UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: DEVA CONCEPTS PRODUCTS LIABILITY LITIGATION This Document Relates To: All Cases	**Master File No. 1:20-cv-01234-GHW** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF DEVA CONCEPTS, LLC'S MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

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Defendant Deva Concepts, LLC ("Deva Concepts" or "DevaCurl") submits this Memorandum of Law in support of its Motion to Dismiss the Consolidated Class Action Complaint (the "Complaint" or "Compl.") pursuant to Rules 8(a), 9(b), 12(b)(6), and 12(b)(1) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

This case involves farfetched and impossibly broad allegations regarding *thirty* DevaCurl hair care products, manufactured by Deva Concepts, that Plaintiffs claim all caused personal injuries such as hair thinning, excessive shedding, and scalp irritation. Plaintiffs complain not only of the physical reactions, but also of Deva Concept's allegedly deceptive marketing of the Products as safe and gentle and failure to warn of adverse reactions. But the Complaint suffers from the essential defect that the Rule 12(b)(6) pleading standard is designed to address: it alleges claims that, while they may seem possible at first glance, are certainly not plausible upon deeper inspection. This overarching lack of plausibility is fatal to the Complaint.

Plaintiffs were given ample time to draft a well-pleaded complaint—based on facts that were neither conclusory nor speculative—which plausibly alleges that Plaintiffs have been injured by some wrongful conduct and puts Deva Concepts on notice of the scope of their claims.

Despite dozens of paragraphs in the Complaint purporting to be statements by DevaCurl, during the pre-motion conference Plaintiffs confirmed that their claims are based only on the two representations they allege that they actually read: (1) the statement "100% Sulfate Paraben Silicone Free" and (2) a representation that the Products were formulated specifically for curly hair, which we now know is a reference to the brand name "DevaCurl". In fact, Plaintiffs do not actually allege that these statements are false, but instead these statements amounted to unstated claims that the Products are gentle and non-irritating and safe for curly hair.

But the Complaint lacks the very essential facts that are within Plaintiffs' control, such as whether and when they saw the at-issue statements, when they experienced adverse reactions (and which products they were using at the time of their experiences), and their basis for attributing their adverse reactions to the Products. Instead, Plaintiffs rely entirely on general allegations that fail to raise their claims above a speculative level. They attempt to cover holes in their pleading with citations to mostly disreputable sources that show the potential for a link between certain ingredients and adverse physical reactions, but Plaintiffs fail to allege any facts—like medical diagnoses, test results, articles or studies that establish that the Products' ingredients invariably, ordinarily, or even probably cause physical reactions of the severity or pervasiveness claimed in the Complaint. Meanwhile, Plaintiffs gloss over the fact that every ingredient is listed on the Products' labels and all of the ingredients and concentrations used are considered safe.

In reality, the Products *are* safe. Deva Concepts confirms this routinely in the normal course of its product development and manufacturing, and Deva Concepts re-confirmed this through additional testing in response to complaints like Plaintiffs'. But this is not merely a factual dispute, it is an indication of the Complaints' utter lack of plausibility in the face of contrary facts within the Complaint itself. Indeed, Plaintiffs fail to allege facts necessary to sustain their claims.

In particular, the Complaint is deficient for a number of reasons. First, Plaintiffs fail to allege any actionable misrepresentations, as a reasonable consumer would not be misled by the two representations attributed to Deva Concepts and Plaintiffs fail to plausibly allege that the at-issue "statements" are false. Second, Plaintiffs' fraud-based claims lack the particularity required under Rule 9(b). Third, although Plaintiffs have now disclaimed any reliance on DevaCurl's website, the Complaint relies heavily on the website, which only bely any fraudulent intent or concealment of known risks because they demonstrate DevaCurl's open, transparent, and public response to consumer complaints. Fourth, Plaintiffs' negligence claims fail because of Plaintiffs'

overarching failure to plausibly allege that the Products caused their reactions. Plaintiffs also fail to adequately plead a price premium theory of injury, lack standing to sue for Products they never purchased, and lack standing to seek injunctive relief. On tops of these crucial shortcomings, Plaintiffs' state-specific claims fail for a myriad of additional reasons.

FACTUAL BACKGROUND

I. A Viral Social Media Campaign is Launched Against DevaCurl

This case begins with a viral social media campaign launched against DevaCurl in August 2019. Compl. ¶ 148. A hair stylist and social media influencer—not a named Plaintiff in this case—"stopped using the Products and told her customers and followers to do the same" after she allegedly experienced "hair loss, hair damage and thinning, balding, excessive shedding, and scalp irritation." *Id.* The Facebook group she started on this topic amassed 60,000 members. *Id.* at ¶ 149. The campaign spread, with a second social media influencer posting a YouTube video titled "Why I Stopped Using DevaCurl," which has amassed close to three million views. *Id.* at ¶ 151; *see also id.* at ¶ 150, n.60 (alleging that Instagram hashtag #recalldevacurl appears in over 1,000 posts). The media widely reported on these viral social media campaigns[1], and the filing of class action lawsuits across the country followed shortly thereafter—culminating in the Consolidated Class Action Complaint at issue here.

