment is gratuitous or for consideration is a fact question. *Jungclaus v. Great N. Ry.,* 99 Minn. 515, 516, 108 N.W. 1118, 1118 (1906); *see also Marchello v. Perfect Little Prods., Inc.,* 941 N.Y.S.2d 846, 846 (App.Div.2012) (stating that defendants, in summary-judgment proceeding, "raised triable issues of fact as to ... whether the bailment in question was gratuitous or for hire").

Here, material to whether the Donahues had a duty to inspect the propane cylinder, a genuine issue of fact exists about whether the Donahues bailed the propane cylinder to Lyzhoft and his son gratuitously or for consideration. Evidence that supports a finding that the Donahues gratuitously bailed the propane cylinder includes Lyzhoft's denial of paying the Donahues for the cylinder and that the cylinder is not listed on the service and materials invoices that Lyzhoft received from Brian Donahue. Evidence that supports a finding that the Donahues bailed the propane tank to Lyzhoft and his son for consideration includes Lyzhoft's assertion that Brian Donahue provided the propane cylinder as "part of [Brian Donahue's] work" and that Brian Donahue bailed the propane cylinder to Lyzhoft and his son for the purpose of expediting Lyzhoft's receipt of a certificate of occupancy and therefore expediting Lyzhoft's payment to Brian Donahue for his work.

***7** And material to whether the Donahues had a duty to warn the Lyzhofts about the dangerous condition of the propane cylinder or facts that made the cylinder likely to be dangerous—because it contained acetylene—a genuine issue of fact exists as to whether the Donahues should have known of the dangerous condition of the propane cylinder or facts that suggested that the cylinder might be dangerous. *See Gray,* 676 N.W.2d at 274 (noting that the Restatement (Second) of Torts section 388 predicates supplier liability for "fail[ure] to exercise reasonable care to inform [chattel recipient] of [chattel']s dangerous condition or of the facts, which make it likely to be so" on supplier "know[ing], or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied" and "hav[ing] no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition" (quotation marks omitted)); *see also Anderson by Anderson v. Shaughnessy,* 519 N.W.2d 229, 232 (Minn.App.1994) ("Whether the seller knew or should have known of the product's defect is typically a question for the jury."), *rev'd on other grounds,*526 N.W.2d 625 (Minn.1995).

Evidence that may support a finding that the Donahues had no duty to warn the Lyzhofts includes Lyzhoft's testimony that he did not know what the Donahues knew about the history of the propane cylinder, did not believe that Thomas Donahue knew that the cylinder contained acetylene, and did not know whether "Brian knew that there had been explosions or mixing of fuels going on out at Tom's rental property prior to the Waconia Farm Supply incident."Additionally, the Donahues deny that they knew the propane cylinder contained acetylene.

Evidence that may support a finding that the Donahues should have known that the propane cylinder was likely dangerous include Brian Donahue's testimony that he knew that the deceased tenant from whom the Donahues acquired the propane cylinder had committed suicide and Thomas Donahue's testimony that he knew that, before the tenant's death, a different propane tank had exploded on the leased premises, injuring the tenant's ear, causing the tenant some hearing loss, and damaging a tractor bucket. A significant other of the deceased tenant testified about her understanding that the deceased tenant told Thomas Donahue that an explosion occurred that damaged the roof at the leased premises. Another individual testified that, after the explosion, the deceased tenant told the individual that he was "transferring oxygen and acetylene into propane tanks."That same individual testified that he sold "meth" day and night out of the deceased tenant's property; had approximately 100 regular customers and customers constantly coming to purchase the methamphetamine; and was "sure" that "law enforcement" was watching the property. The deputy fire marshal testified that, after investigating the subject propane-cylinder explosion, he believed that the deceased tenant had likely put acetylene in the propane cylinder. An acquaintance of the deceased tenant, who attended treatment with him, affirmed that, while the acquaintance and others—including Thomas Donahue—were cleaning up the tenant's rental property after his death, the acquaintance heard someone "talking about [the deceased tenant] cooking f-cking meth out at the property."And Lyzhoft testified that, after the explosion, Thomas Donahue told him by phone, " 'I know where this tank came from, but I can't tell you ... right now,' " and arranged a meeting with Lyzhoft along the side of a country road after telling Lyzhoft that he wanted them to "work [ ] together on this thing."

***8** "[I]t is only in the clearest of cases that the question of negligence becomes one of law."*Martinco v. Hastings*, 265 Minn. 490, 501, 122 N.W.2d 631, 640 (1963); *see Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 505 (Minn.1997) ("The question of negligence is ordinarily a question of fact and not susceptible to summary adjudication."). This case is not one of the "clearest of cases." Because genuine issues of material fact exist regarding the extent of Donahues' knowledge and therefore the extent of their duties and whether they breached those duties, we conclude that the district court erred by granting summary judgment to the Donahues on Lyzhoft's negligence claims, dismissing those negligence claims, and dismissing Waconia Farm Supply's cross-claim against the Donahues for contribution and indemnity. Accordingly, we affirm the district court's dismissal of Lyzhoft's strict products-liability claim against the Donahues, reverse the dismissal of Lyzhoft's negligence claims against the Donahues, reverse the dismissal of Waconia Farm Supply's cross-claim against the Donahues, and remand for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W.2d, 2013 WL 3368832

Footnotes

1 In A12–2237, Lyzhoft is the appellant and Waconia Farm Supply is the respondent. In A12–2238, Waconia Farm Supply is the appellant and Lyzhoft is the respondent.

2 The Restatement (Third) of Torts: Products Liability sections 1 and 20(b) (1998) expressly extends strict products liability to commercial bailors and lessors, stating that "[o]ne otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another for use" and that "[c]ommercial nonsale product distributers include, but are not limited to, lessors[and] bailors."In *Duxbury v. Spex Feeds, Inc.*, this court observed that, "[s]ince its publication, we have relied on Restatement (Third) of Torts when considering the law of products liability."681 N.W.2d 380, 387 (Minn.App.2004), *review denied* (Minn. Aug. 25, 2004); *see, e.g., Glorvigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 551 (Minn.App.2011) (relying on product-liability comment in third torts restatement), *aff'd*,816 N.W.2d 572 (Minn.2012); *see also Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451, 455 (Minn.2007) (relying on section 1 in third torts restatement on products liability); *see Duxbury*, 681 N.W.2d at 387 (quoting section 20(a) of third torts restatement).