II. Deva Concepts Responds to Customer Complaints by Conducting Additional Independent Testing, Providing Transparency into Product Development and Ingredients, and Offering Extra Resources and Support to Customers

Deva Concepts has taken several concrete and immediate steps in response to customer complaints. First, on top of the rigorous testing performed on DevaCurl Products as a matter of course, Deva Concepts commissioned independent testing to confirm that none of the Products

[1] *See id.* at ¶¶ 18 n.17 (ABC Eyewitness News story), 19 n.19 (article on Refinery29), 127-130 (*The New York Times* article), 149 n.58 (ABC Action News story).

could cause the adverse reactions that have been alleged.[2] Second, although every Product has an ingredient panel on the label, Deva Concepts launched the "Facts about DevaCurl" website to provide additional transparency into the Products' ingredients, formulations, testing, manufacturing process, safety standards, packaging, fragrances, and compliance with standards and recommendations issued the FDA, the US Cosmetic Ingredient Review, the EU Scientific Committee on Consumer Safety, the International Fragrance Research Association, and Health Canada. *See* https://www.factsaboutdevacurl.com/us/frequently-asked-questions (cited at Compl. ¶ 11 n.8) (last visited Nov. 12, 2020). In addition, the website provides resources for customers such as a "Curl Care Community" contact number, answers questions regarding common hair issues, and introduces the "DevaCurl Expert Curl Council"—which is comprised of "[l]eading professionals in dermatology, trichology, psychology and cosmetology" to "provide their expertise on curly hair and scalp health." *See* https://www.factsaboutdevacurl.com/us (cited at Compl. ¶ 126 n.45) (last visited Nov. 12, 2020).

In addition to the "Facts About DevaCurl" website created specifically to address customer concerns, DevaCurl also offers several sources of information on its main website, devacurl.com. As Plaintiffs point out in the Complaint, the devacurl.com website informs consumers, among other things:

- That some Products contain synthetic fragrances, which, although some ingredients may be considered allergens, are (a) compliant with the International Fragrance Research Association and other global safety standards, (b) in minimal concentrations, and (c) subject to extensive testing, such as a human repeat patch testing (which reveals no potential for skin irritation or allergic contact sensitization), microbiological testing (which ensures that the preservatives keep the Products safe from bacterial contamination), ocular tests (which make sure that the Products' formulas are not harmful to the eyes), and stability tests (which place the formulas in extreme environmental conditions for extended periods

[2] *See* https://www.factsaboutdevacurl.com/us/frequently-asked-questions (cited at Compl. ¶ 11 n.8) (section on "testing") (last visited Nov. 12, 2020); https://www.devacurl.com/us/curl-101/product-philosophy (cited at Compl. ¶ 101(a) n.26) (section on "extensive product testing") (last visited Nov. 12, 2020).

of time to confirm that the Products will maintain their intended physical, chemical, and microbial properties throughout their shelf life)[3];

- That curly hair is prone to breakage if damaged (and the myriad reasons why hair might be damaged, including exposure to heat, chemicals, extreme temperatures, hard water, age, stress, and hormonal changes)[4];

- That certain amounts of shedding are normal, and that the Products do not have the capacity to cause "hair loss"[5]; ways to lessen shedding; and that customers with concerns about shedding should consult a dermatologist[6].

As these concrete, public actions make clear, Deva Concepts is not ignoring, concealing, or hiding from the complaints raised by consumers like Plaintiffs. *See* https://www.devacurl.com/us/deva-community-statement (cited at Compl. ¶ 18 n.18) (detailing the rigorous and extensive testing that the Products haven undergone since inception and explaining that, in response to customers, Deva Concepts has "conducted additional testing at the manufacturer and warehouse level" and has "worked with an independent third-party toxicologist to verify the safety of these formulas," concluding that "[a]ll these tests verified there are no safety issues with our products"). Deva Concepts has not recalled any Products or warned customers that their Products cause the adverse reactions Plaintiffs alleged in the Complaint, because Deva Concepts' extensive investigation has not revealed any evidence to support taking these steps. *See* Compl. ¶ 155; https://www.factsaboutdevacurl.com/us/frequently-asked-questions (cited at Compl. ¶ 11 n.8) (section titled "general" under "are you considering a recall?") (last visited Nov. 13, 2020).[7]

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[3] *See* https://www.devacurl.com/us/curl-101/curl-knowledge/scent-sitivity (cited at Compl. ¶ 16 n.13) (last visited Nov. 13, 2020).
[4] *See* https://www.devacurl.com/us/curl-101/curl-knowledge/break-breakage (cited at Compl. ¶ 17 n.14) (last visited Nov. 13, 2020).
[5] *See* https://www.devacurl.com/us/curl-101/curl-knowledge/hair-loss (cited at Compl. ¶ 17 n.15) (last visited Nov. 13, 2020).
[6] *See* *https://www.devacurl.com/blog/hair-shedding-101/* (cited at Compl. ¶ 17 n.15) (last visited Nov. 13, 2020).
[7] As publicized on its website, Deva Concepts reformulated the preservatives in several Products in the past year to improve quality, enhance the Products' performance, comply with regulatory changes, and/or respond to consumer preferences. *See* https://oliahnaturals.com/devacurl-lawsuit-

III. Plaintiffs' Allegations in the Complaint

The factual allegations in the Complaint relate almost entirely to the negative publicity and social media backlash against DevaCurl, along with a litany of other claims that are implausible, unsubstantiated or unspecific to either DevaCurl or Plaintiffs themselves. *See e.g.*, *id.* at ¶ 14, n. 12 (claiming that Iodopropynyl Butylcarbamate is a human carcinogen but the source cited, a skincare company that uses "organic and wildcrafted ingredients" (Annmarie Skin Care) says no such thing); *id.* at ¶¶ 116-118 (relying on the Environmental Working Group to substantiate medical claims about cosmetic ingredients). In fact, of the 612 paragraphs in the Complaint, only about 60 relate directly to one of the 12 named Plaintiffs or to particular facts surrounding their purchases, use, or alleged adverse reactions. *See id.* at ¶¶ 33-93.[8] And those allegations that do relate specifically to Plaintiffs are boilerplate, repetitive, and spartan. *Id.* The only details directly related to each named Plaintiff are (1) the date range in which they purchased DevaCurl products (stated in terms of years, or month and year); (2) the states in which Plaintiffs live; (3) the states and/or retailers where they purchased the Products; (4) a list of Products purchased; and (5) which reactions, from a standard set of adverse reactions, the Plaintiffs allegedly experienced. *Id.*

Most importantly, the Complaint identifies only one specific marketing claim that each Plaintiff viewed: "100% Sulfate Paraben Silicone Free."[9] *See id.* at ¶¶ 35, 40, 45, 50, 55, 60, 65,

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reformulation-after-hair-scandal/ (cited at Compl. ¶ 13 n.9). Plaintiffs do not allege that the replaced ingredients were ever concealed or that Deva Curl failed to list these ingredients directly on the Products' labels.

[8] Significantly, the lack of Plaintiff-specific allegations in the Complaint comes nearly eight months after the first class action complaint was filed (*Dixon, et al. v. Deva Concepts, LLC*, Case No. 1:20-cv-1234 (Feb. 20, 2020); nearly four months after the initial deadline for filing a consolidated complaint (*see* ECF #36 (noting that the initial consolidated complaint deadline was June 5, 2020)); and after at least two additional extensions of Plaintiffs' deadline in order to finish "vetting" plaintiffs (*see* ECF #42, 68-3; Transcript of Teleconference, August 20, 2020, 5:9-20. attached as Exhibit B to the January 28, 2020 Certification of Keith E. Smith.

[9] Plaintiffs also claim that the Products' packaging represented that the Products were formulated specifically for curly hair, which constituted an affirmative misrepresentation, but Plaintiffs do not allege the specific language they are relying on. *See, e.g.*, Compl. ¶ 35 ("The packaging of the

70, 75, 80, 85, 90. At the December 22, 2020 Pre-Motion Conference, Plaintiffs' counsel confirmed that, in addition to the 100% claim, the only other affirmative misrepresentation at issue in this case is "[t]he name of the product itself, DevaCurl." *See* Transcript of Pre-Motion Conference, December 22, 2020, 20:10-21:2, attached as Exhibit B to the January 28, 2020 Certification of Keith E. Smith.[10]

With regards to their concealment claims, Plaintiffs allege that the Products "have the propensity to cause the adverse reactions detailed herein" but that Deva Concepts "made material omissions by failing to disclose the known risks of using the Products regularly." *Id.* at ¶¶ 105, 107. However, the Complaint lacks any plausible theory as to how the Products could have caused the adverse reactions Plaintiffs allege. To the contrary, the Complaint suggests other possible causes of consumers' alleged personal injuries. *See id.* at ¶ 153 (quoting negative consumer complaints that also identify gluten allergy (p. 40), menopause (p. 42), hard water (p. 44), age (p. 44), infrequent washing (p. 46), and the "Curly Girl Method"[11] in general (pp. 40, 43) as potential causes of adverse reactions). Moreover, Plaintiffs implicitly ask the Court to infer that Deva Concepts had knowledge that its Products caused hair loss and scalp irritation based exclusively on complaints lodged with the FDA and posted on social media. *Id.* at ¶¶ 18, 154.