3 Other jurisdictions have extended strict products liability to commercial bailors or lessors based, at least in part, on the Restatement (Second) of Torts section 402A. *See Stewart v. Budget Rent–A–Car Corp.*, 470 P.2d 240, 243 (Haw.1970) (lessors); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769, 777–78 (N.J.1965) (bailors); *Livingston v. Begay*, 652 P.2d 734, 737 (N.M.1982) (lessors); *Francioni v. Gibsonia Truck Corp.*, 372 A.2d 736, 739–40 (Pa.1977) (lessors).

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EXHIBIT E

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United States District Court,
D. Minnesota.

James W. SMITH, Jr., on his own behalf and on behalf of those similarly situated, Plaintiff,
v.
QUESTAR CAPITAL CORPORATION, Yorktown Financial Companies, Inc., and Allianz Life Insurance Companies of North America, Defendants.

No. 12–cv–2669 (SRN/TNL). | Aug. 2, 2013.

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MEMORANDUM OPINION AND ORDER

SUSAN RICHARD NELSON, District Judge.

I. INTRODUCTION

*1 This matter is before the Court on the Motion to Dismiss the Class Action Complaint, [Doc. No. 16], brought by Defendants Questar Capital Corporation, Yorktown Financial Companies, Inc., and Allianz Life Insurance Companies of North America. For the reasons set forth below, the Court grants it in part and denies it in part.

II. BACKGROUND

Plaintiff and putative class representative James W. Smith, Jr. ("Smith") is an investor who resides in Florida. (*See* Compl. ¶ 15 [Doc. No. 1].) Defendant Questar Capital Corporation ("Questar") is a Minnesota corporation with its principal place of business in Minnesota. (*Id.* ¶ 15.)Questar allegedly solicited, offered, and sold securities that were issued by non-party Diversified Business Services & Investments, Inc. ("DBSI") and its subsidiaries and affiliates. (*Id.* ¶ 13.)DBSI is an Idaho corporation, with its principal place of business in Idaho. (*Id.* ¶ 8.) A now-defunct Ponzi scheme, DBSI purported to finance the purchase of real estate ventures through wholly-owned subsidiaries and Special Purpose Corporations. (*Id.* ¶¶ 1, 8.) On February 21, 2008, Smith purchased from Questar a note issued by DBSI 2008 Notes Corporation—a DBSI subsidiary—for $50,000 ("the Smith Note").(*Id.* ¶ 63; Ex. G to Aff. of Daniel E. Gustafson in Supp. of Pl.'s Opp'n to Defs.' Mot. to Dismiss [Doc. No. 30–7].) Smith alleges that from approximately October 16, 2006 until October 16, 2012, members of the putative class purchased or acquired DBSI-issued securities via private placement offerings, similarly offered and sold by Questar. (Compl.¶¶ 10, 50.)

Defendant Yorktown Financial Companies, Inc. ("Yorktown") is an Indiana corporation with its principal place of business in Minnesota. (*Id.* ¶ 18.)Defendant Allianz Life Insurance Companies of North America ("Allianz") is a Minnesota corporation, with its principal place of business in Minnesota.(*Id.*) Smith alleges that according to Questar's regulatory filings with the Financial Industry Regulatory Authority ("FINRA"), Yorktown and Allianz "directly or indirectly control Questar," including Questar's management and policies. (*Id.* ¶¶ 155–56.)

In November 2008, DBSI filed for bankruptcy protection in the District of Delaware. (Compl.¶ 20.) The Bankruptcy Court appointed an Examiner, who filed an Interim Report and a Final Report. (*Id.* ¶ 22; Ex. B to Compl. [Doc. No. 1–2]; Ex. B to Aff. of Anthony N. Cicchetti [Doc. No. 19–2].) The Examiner's Interim Report allegedly focused on DBSI's misuse of proceeds from the DBSI 2008 Notes Corporation offering. (Compl.¶ 23.) The Examiner's Final Report allegedly showed that as early as 2005, DBSI constantly needed new investor funds in order to meet pre-existing obligations. (*Id.* ¶ 24.)

Smith alleges that Questar's due diligence advisors raised questions about the accuracy of DBSI's offering materials and financial statements. (*Id.* ¶ 26.)Alternatively, Smith alleges that the due diligence reports raised certain red flags that should have prompted Questar to undertake its own due diligence.(*Id.*) Based on these reports, Smith alleges that Questar should have realized that DBSI was likely a Ponzi scheme and informed Questar's brokers and

customers of the same. (*Id.* ¶¶ 27–28.)Questar, however, allegedly continued selling DBSI securities and circulating DBSI's private placement memoranda ("PPM") and offering materials. (Compl.¶¶ 36, 38.) In addition, Questar allegedly solicited and made assurances to Smith and members of the putative class that DBSI was a safe and well-established company that would provide reliable returns. (*Id.* ¶ 50.)Relying on Questar's assurances, Smith alleges that he and the putative class members sustained substantial losses in DBSI's now-worthless securities. (*Id.* ¶¶ 64, 84.)Smith alleges that Questar knew—or was deliberately reckless or negligent in not knowing—that their statements were materially false and misleading. (*Id.* ¶ 50.)

***2** On October 18, 2012, Smith filed a Class Action Complaint, alleging the following causes of action: violations of the Minnesota Securities Act under Minn.Stat. §§ 80A.68(1), 80A.68(2), 80A.76(g)(3), 80A.86(3), and 80.76(g)(1) (Counts 1, 2, 3, 6, and 7); common law negligence (Count 4); and common law negligent misrepresentation (Count 5). (Compl.¶¶ 79–157.) On January 2, 2013, Defendants moved to dismiss the Complaint, which Plaintiff opposed on March 4, 2013. (Defs.' Mot. to Dismiss [Doc. No. 16]; Pl .'s Opp'n to Defs.' Mot. to Dismiss [Doc. No. 29].) On April 1, 2013, this Court heard oral argument. (Min. Entry for Mot. Hr'g [Doc. No. 37].)

III. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief."To meet this standard and survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Although a complaint is not required to contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 555). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility." *Braden v. Wal–Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir.2009) (citation omitted). It is not, however, a "probability requirement." *Id.* (citation omitted). Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Twombly,* 550 U.S. at 556 (citation omitted).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."*Iqbal,* 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 556). Several principles guide courts in determining whether a complaint meets this standard. First, the court must take the plaintiff's factual allegations as true and grant all reasonable inferences in favor of the plaintiff. *Crooks v. Lynch,* 557 F.3d 846, 848 (8th Cir.2009). This tenet does not apply, however, to legal conclusions or "formulaic recitation of the elements of a cause of action," and such allegations may properly be set aside. *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 555). In addition, some factual allegations may be so indeterminate that they require "further factual enhancement" in order to state a claim. *Id.* (quoting *Twombly,* 550 U.S. at 557.) Finally, the complaint "should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."*Braden,* 588 F.3d at 594. Evaluation of a complaint upon a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."*Iqbal,* 556 U.S. at 679 (citation omitted). A motion to dismiss a complaint should not be granted unless it appears beyond doubt that a plaintiff can prove no set of facts that would entitle him to relief. *Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir.1994).

B. Materials Considered

***3** A court may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint in deciding a motion to dismiss under Rule 12(b)(6).*Porous Media Corp. v. Pall Corp.,* 186 F.3d 1077, 1079 (8th Cir.1999); *see Piper Jaffray Cos., Inc. v. Nat'l Union Fire Ins. Co.,* 967 F.Supp. 1148, 1152 (D.Minn.1997) (finding that on a motion to dismiss, "the Court simply may not ... resolve factual disputes on the basis of preemptive (and untested) submissions" and may only "consider extra-pleading material necessarily embraced by the pleadings ... and all documents they incorporate by reference").

Both parties have submitted extra-pleading materials and statements in their memoranda. Defendants present public filings, news reports, business articles, and other documents that are not referenced in the Complaint. (*See* Aff. of Anthony N. Cicchetti [Doc. No. 19].) In addition, Defendants' Memorandum includes the Confidential Private

Placement Memorandum for the DBSI 2008 Notes Corporation, dated February 6, 2008 [Doc. No. 19–1]; the Bankruptcy Examiner's Final Report [Doc. No. 19–2]; and the Subscription Agreement between DBSI 2008 Notes Corporation and Plaintiff, dated February 21, 2008 [Doc. No. 19–3]. Plaintiff's Memorandum provides the same PPM [Doc. No. 30–4] and Subscription Agreement [Doc. 30–7], as well as public filings and non-public documents that are not referenced in the Complaint. (*See* Aff. of Daniel E. Gufstafson in Supp. of Pl.'s Opp'n to Defs.' Mot. to Dismiss [Doc. No. 30].)

Here, materials embraced by the Complaint include the PPM for the DBSI 2008 Notes Corporation, the Bankruptcy Examiner's First Interim Report and the Final Report, the Subscription Agreement, and the Notice to Members 03–71 and Regulatory Notice 10–22. The Court considers the PPM because it is referenced in the Complaint and forms the basis of the dispute. (*E.g.*, Compl. ¶ ¶ 11, 33, 38–42, 47, 50–55, 61, 73.) Similarly, the Bankruptcy Examiner's Reports are referenced in the Complaint, (*id.* ¶¶ 23, 24, 25); they form the basis of the dispute; and the First Interim Report is an exhibit to the Complaint [Doc. No. 1–2]. The Court also considers the Subscription Agreement despite its lack of reference in the Complaint, because it forms the basis of the dispute. Finally, the Court considers the Notice to Members 03–71 and Regulatory Notice 10–22 because they are referenced in and attached to the Complaint. (Compl. ¶¶ 104, 107, 129–31; Exs. C and D to Compl. [Doc. Nos. 1–3 and 1–4].) The Court considers these documents without converting the motion to dismiss into a motion for summary judgment. The Court will not consider other statements and materials referenced in the parties' briefing in the context of this Motion to Dismiss.

C. Rule 9(b)

Certain claims that include allegations of fraud must be pled with particularity under Federal Rule of Civil Procedure 9(b). Claims subject to the particularity requirements must be pled to include "such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentations and what was obtained or given up thereby."*Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549 (8th Cir.1997) (citations omitted)."[C]onclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule."*Id.* (citations omitted). As a general matter, the "who, what, when, where, and how" of any fraud claim must be pled in detail. *Id.* at 550 (citations omitted). In the securities fraud context, Rule 9(b) requires that the pleading set forth facts explaining why it is claimed that each of the defendants knew the representations to be untrue or misleading when they were made. *In re Buffets, Inc. Sec. Litig.*, 906 F.Supp. 1293, 1300 (D.Minn.1995). The Court is mindful that the issue here is not whether the plaintiff will prevail at trial, but rather whether he is entitled to proceed with his claims. *In re Digi Intern., Inc. Sec. Litig.*, 6 F.Supp.2d 1089, 1095 (D.Minn.1998).

***4** Defendants argue that Smith's allegations of Questar's omissions or misrepresentations do not meet the heightened pleading standard of Rule 9(b). (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 10–12 [Doc. No. 18].) These alleged omissions or misrepresentations can be categorized as: (1) Questar's alleged failure to heed due diligence advisors or adequately perform due diligence; (2) the DBSI PPM and other offering, sales, and marketing or advertising materials; and (3) assurances that DBSI securities were sound investments. (*Id.* at 10.)

Smith responds that his allegations overcome Rule 9(b) because they detail:

> Who: Questar, controlled by Allianz and Yorktown
>
> What: sold about $20 million in DBSI securities that were part of DBSI's Ponzi scheme to Smith and other investors;
>
> Where: Minnesota
>
> When: Between October 16, 2006 and October 16, 2012 for the putative class; February 21, 2008 for Smith, and 2008 Notes generally, February 6, 2008—the 2008 Notes PPM's date; and
>
> How: via PPM[sic]s rife with material omissions and misrepresentations, and via Questar's due diligence failures.

(Pl.'s Opp'n to Defs.' Mot. to Dismiss at 33–34 [Doc. No. 29].) In addition, Smith cites repeatedly to paragraphs 23 and 25 of the Complaint, in support of his position that the Complaint does specify Questar's "misrepresentations, omissions, and due diligence failures."(*Id.* at 31–32.)