Products Plaintiff Baldyga purchased contained the representation, among others, that they were "100% Sulfate Paraben Silicone Free" and formulated specifically for curly hair.").

[10] Although the Complaint is littered with other statements Deva Concepts allegedly made throughout the life of the company, Plaintiffs never allege that they actually viewed any of them. See e.g., id. at ¶¶ 7, 97, 133 (image of one Product's bottle). In fact, the Complaint references dozens of quotations from the DevaCurl website, yet not a single Plaintiff is alleged to have visited the DevaCurl website or viewed any of the statements published there, or elsewhere. See, e.g., id. at ¶¶ 2, 6, 7, 96, 99, 101(a-e). Indeed, Plaintiffs' counsel confirmed, in response to pointed questions from the Court, that although the Complaint contains numerous other statements from Deva Concepts' marketing and from Deva Concepts' websites, Plaintiffs are not claiming that they saw or relied on any statements other than (1) the 100% claim and (2) the name "DevaCurl" itself. *See* Ex A to the Smith Cert. at 21:4-22:13.

[11] *See* https://www.nytimes.com/2020/04/01/style/deva-curl-hair-loss.html (describing the "Curly Girl Method" of using just conditioner and gel) (cited at Compl. ¶ 127, n.46).

Plaintiffs further allege that Deva Concepts misrepresented the Products as gentle (a claim that no Plaintiff is alleged to have viewed) and "failed to disclose the harmful ingredients contained in its Products," but the Complaint ignores that the Products' labels contain an ingredient list, and Plaintiffs do not identify any ingredients that were erroneously or deliberately excluded from the ingredient lists. *Id.* at ¶¶ 126, 132. In addition, Plaintiffs allege that Deva Concepts failed to warn consumers of the risk of adverse reactions after using the Products, and they take issue with sections of the DevaCurl website that address shedding without warning consumers of the risk of adverse reactions, but they do not allege that any of them read these statements. *Id.* at ¶¶ 132-40.

Plaintiffs purport to bring this action on behalf of themselves and a putative class of "all persons who purchased Defendant's Products within the United States (the 'Nationwide Class')" as well as State Classes consisting of "all persons who Purchased Defendant's Products" in each of the following states: California, Florida, Georgie, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, New York, and Pennsylvania, respectively. *Id.* at ¶¶ 179-80. Plaintiffs assert claims for personal injuries and economic losses under a price premium theory of damages. *Id.* at ¶¶ 27, 111, 262, 338. In addition to compensatory, statutory, and punitive damages, Plaintiffs seek restitution and injunctive relief. *Id.* WHEREFORE Clause at ¶¶ d-g.

IV. Procedural History

The first class actions alleging claims of hair loss and scalp damage were filed against Deva Concepts on February 10, 2020, in the Southern District of Florida and the Central District of California. *See Bransky v. Deva Concepts, LLC*, No. 20-cv-20604 (S.D. Fla. Feb. 10, 2020) and *Airoso v. Deva Concepts, LLC*, No. 20-cv-1289 (C.D. Cal. Feb 10, 2020). The third lawsuit was filed in the Southern District of New York ("SDNY") on February 12, 2020, and assigned to this Court. *See Dixon v. Deva Concepts, LLC*, No. 1:20-cv-01234. Ten other class actions alleging substantially similar claims of hair loss and scalp damage against Deva Concepts were filed within

the next several days. Since then, the first-filed actions in Florida and California were dismissed, and a number of other actions across the country were either voluntarily dismissed or transferred to the SDNY. The plaintiffs ultimately filed a joint stipulation with DevaCurl seeking to consolidate all pending class actions in the SDNY before this Court. *See Dixon*, No. 1:20-cv-01234, at Dkt. No. 25. On April 21, 2020, the Court entered the Stipulation to Consolidate eight related actions, under the caption *In re: Deva Concepts Products Liability Litigation* and master file number 1:20-cv-01234. *Id.* This Order gave Plaintiffs 45 days to file a consolidated amended complaint. *Id.*

On June 8, 2020, the Court approved a stipulation to extend the deadline for Plaintiffs to file a consolidated amended complaint until 30 days after the Court ruled on an anticipated motion to appoint interim lead counsel. *Id.* at Dkt. No. 42. On July 30, 2020, the Court granted a motion to appoint interim lead counsel. *Id.* at Dkt. No. 66. On August 20, the Court approved a stipulation to extend Plaintiffs' deadline to file a consolidated amended complaint until September 28, 2020. *Id.* at Dkt. No. 74. On September 22, 2020, the Court approved a stipulation to extend Plaintiffs' deadline until October 2, 2020. *Id.* at Dkt. No. 76. The Consolidated Amended Complaint was filed on October 2, 2020 (Dkt. No. 77) and amended on October 6, 2020 (Dkt. No. 79), nearly eight months after the initial class action complaints were filed.

The Court granted Deva Concepts' request to file a motion to dismiss during a Pre-Motion Conference on December 22, 2020. *Id.* at Dkt. No 93.

LEGAL STANDARDS

I. Rules 8(a) and 12(b)(6)

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain sufficient facts to place a defendant on notice of the scope of the claims against it. *See also Miller v. Hyundai Motor Am.*, 2016 U.S. Dist. LEXIS 133668, at *45 (S.D.N.Y. Sep. 28, 2016). At a

minimum, a complaint must give a defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Littlejohn v. City of New York*, 795 F.3d 297, 309 (2d Cir. 2015) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 507 (2002)).

To meet this standard and survive a motion to dismiss under Rule 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007). Although all allegations of material fact are taken as true, *Silverman v. Teamsters Local 210 Affiliated Health & Ins. Fund*, 761 F.3d 277, 284 (2d Cir. 2014), those factual allegations "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Conclusory allegations are not entitled to a presumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The "practical significance" of requiring a plaintiff to plead "something beyond the mere possibility" of proving the elements of their claim is to prevent "a potentially massive factual controversy" from needlessly proceeding beyond the pleading stage, which is "the point of minimum expenditure or time and money by the parties and the court." *Twombly*, 550 U.S. at 557-58.

II. Rule 9(b)

When alleging a fraud-based claim, "in conjunction with the facial plausibility standard of Rule 12(b)(6), Plaintiffs must satisfy the heightened pleading standard set forth in Rule 9(b)." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 171 (2d Cir. 2015). Under Rule 9(b), parties must state the "circumstances constituting fraud . . . with particularity." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). "It is well settled that claims sounding in fraud must allege at minimum all essential facts that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue." *Dicicco v.*

PVH Corp., 2020 U.S. Dist. LEXIS 160465, at *6-7 (S.D.N.Y. Sep. 2, 2020) (internal quotation marks and citations omitted)). "Allegations that are conclusory or unsupported by factual assertions are insufficient." *ATSI Commc'ns Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007).

ARGUMENT

I. The Complaint Fails to Allege Any Actionable Misrepresentations

A. Plaintiffs Can Assert Claims Only for Statements They Actually Viewed, and Those Statements are Not False or Misleading.

Plaintiffs must have read a statement to plausibly allege that they were misled by it or that it formed the basis of their bargain. *See, e.g.*, *In re GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 322 (S.D. Ill. 2007) (under the UCC, "an express warranty consists of all of a seller's affirmations of fact and promises relating to goods that become part of the basis of the bargain"). Accordingly, Plaintiffs cannot sustain their claims to the extent they are premised on statements that Plaintiffs do not allege they ever read. [12] Thus, the two marketing claims that Plaintiffs allege

[12] This principle applies to claims for all eleven states at issue, for example:

- negligent misrepresentation; *see, e.g.*, *Berarov v. Archers-Daniels-Midland Co.*, 2019 U.S. Dist. LEXIS 10169, at *25 (N.D. Ill. Jan. 22, 2019) (negligent misrepresentation claim dismissed for failure to allege reliance where plaintiffs do not allege they actually read the misrepresentations); *Chavez v. Church & Dwight Co., Inc.*, 2018 WL 2238191 at *11 (N.D. Ill. May 16, 2018) ("By failing to allege that he read the statements on [defendant's] website, there is no basis to conclude that [plaintiff] relied on them in purchasing [the product] or that they induced him to purchase the [product]"); *Gillan v. Wright Med. Tech. Inc.*, 396 F. Supp. 3d 844, 849 (E.D. Mo. 2019) (dismissing negligent misrepresentation claim "because plaintiff did not plead the specific statements that induced plaintiff 'to justifiably rely' to his detriment"); *Dix v. Nova Benefit Plans, LLC*, 2015 U.S. Dist. LEXIS 190409, at *13 (C.D. Cal. Apr. 28, 2015) ("California law is clear . . . that both fraud and negligent misrepresentation require 'justifiable reliance on the representation, and resulting damage.'"); *Boodram v. Coomes*, 2015 WL 1248809, at *6 (W.D. Ky. Mar. 18, 2015) (Under Kentucky law, both negligent misrepresentation and fraud require Plaintiffs to prove reliance on the false statement and injuries resulting from that reliance); *Todorovich v. Accrediting Bureau of Health Educ. Sch., Inc.,* 2017 WL 7726705, at *5 (S.D. Fla. July 24, 2017) (dismissing negligent misrepresentation claim because "Plaintiff does not allege she ever reviewed the alleged misrepresentations, let alone relied on them"); *Kaufman v.*