The Court finds that the Complaint pleads with considerable specificity the circumstances of DBSI's fraud, but not that of Questar. Paragraphs 23 and 25 of the Complaint, for example, thoroughly describe the conclusions of the Bankruptcy Examiner's Interim Report about the PPM misstatements

and DBSI's fraudulent activities. (Compl.¶¶ 23, 25.) Smith, however, does not bring this action against DBSI. Where he has sued the instant Defendants, Smith must provide detailed allegations of their fraudulent activities. Smith has not done so here. First, regarding Questar's alleged failure to heed due diligence advisors or adequately perform due diligence, Smith does not specify the contents of any due diligence reports, or when and where they were compiled. [1] At most, Smith alleges that Mick & Associates, P.C. and Buttonwood Investment Services, LLC, "among others," prepared these reports. (*Id.* ¶ 37.)Smith does not sufficiently allege that these reports contained red flags of a Ponzi scheme, or that Questar ignored any such indications. Second, with respect to Questar allegedly distributing, offering, and selling DBSI-issued securities through materially misleading PPMs and marketing materials, Smith does not allege when, where, or by whom the PPM and other materials were transmitted to Smith or putative class members. (*E.g., id.* ¶¶ 38, 42, 61.)Third, with respect to Questar's alleged assurances to Smith and the putative class members about the soundness of DBSI securities, Smith's general allegations do not identify the time, place, or contents of the assurances, or by whom they were made. (*Id.* ¶¶ 50, 83.)For these reasons, Smith's allegations are inadequate to state a claim that Questar is directly liable for fraud.

***5** Accordingly, the Court grants Defendants' motion to dismiss Counts 1, 2, 3, 5, 6, and 7 because they do not meet the heightened pleading standard of Rule 9(b). The Court grants Defendants' motion to dismiss Count 4 for the reasons set forth in Part III(E)(3), as a common law negligence claim is not subject to the heightened pleading standard. Within thirty days of this Order's date, Smith may file an amended complaint that complies with the requirements of Rule 9(b) as set forth above to be viable.

D. Minnesota Securities Act

1. Applicability of the Minnesota Securities Act

Defendants argue that Counts 1, 2, 3, 6, and 7 of the Complaint, which assert claims under the Minnesota Securities Act, should be dismissed for failure to state a claim because the Minnesota Securities Act [2] does not apply. Defendants submit that the allegations do not establish that the offer to sell the Smith Note or the actual sale thereof was made in Minnesota—nor do the allegations establish that the offer to purchase or the actual purchase of the Smith Note was made and accepted in Minnesota. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 12 [Doc. No. 18].) Defendants contend that to the contrary, the Subscription Agreement between Smith and DBSI 2008 Notes Corporation shows that all of the relevant conduct occurred outside Minnesota. (*Id.* at 13.)

Smith responds that Questar, a Minnesota corporation, principally operates out of Minnesota, and upon information and belief, Questar's culpable acts all occurred in Minnesota. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 12 [Doc. No. 29].) In addition, Smith argues that the Subscription Agreement establishes the applicability of Minnesota law, because a Minnesota phone number was listed for the Questar official who approved the offer to Smith, and a Questar employee—then working at the headquarters in Minnesota—authorized the Subscription Agreement and thus extended Smith's offer. (*Id.* at 12–13.)

The Court has reviewed the Subscription Agreement. This document lists a mailing address and telephone number for Smith in Miami, Florida. (Ex. C to Aff. of Anthony N. Cicchetti at 1 [Doc. No. 19–3].) In addition, the document lists Questar as the "broker/dealer" with a Minnesota telephone number and the authorizing signature of an "R. Bourell." (*Id.* at 2.) Further, the Subscription Agreement lists a registered representative at an address in Glenville, North Carolina and an office telephone number in Florida. (*Id.*) From these facts alone, the Court cannot discern where the offer to sell or the sale itself was made, or where the offer to purchase or the purchase itself was made. Discovery is necessary to develop a fair record on whether the Minnesota Securities Act applies, after which Defendants may renew their argument by way of summary judgment, if appropriate. Accordingly, the Court denies Defendants' motion to dismiss Counts 1, 2, 3, 6, and 7 for failure to state a claim under the Minnesota Securities Act.

2. Private Cause of Action under Minn.Stat. § 80A.68

***6** Defendants argue that Counts 1, 2, and 6 of the Complaint, which state causes of action under Minn.Stat. § 80A.68(1), (2), and (3) respectively, should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because private causes of action are unavailable under Minn.Stat. § 80A.68. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 14–15 [Doc. No. 18].)

The Court disagrees. Private causes of action are available under Minn.Stat. § 80A.68, which is the general fraud provision under the Minnesota Securities Act. *See Merry v. Prestige Capital Mkts., Ltd.*, No. 12-cv–1608, 2013 WL

1900628, at *4–*6 (D.Minn. May 7, 2013) (permitting investor plaintiff to amend complaint stating cause of action under § 80A.68, and noting that § 80A.68 is the state analogue to federal Rule 10b–5). Thus, the Court denies Defendants' motion to dismiss Counts 1, 2, and 6 on the asserted ground that private causes of action are unavailable under Minn.Stat. § 80A.68.

3. Secondary Liability Claims

a. Aiding and Abetting under Minn.Stat. § 80A.76(g)(3)

Count 3 of the Complaint asserts a claim against Questar under Minn.Stat. § 80A.76(g)(3) for materially aiding "DBSI's offer and sale of interests in a Ponzi scheme, including, but not limited to, the DBSI 2008 Notes Corporation offering."(Compl.¶ 92.) Defendants argue that Smith fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) because the Complaint does not name DBSI as a defendant or establish DBSI's primary liability under Minn.Stat. § 80A.76 subsections (b) through (f). (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 16 [Doc. No. 18].) Defendants also contend that Smith cannot establish liability under § 80A.76(g)(3) because Questar is a legal entity—not an "individual," as specified under subsection (g)(3).(*Id.*)

Smith responds that the Complaint and the Bankruptcy Examiner's Reports provide thorough detail about DBSI's fraud, which would render DBSI liable under the Minnesota Securities Act. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 27 [Doc. No. 29].) Smith also rejects the proposition that he must name DBSI as a party defendant in order to sue Questar for aiding and abetting. (*Id.*) Finally, Smith notes the scrivener's error in citing § 80A.76(g)(3) and requests leave to amend the Complaint to assert the proper subsection. (*Id.* at 27–28.)