I-Stat Corp., 165 N.J. 94, 109 (2000) (dismissing plaintiff's negligent misrepresentation and common-law fraud claims because the plaintiff "provided no evidence that she had read the allegedly fraudulent statements of the defendants on which she later based her fraud and negligent misrepresentation claims" and concluding "[t]he actual receipt and consideration of any misstatement remain central to the case of any plaintiff seeking to prove that he or she was deceived by the misstatement or omission. The element of reliance is the same for fraud and negligent misrepresentation"); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 90-91 (N.D.N.Y. 2000) (dismissing negligent misrepresentation claim because the plaintiff did not allege her husband actually relied on an advertisements or representations by the defendant and thus "[a]bsent evidence of reliance, Plaintiffs' cause of action for negligent misrepresentation necessarily must fail"); *Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 923 (8th Cir. 2004) (applying Minnesota law and dismissing plaintiff's negligent misrepresentation claims because she could not prove that the decedent actually "read and relied upon the alleged misrepresentations"); *Hebert v. Vantage Travel Serv.*, 444 F. Supp. 3d 233, 247 (D. Mass. 2020) (plaintiff must plead justifiable reliance on alleged negligent misrepresentation); *Home Depot U.S.A., Inc. v. Wabash Nat. Corp.*, 724 S.E. 2d. 53 (Ga. Ct. App. 2012) (reasonable reliance element of claim); *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 277 (Pa. 2005) (noting element of justifiable reliance).

- violation of consumer protection statutes; *see, e.g.*, *Craggs v. Fast Lane Car Wash & Lube, L.L.C.*, 402 F. Supp. 3d 605, 611 (W.D. Mo. 2019); *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 393 F. Supp. 3d 745, 757-58 (N.D. Ill. 2019) (dismissing ICFA claim where plaintiffs did not read the allegedly offending label); *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 927 (2007) ("plaintiffs must prove that each and every consumer who seeks redress actually saw and was deceived by the statements in question"); *Miller v. Hyundai Motor Am.*, 2016 U.S. Dist. LEXIS 133668, at *46 (S.D.N.Y. Sep. 28, 2016) ("To properly allege causation [for a GBL § 349 claim], a plaintiff must state in his complaint that he had seen the misleading statements of which he complains before he came into possession of the products he purchased."); *Darisse v. Nest Labs, Inc.*, 2016 U.S. Dist. LEXIS 107938, at *29 (N.D. Cal. Aug. 15, 2016) (noting the reliance requirement for California consumer protection claims); *Perisic v. Ashley Furniture Indus.*, 2018 WL 3391359, at *6 (M.D. Fla. June 27, 2018) (holding that plaintiff could not establish causation because she did not review the website or read either the hangtag or label prior to deciding to purchase the product); *Edlow v. RBW, LLC*, 688 F.3d 26, 39 (1st Cir. 2012) (plaintiff must plead reasonable reliance); *Tiismann v. Linda Martin Homes Corp.*, 281 Ga. 137, 138, 637 S.E.2d 14, 16 (2006) (statute requires reliance); *Kern v. Lehigh Valley Hosp., Inc.*, 108 A.3d 1281, 1290 (Pa. Super. 2015) (plaintiff must show justifiable reliance).
- common law fraud; *see, e.g.*, *Zaccarello v. Medtronic, Inc.*, 38 F. Supp. 3d 1061, 1071 (W.D. Mo. 2014) ("Plaintiff provides detailed allegations on studies, journal articles, investigations, and media reports, but he fails to identify (among other things) the particular misrepresentations and knowingly false statements that were made to him and his physician."); *Dix*, 2015 U.S. Dist. LEXIS 190409, at *13; *In re Sahlen & Assocs., Sec. Litig.*, 773 F. Supp. 342, 371 (S.D. Fla. 1991) (dismissing fraud claim where "Plaintiffs . . . have not stated which of them read and relied on which particular statements made by Defendants."); *Boodram* 2015 WL 1248809, at *6 (Under Kentucky law, both negligent misrepresentation and fraud require Plaintiffs to prove reliance on the false statement and

injuries resulting from that reliance); *Kaufman*, 165 N.J. at 109; *In re Ford Fusion & C-Max Fuel Econ. Litig.*, 2015 U.S. Dist. LEXIS 155383, at *56 (S.D.N.Y. Nov. 12, 2015) (citing *In re Fritz-lay N. Am., Inc. All Natural Litig.*, 2013 U.S. Dist. LEXIS 123824 (E.D.N.Y. Aug. 29, 2013); *Villa Lara v. LG Elecs. U.S.A.*, Inc., 2018 WL 3748177, at *4 (D. Minn. Aug. 7, 2018) (dismissing fraud claim where complaint failed to specify the how, when, or where plaintiff viewed or relied on alleged misrepresentations); *In re Lupron Mktg. & Sales Practices Litig.*, 2004 U.S. Dist. LEXIS 18512, at *13-14 (D. Mass. Sep. 16, 2004) (dismissing common law fraud claim for failure to plead reliance); *Home Depot U.S.A., Inc. v. Wabash Nat. Corp.*, 724 S.E. 2d. 53 (Ga. Ct. App. 2012) (justifiable reliance element of claim); *Ross v. Foremost Ins. Co.*, 998 A.2d 648, 654 (Pa. Super. 2010) (noting justifiable reliance as element of claim).