In order to allege a claim against Questar for secondary liability, Smith must first establish primary liability on the part of DBSI. *See Foley v. Allard,* 427 N.W.2d 647, 650 (Minn.1988) (applying the federal three-part test for aiding and abetting claim under Minnesota Securities Act, which requires the "existence of a securities law violation by the primary party, as opposed to the aiding and abetting party"). Although Smith has not pled DBSI's primary liability explicitly, the Complaint extensively describes DBSI's fraudulent activity, as concluded by the Bankruptcy Examiner's Interim and Final Reports. (*E.g.,* Compl. ¶¶ 23, 25.) These allegations, if true, convey DBSI's primary liability on which any secondary liability depends.

*7 Next, the Court rejects Defendants' proposition that Smith must name DBSI as a defendant in order to sue Questar for aiding and abetting DBSI. *See Sheftelman v. N.L. Indus., Inc.,* No. 84–3199, 1985 WL 29951, at *5 (D.N.J. Feb. 1, 1985) (identifying the "need to prove a securities *violation* but in no way indicates that the primary *violator* need be named as a defendant") (emphasis in original). The fact that Smith does not identify DBSI as a defendant does not prevent him from asserting an aiding and abetting claim against Questar.

Finally, the Court agrees that Smith cannot allege Questar's secondary liability under § 80A.76(g)(3) because Questar is not an "individual" as required under this subsection. MINN.STAT. § 80A.76(g)(3). Given what appears to be a scrivener's error, however, the Court grants leave for Smith to amend the Complaint to assert the proper subsection, § 80A.76(g)(4), instead.

Thus, the Court grants Defendants' motion to dismiss Count 3. Within thirty days of the date of this Order, Smith may file an amended complaint that correctly asserts Questar's secondary liability under Minn.Stat. § 80A.76(g)(4).

b. Control Person Liability under Minn.Stat. § 80A.76(g)(1)

Count 7 of the Complaint asserts a claim against Yorktown and Allianz under Minn.Stat. § 80A.76(g)(1) for control person liability. (Compl.¶¶ 154–57.) Defendants argue that Smith fails to state a claim because Smith has not established Questar's primary liability, which is necessary to establish Yorktown and Allianz's secondary liability. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 17 [Doc. No. 18].) Defendants also argue that merely alleging Yorktown and Allianz's control over Questar's management and policies is insufficient pleading. (*Id.*)

Smith responds that he adequately alleges Questar's primary liability under the Minnesota Securities Act. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 24–25 [Doc. No. 29].) Smith also contends that identifying Questar's regulatory admissions that Yorktown and Allianz "directly or indirectly control Questar" and "direct Questar's management and policies" sufficiently puts Defendants on notice at the pleading stage. (*Id.* at 25.)

In order to allege a claim against Yorktown and Allianz for secondary liability, Smith must first establish Questar's primary liability. *See Foley,* 427 N.W.2d at 650. The Court

finds that Smith has not pled Questar's primary liability sufficiently. Smith cites to paragraphs 23, 25, 46, 47, 51, 80, 81, and 88 of the Complaint in support of purportedly detailed allegations against Questar. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 24–25 [Doc. No. 29].) But paragraphs 23, 25, 46, and 51 describe DBSI's fraudulent activities, not those of Questar. Questar's alleged liability is pled only generally in the Complaint. To illustrate:

- Questar failed to detect and disclose [DBSI's accounting hijinx] because Questar ignored its obligations under FINRA Notices.... (Compl.¶ 46.)

*8 - Questar circulated DBSI PPMs and marketing materials to Smith and to members of the putative class. Those documents omitted disclosure of the facts and risks identified ... and were therefore materially false and misleading. (*Id.* ¶ 47.)

- Questar publicly distributed, offered, and sold promissory securities issued by DBSI via materially misleading PPMs and marketing materials. Questar publicly distributed, offered, and sold securities issued by DBSI via misleading omissions contained in the PPMs and marketing materials that Questar disseminated to its brokers and investors. (*Id.* ¶ 80.)

- The omissions were all substantially similar in DBSI PPMs, and are identified herein. (*Id.* ¶ 81.)

- Questar violated the Minnesota Securities Act when Questar circulated to its brokers DBSI promotional materials and PPMs, all the while withholding material risks repeatedly highlighted by due diligence advisors and red flags that should have been apparent to Questar, knowing that its brokers would disseminate these materials to investors. (*Id.* ¶ 88.)

As discussed earlier, Smith's fraud allegations against Questar are subject to the heightened pleading standard. *See supra* Part III(C). These paragraphs do not describe with sufficient particularity Questar's failure to detect and disclose DBSI's fraudulent activities. Nor do they allege when, where, or by whom the PPM and other materials were transmitted to Smith or putative class members. Because Smith has not pled Questar's primary liability sufficiently, his claims against Yorktown and Allianz for secondary liability cannot stand.

The Court notes, however, that had Smith pled Questar's primary liability adequately, his control person liability allegations against Yorktown and Allianz would suffice. *See Antinore v. Alexander & Alexander Servs., Inc.*, 597 F.Supp. 1353, 1359–60 (D.Minn.1984). In *Antinore*, the court noted that plaintiffs "need not plead specific affirmative acts showing actual control of a particular defendant over an alleged principal violator," but it was "necessary that, at the least, defendants be informed whether they are alleged to be primary or secondary violators, as to which primary violator they are allegedly controlling persons and whether they are controlling persons as a result of status or affirmative acts."(*Id.*) The court in *Antinore* held that the plaintiffs' complaint against defendant A & A met these requirements, because it named A & A as a secondary violator, identified the primary violator it allegedly controlled, and identified the relationship upon which control liability was based. (*Id.* at 1960.)Similarly, here, Smith's Complaint names Yorktown and Allianz as a secondary violator ("... Yorktown and Allianz as control persons"); identifies the primary violator it allegedly controlled ("Defendants Yorktown Financial Companies and Allianz Life Insurance Companies of North America directly or indirectly control Questar"); and identifies the relationship upon which control liability was based ("Yorktown and Allianz direct Questar's management and polices"). (Compl.¶¶ 157, 155, 156.) Thus, were Questar's primary liability pled sufficiently, Smith's allegations against Yorktown and Allianz would stand.