- breach of express warranty; *see, e.g.*, *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 86 (Mo. Ct. App. 2011) ("Missouri law is clear that while a brochure, catalog, or advertisement may constitute part of an express warranty, that catalog, advertisement, or brochure must have at least been read by the party claiming the express warranty."); *Nickerson v. Goodyear Tire & Rubber Corp.*, 2020 U.S. Dist. LEXIS 155176, at *12-13 (C.D. Cal. June 3, 2020) ("[W]here, as here, 'the parties are not in privity, 'California law requires a showing that a plaintiff relied on an alleged warranty.'"'); *Royal Typewriter Co. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1101 (11th Cir. 1983) ("The requirement that a statement be part of the basis of the bargain is essentially a reliance requirement" and the "absence of reliance will negate the existence of an express warranty."); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 501 (W.D. Pa. 2012) (holding that "[a]bsent a demonstration that a promise or affirmative statement was made, how or by whom the promise was made, or what was in fact promised, a claim for breach of express warranty is not sufficiently pled" and explaining that "a promise is the 'basis of the bargain if the plaintiff can prove that she read, heard, saw or knew of the advertisement containing the affirmation of facts or promise.'"); *Payne v. Biomet, Inc.*, 2019 U.S. Dist. LEXIS 111012, at *10 (D.N.J. July 2, 2019) ("As to the 'basis of the bargain' element, the plaintiff must allege that she 'read, heard, saw or knew of the advertisement containing the [express warranty]' when choosing to use the product"); *Oden v. Bos. Sci. Corp.*, 330 F. Supp. 3d 877, 895 (E.D.N.Y. 2018) (dismissing breach of express warranty claim because "the Complaint is devoid of any facts that would permit the inference that Plaintiff actually read these statements and directly relied upon them when making the decision to utilize Defendant's product. In addition, there are no facts illustrating that Plaintiff's physicians ever reviewed the statements contained on Defendant's website or those set forth in the product brochure prior to making the decision to recommend use of the [product]. Without such allegations, any purported claim that such reliance existed is implausible"); *Reichel Foods, Inc. v. Proseal Am., Inc.*, 2020 U.S. Dist. LEXIS 226932, at *14 (D. Minn. Dec. 3, 2020); *Hebert v. Vantage Travel Serv.*, 444 F. Supp. 3d 233, 246 (D. Mass. 2020) (plaintiff must plead reliance on alleged warranty); *Webb v. Volvo Cars of N.A., LLC*, 2018 U.S. Dist. LEXIS 49095, at *19 (E.D. Pa. Mar. 26, 2018) ("Where an express warranty claim is based on advertisements, a plaintiff must allege that she saw or heard, and also believed, the allegedly false advertisements in order to satisfy her obligation to allege that advertisements formed the basis of the bargain.").

that they actually read are the only potentially actionable representations in this case: (1) "100% Sulfate Paraben Silicone Free" and (2) a representation that the Products were formulated specifically for curly hair, which we now know is a reference to the brand name "DevaCurl." *See* Compl. ¶¶ 35, 40, 45, 50, 55, 60, 65, 70, 75, 80, 85, 90.[13] Plaintiffs do not allege that they ever saw any of the other representations referenced in the Complaint, or that they ever visited the DevaCurl website, where most of the other representations cited in the Complaint were published. As a result, the "100%" claim and the claim that the Products were formulated specifically for curly hair, or the "DevaCurl" name, are the only alleged misrepresentations that can support Plaintiffs' causes of action.

However, the Complaint lacks any plausible allegation that either claim is false or misleading. First, Plaintiffs do not allege that the 100% statement is false.[14] Instead, Plaintiffs seek to argue that the 100% claim is misleading because it suggests that the Products are generally safe or lack any other potentially harmful ingredients, those are simply not actionable promises or representations in this case. *See, e.g.*, *McGee v. S-L Snacks Nat'l*, 982 F.3d 700 (9th Cir. 2020) ("A plaintiff, however, must do more than allege that she 'did not receive the benefit she thought

[13] Although Plaintiffs generally allege that they viewed these two representations, they do not explicitly base any of their causes action on them. *See* Compl., ¶¶ 197-98 (MMWA); ¶ 272 (fraud); ¶¶ 285, 292 (negligent misrepresentation); ¶¶ 306, 312 (breach of express warranty); ¶ 333 (breach of implied warranty); ¶ 352 (CLRA); ¶¶ 367-78 (CA FAL); ¶ 390 (CA UCL); ¶ 408 (FDUTPA); ¶ 423 (Georgia UDTPA); ¶ 436, 450 (ICFA); ¶ 462 (KY CPA); ¶ 479 (MA CPA); ¶ 495 (MN CFA); ¶ 506 (MN UDTPA); ¶ 521 (MN UTPA); ¶ 531 (MN False Statement in Advertisement Act); ¶ 545 (MMPA); ¶ 559 (NJ CFA); ¶¶ 566-81 (NY GBL § 349); ¶ 586 (NY GBL § 350); ¶ 603 (PA UTPA).