*9 For these reasons, the Court grants Defendants' motion to dismiss Count 7 of the Complaint. Within thirty days of this Order's date, Smith may file an amended complaint that sufficiently pleads Questar's primary liability.

4. Availability of Relief

Defendants argue that Smith is not entitled to relief under the Minnesota Securities Act because he has not alleged that he sold the Smith Note. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 18–19 [Doc. No. 18].) Plaintiff responds that he is not required to sell the Smith Note before suing, and that he is entitled to actual damages if he "disposes" of the 2008 Note any time before judgment. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 28–29 [Doc. No. 29].)

The Court agrees with Plaintiff. The Minnesota Securities Act does not require Plaintiff to sell the Smith Note before suing. Indeed, the statute is altogether silent on when a plaintiff must dispose of the security. MINN. STAT. § 80A.76(b)(3) ("Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it, and interest from the date of the purchase, costs,

and reasonable attorneys' fees determined by the court."). To require sale before suit, particularly where no market would exist for an allegedly worthless security, would leave purchasers of securities that cannot be legally sold without a remedy. As long as Plaintiff disposes of the Smith Note before judgment,[3] which he may do by tendering it to Questar, Plaintiff may recover actual damages.

Thus, the Court denies Defendants' motion to dismiss Plaintiff's claims under the Minnesota Securities Act on the asserted ground that Plaintiff has not alleged selling the Smith Note before litigation.

5. Statute of Limitations

Defendants argue that Plaintiff's claims under the Minnesota Securities Act—brought in October 2012—are barred by the two-year statute of limitations. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 19 [Doc. No. 18].) Defendants contend that the statute of limitations began to run upon Plaintiff's receipt of DBSI's PPM in February 2008, and that public documents alleging DBSI's impropriety put Plaintiff on inquiry notice as early as October 2008. (*Id.* at 20–22.)

Smith responds that his claims under the Minnesota Securities Act are not time-barred, because the documents cited by Defendants in support of their statute of limitations argument do not indicate wrongdoing by Questar. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 9 [Doc. No. 29].) Smith submits that the first public documents accusing Questar of wrongdoing were filed less than two years before he began this litigation. (*Id.* at 10.)Smith further contends that whether the two-year statute of limitations has run is a fact issue for the jury, and not for resolution on a motion to dismiss. (*Id.*)

***10** In Minnesota, an action for securities fraud must be brought either two years after discovery of the facts constituting the violation or five years after the violation, whichever is earlier. MINN.STAT. § 80A.76(j)(2). The Court agrees with Smith that the statute of limitations runs from the time that he reasonably should have understood that he had a claim against Questar, because this case names Questar and not DBSI as a defendant. Thus, Smith's receipt of DBSI's PPM and the public documents alleging DBSI's impropriety in 2008 does not time-bar his claims under the Minnesota Securities Act.

The Court also agrees with Smith that the question of whether the two-year statute of limitations has run is not for resolution on Defendants' Motion to Dismiss. *See Joyce v. Teasdale,* 635 F.3d 364, 367 (8th Cir.2011). As a general rule, "the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense."*Id.* (citing *Jessie v. Potter,* 516 F.3d 709, 713 n. 2 (8th Cir.2008)). Here, the Complaint does not establish this defense, because Smith does not allege facts suggesting he understood that he had a claim against Questar beyond the two-year statute of limitations period. Thus, the Court does not resolve the statute of limitations issue for the Minnesota Securities Act claims at this time.

For these reasons, the Court denies Defendants' Motion to Dismiss Plaintiff's claims under the Minnesota Securities Act on the asserted ground that they are barred by Minnesota's two-year statute of limitations.

E. Negligence and Negligent Misrepresentation Claims

1. Choice of Law and Statute of Limitations

Defendants argue that under a choice-of-law analysis, Florida law applies to Plaintiff's negligence and negligent misrepresentation claims. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 23–27 [Doc. No. 18].) Defendants contend that under Florida law, these claims are time-barred by Florida's four-year statute of limitations. (*Id.* at 27–28.)

Plaintiff responds that Minnesota law, not Florida law, applies to his tort claims. Accordingly, he argues that Minnesota's six-year statute of limitations applies and does not bar his claims. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 11 [Doc. No. 29].) Plaintiff also contends that even if Florida law were to apply, Florida's four-year statute of limitations does not bar his negligence and negligent misrepresentation claims because he did not suffer actual damages from Questar's wrongdoing until the DBSI securities became worthless in November 2008.(*Id.*)

The Court declines to analyze choice of law at this time. Plaintiff alleges that the "violations of Minnesota law that give rise to this putative class action occurred in this District."(Compl.¶ 16.) Meanwhile, Defendants allege that Plaintiff, a Florida resident, received and relied on any alleged misrepresentations or omissions in Florida; executed his Subscription Agreement and purchased the Smith Note in Florida; and sustained any injury in Florida. (Defs.' Mem.

of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 23 [Doc. No. 18].) Without discovery and a full record, it is not possible to evaluate which state law should apply to Plaintiff's claims. For example, the Subscription Agreement raises questions about where the offer to sell the Smith Note or the sale itself was made, or where the offer to purchase or the purchase itself was made. *Supra* Part III(D)(1). The Court cannot conduct this fact-intensive inquiry on the motion-to-dismiss record. *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 484 F.Supp.2d 973, 985 n. 7 (D.Minn.2007) (evaluating the sufficiency of Plaintiff's subrogation claim on a motion to dismiss and stating that there is "no need to perform a choice of law analysis at this stage of the proceedings"). Because the Court does not determine whether Minnesota or Florida law applies at this time, it also reserves ruling on the statute of limitations issue with respect to the negligence and negligent misrepresentation claims.

2. Economic Loss Doctrine

***11** Defendants argue that the economic loss doctrine precludes Smith's negligence and negligent misrepresentation claims, because Plaintiff has not alleged separate physical injury or property damage. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 29 [Doc. No. 18].) Plaintiff responds that the economic loss doctrine does not preclude his tort claims because under Minnesota law, the doctrine only bars tort claims in the sale of defective goods, and the doctrine does not apply if the misrepresentation was made "recklessly." (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 36 [Doc. No. 29].) Plaintiff also argues that under Florida law, the doctrine only applies in product liability cases and when the breached duties arise in contract, neither of which is present here. (*Id.*)

The Court need not decide which state's law to apply because the Court finds that the economic loss doctrine would not preclude recovery here under either Florida or Minnesota law. *See Cotton v. Commodore Express, Inc.*, 459 F.3d 862, 864 (8th Cir.2006) (holding that the court was not required to analyze choice of law because the appellees would prevail under the laws of either state alleged to apply). The Supreme Court of Florida recently held that the economic loss rule applies only in the products liability context, and it receded from prior rulings to the extent that they applied the economic loss rule to cases other than products liability. *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So.3d 399, 407 (Fla.2013). Because the instant litigation is not a products liability case, the economic loss rule does not preclude recovery under Florida law.

In Minnesota, the economic loss doctrine is codified at Minn.Stat. § § 604.10–.101 (2012). This statute provides in relevant part: "[e]conomic loss that arises from a sale of goods, between merchants, that is not due to damage to tangible property other than the goods sold may not be recovered in tort."MINN.STAT. § 604.10(b). "Goods" are defined as "tangible personal property." *Id.* § 604.101(c). The Court finds that because investment securities are not tangible personal property, they are not "goods" under Minn.Stat. § § 604.10–.101. Thus, Minnesota's economic loss rule does not preclude Smith's negligence and negligent misrepresentation claims.

3. Pleading Negligence

The parties contest whether Plaintiff has pled the elements of a negligence claim adequately. Such a claim requires Plaintiff to allege: (1) that Questar owed Smith a duty of care; (2) breach of that duty; (3) that breach of the duty proximately caused Smith's injury; and (4) damages.[4] *See Minneapolis Emp. Ret. Fund v. Allison–Williams Co.*, 519 N.W.2d 176, 182 (Minn.1994); *Jackson Hewitt, Inc. v. Kanan*, 100 So.3d 19, 27–28 (Fla.Ct.App.2011) (citing *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003)).

Citing the Complaint's reference to FINRA's Regulatory Notice to Members 03–71 and 10–22, Plaintiff argues that he sufficiently alleged a duty on Questar's part to perform the due diligence that it allegedly failed to do. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 38 [Doc. No. 29]; Compl. ¶¶ 104, 107, 129–31.) These Notices set forth due diligence practices, and they remind broker-dealers of their obligation to conduct a reasonable investigation of the issuer and the securities they recommend. (Exs. C and D to Compl. [Doc. Nos. 1–3 and 1–4].)

***12** Defendants argue that these Notices do not create a duty because they issued after Plaintiff purchased the Smith Note. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 29 [Doc. No. 18].) In addition, Defendants argue that Plaintiff cannot use a regulatory standard to establish a duty of care in a negligence action. (Tr. of Hr'g on Defs.' Mot. to Dismiss at 19 [Doc. No. 39].)

The Court finds that Plaintiff has not identified a legal duty owed by Defendants by relying only upon FINRA's Regulatory Notice to Members 03–71 and 10–22. First, courts have rejected efforts to derive causes of action from securities regulations based on a negligence standard. *See BNP Paribas Mortgage Corp. v. Bank of Am., N.A.*, 866 F.Supp.2d 257, 266 (S.D.N.Y.2012) ("... mere negligent violations of the NYSE [New York Stock Exchange] or NASD [National Association of Securities Dealers] rules are not actionable in federal court; rather, to form the basis for liability in damages, the broker's violations of the rules must be 'tantamount to fraud.' "). Second, Plaintiff argues that Questar "bore a duty to conduct adequate due diligence into DBSI's securities offerings," (Compl.¶ 98), but fails to identify any negligence case finding that a duty of due diligence exists between a broker-dealer and a purchaser of securities. [5] In this heavily regulated area of the law, the Court finds no basis to create a new common law duty. Because Plaintiff's negligence claim lacks support for the existence of such a duty, it fails as a matter of law. For these reasons, the Court grants Defendants' motion to dismiss Count 4 of the Complaint.

4. Pleading Negligent Misrepresentation

The parties contest whether Plaintiff states a claim for negligent misrepresentation. Defendants argue that Questar bore no duty to discover or disclose the omissions in the 2008 Note PPM; Smith inadequately pled reliance; reasonable reliance was impossible; and DBSI's conduct is an intervening cause that precludes proximate cause. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 31–33 [Doc. No. 18].)

Plaintiff responds that he has sufficiently pled Questar's duty to prospective investors and Plaintiff's reliance on Questar's misrepresentation. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 43–44 [Doc. No. 29].) Plaintiff also contends that reasonable reliance was not impossible because Questar did not disclose all material risks adequately, and DBSI's negligence was not an intervening cause that relieved Questar of liability. (*Id.* at 44.)

To state a claim for negligent misrepresentation, Smith must allege: (1) a misrepresentation of material fact; (2) the defendant either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false; (3) the defendant intended to induce another to act on the misrepresentation; and (4) injury resulted to a party acting in justifiable reliance upon the misrepresentation. [6] *Baggett v. Elec. Local 915*, 620 So.2d 784, 786 (Fla.Dist.Ct.App.1993); *see Florenzano v. Olson*, 387 N.W.2d 168, 174 n. 3 (Minn.1986) (in a negligent misrepresentation claim, a plaintiff must show that the defendant "supplie[d] false information for the guidance of others in their business transactions" and in doing so, "fail[ed] to exercise reasonable care or competence in obtaining or communicating the information"). The heightened pleading requirement under Federal Rule of Civil Procedure 9(b) applies to such a claim, whether in Minnesota or Florida. *Trooien v. Mansour*, 608 F.3d 1020, 1028 (8th Cir.2010); *Lamm v. State Street Bank & Trust Co.*, 889 F.Supp.2d 1321, 1332 (S.D.Fla.2012).

***13** The Court finds that Smith's claim for negligent misrepresentation does not meet the heightened pleading standards of Rule 9(b). Like Smith's claims under the Minnesota Securities Act, the negligent misrepresentation claim relies on but does not sufficiently describe (1) Questar's alleged failure to heed due diligence advisors or adequately perform due diligence; (2) the DBSI PPM and other offerings, sales, and marketing or advertising materials; or (3) assurances to investors that DBSI securities were sound investments. *See supra* Part III(C). Rather, Plaintiff premises the negligent misrepresentation claim on largely conclusory allegations, such as:

- Questar negligently omitted to disclose to Plaintiff and all members of the putative class that Questar had not conducted adequate due diligence and that Questar's due diligence had learned of red flags. Questar failed to disclose the problems, their risks or implications to the Plaintiff or to any member of the putative class. (Compl.¶ 144.)
- Questar negligently omitted to disclose to Plaintiff and all members of the putative class that DBSI was nothing more than just another Ponzi scheme. (*Id.* ¶ 146.)
- Questar's negligent omissions were substantially the same to Plaintiff and all putative class members. (*Id.* ¶ 147.)
- These negligent misrepresentations were made regarding the profitability and promise of investing in DBSI notes via the misleading omissions in DBSI PPMs that Questar circulated to Plaintiff and members of the putative class. (*Id.* ¶ 148.)

Such allegations do not satisfy the particularity requirements of Rule 9(b). *See Parnes*, 122 F.3d at 550. Therefore, the Court

grants Defendants' motion to dismiss Count 5. Within thirty days of the date of this Order, Smith may file an amended complaint that complies with the requirements of Rule 9(b) as set forth above.

F. Class Allegations

Finally, Defendants argue that all claims relating to the offer and sale of DBSI securities other than the Smith Note must be dismissed because Plaintiff invested only in his note. (Defs.' Mem. of Law in Supp. of Their Mot. to Dismiss the Class Action Compl. at 33 [Doc. No. 18].) Plaintiff responds that he is not required to invest in all class securities to be a class representative. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 21 [Doc. No. 29].)

The Court agrees with Plaintiff. A class representative "need not have invested in each security so long as the plaintiffs have alleged a single course of wrongful conduct with regard to each security."*In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98-cv4318, 2000 WL 1357509, at *3 (S.D.N.Y. Sept. 20, 2000). Here, Plaintiff has alleged a single course of wrongful conduct with regard to each security. That is, from approximately October 16, 2006 to October 16, 2012, Smith and the putative class members "purchased or acquired securities issued by DBSI ... that, upon information and belief, were offered and sold through promotions, solicitations, or offers made by Defendant Questar."(Compl.¶ 10.) Questar's alleged ignorance of due diligence warnings or its failure to conduct due diligence pertained to all of these securities at issue. (*Id.* ¶ 50.)

***14** The Court notes, however, that to the extent Plaintiff's claims as an individual lack particularity under Rule 9(b), his claims for the putative class do as well. Thus, the Court grants Defendants' motion to dismiss Smith's claims regarding the putative class—not because Plaintiff did not invest each security, but rather, because the fraud allegations of the putative class do not meet the heightened pleading standard. Within thirty days of the date of this Order, Smith may file an amended complaint that complies with the requirements of Rule 9(b) as set forth above.

IV. ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT** Defendants' Motion to Dismiss Plaintiff's Class Action Complaint [Doc. No. 16] is **GRANTED IN PART** and **DENIED IN PART** consistent with this Order:

1. Defendants' Motion to Dismiss Counts 1, 2, 3, 6, and 7 of the Class Action Complaint alleging violations of the Minnesota Securities Act is **GRANTED WITHOUT PREJUDICE.**

2. Defendants' Motion to Dismiss Count 4 of the Class Action Complaint alleging common law negligence is **GRANTED WITH PREJUDICE .**

3. Defendants' Motion to Dismiss Count 5 of the Class Action Complaint alleging common law negligent misrepresentation is **GRANTED WITHOUT PREJUDICE.**

IT IS FURTHER HERBY ORDERED that Plaintiff shall have thirty days from the date of this Order to file an amended complaint.

All Citations

Slip Copy, 2013 WL 3990319

Footnotes

1 For example, Smith alleges, "[u]pon information and belief, Questar's due diligence advisors raised questions about the accuracy of DBSI's offering materials and financial statements. Alternatively, upon information and belief, Questar's due diligence advisors' reports raised certain red flags that should have (but did not) prompt Questar to undertake its own independent due diligence."(Compl.¶ 26.) Allegations pleaded on information and belief usually do not meet Rule 9(b)'s particularity requirement. *See generally*5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1298 (3d ed.2004); 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 9.03[1][g] (3d ed.1997).

The Court considers Smith's argument that he cannot plead the contents of due diligence reports that only Questar likely possesses. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 34 [Doc. No. 29].) Although allegations may be pleaded on information and belief when the facts constituting the fraud are "peculiarly within the opposing party's knowledge,"Fla. *State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 668 (8th Cir.2001), Rule 9(b) may be satisfied "if the

pleader identifies the available information on which the allegation of fraud is founded, as well as the efforts made to obtain additional information."MOORE'S FEDERAL PRACTICE § 9.03[1][g]. Smith has not identified such information or efforts made to obtain additional information in the Complaint. Thus, pleading "on information and belief" is insufficient here.

2 The Minnesota Securities Act applies to the offer to sell or the sale of a security only if "the offer to sell or the sale is made in this state [Minnesota] or the offer to purchase or the purchase is made and accepted in this state [Minnesota]."MINN.STAT. § 80A.87(a).

3 The Court notes that under the Uniform Securities Act, a plaintiff's remedy is limited to either rescission or actual damages, and a plaintiff "is not given the right under this type of statutory formula to retain stock and also seek damages."Uniform Securities Act § 509 (2002), Official Comments 1, 5.

4 The Court need not decide whether Minnesota or Florida applies at this time because the elements for negligence in both states are similar. *See Leonards v. S. Farm Bureau Cas. Ins. Co.*, 279 F.3d 611, 612 (8th Cir.2002) (finding it unnecessary to resolve a choice-of-law conflict when the relevant legal principles were the same in both states at issue).

5 Plaintiff cites *Everest Sec., Inc. v. SEC*, 116 F.3d 1235, 1239 (8th Cir.1997), *SEC v. Current Fin. Serv., Inc.*, 100 F.Supp.2d 1, 14–15 (D.D.C.2000), and *Hanly v. SEC*, 415 F.2d 589, 595–96 (2d Cir.1969) for the proposition that a broker-dealer "who recommends securities must conduct a reasonable investigation regarding that offering and the issuer's representations about it."(Pl.'s Opp'n to Defs.' Mot. to Dismiss at 40 [Doc. No. 29].) These cases, however, do not involve negligence claims.

6 The Court need not decide whether Minnesota or Florida law applies because the elements for negligent misrepresentation in both states are similar. *See Leonards*, 279 F.3d at 612.

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