[14] In cases involving an actionable "100%" claim, the plaintiffs have some basis for alleging that the "100%" claim is false or misleading, most commonly because the product contains an ingredient that contradicts the claim. *See, e.g.*, *Tyman v. Pfizer, Inc.*, 2017 U.S. Dist. LEXIS 212879, at *6 (S.D.N.Y. Dec. 27, 2017) (alleging that "100% Natural" claim is a "statement of fact" that is false because the products "contain ingredients that are artificial, synthetic, or otherwise highly or chemically processed"); *Rojas v. Gen. Mills, Inc.*, 2014 U.S. Dist. LEXIS 41315, at *1 (N.D. Cal. Mar. 26, 2014) (alleging that "100% NATURAL" claim "is deceptive and misleading because of the alleged presence of genetically modified organisms ('GMOs') and other synthetic ingredients").

she was obtaining.' . . . The plaintiff must show that she did not receive a benefit for which she actually bargained."). Stating that the Products are free of parabens, sulfates, and silicone does not represent anything else about the rest of the ingredients in the Products. Thus, Plaintiffs cannot sustain a claim based on an assumption that the 100% claim meant, for example, that the Products did not contain other undesirable ingredients, like formaldehyde donors, especially where all of the ingredients are listed on the bottle. *See id.* ("Although [plaintiff] may have assumed that Pop Secret [popcorn] contained only safe and healthy ingredients, her assumptions were not included in the bargain, particularly given the [other] labeling disclosure").

In addition, the Complaint lacks any plausible allegation showing that the brand name "DevaCurl" or any general representation that the Products were formulated specifically for curly hair was false, misleading, or constituted a warranty. *See Lisowski v. Henry Thayer Co., Inc.*, 2020 U.S. Dist. LEXIS 214247, at *17 (W.D. Pa. Nov. 17, 2020) (citing cases and holding that "[t]he minimal case law, addressing the issue of whether a trademark can create an express warranty, uniformly holds that a trademark cannot create an express warranty."). Plaintiffs want the Court to infer that the name "DevaCurl" contains an implicit representation about quality or safety, but the Complaint lacks any reasonable basis for drawing any such inference. Under Plaintiffs' logic, the name "Diet Coke" would represent that the drink can help dieters lose weight, a claim that has been repeatedly rejected by courts. *See, e.g., Geffner v. Coca-Cola Co.*, 928 F.3d 198, 199-201 (2d Cir. 2019) (citing cases and affirming dismissal of claims based on product name "Diet Coke" because the term "diet" does not constitute a misleading statement). But even the term "diet" has a more specific meaning and reasonable association with weight loss than the term "DevaCurl" has with any qualities of hair. Accordingly, Plaintiffs not only fail to plausibly allege that the name "DevaCurl" is misleading, they fail to allege that it is even an actionable, affirmative misrepresentation.

Accordingly, Plaintiffs claims for common law fraud (Count VI), negligent misrepresentation (Count VII), breach of express warranty (Count VIII), and violation of consumer protection statutes (Count X to Count XXVII) should be dismissed because Plaintiffs fail to put forth any promise that was broken or any affirmative representation that was false or misleading.

B. Plaintiffs' Claims Should be Dismissed Because the Statements are not Materially Misleading

As set forth above, Plaintiffs fail to satisfy the threshold requirement of pleading that the two at-issue statements were false or misleading. Even if the Complaint plausibly alleged that the 100% statement and the name "DevaCurl" were false or misleading, Plaintiffs' claims for breach of express warranty, negligent misrepresentation, violation of consumer protection statutes, and common law fraud would still fail because Plaintiffs fail to plausibly allege that these statements are materially misleading and that they would mislead a reasonable consumer. [15] The at-issue statements are not misleading to a reasonable consumer because (1) the brand name "DevaCurl" constitutes non-actionable puffery; (2) a reasonable consumer would expect that they could

[15] *See, e.g.*, *Aesthetics in Jewelry, Inc. v. Brown, ex rel. coexecutors*, 339 S.W.3d 489, 495 (Ky. Ct. App. 2011) (stating that negligent misrepresentation "requires proof by clear and convincing evidence of a material representation"); *Izquierdo v. Mondelez Int'l, Inc.*, 2016 U.S. Dist. LEXIS 149795, at *23 (S.D.N.Y. Oct. 26, 2016) (plead a common law fraud claim, plaintiff must allege that the defendant "represented or omitted a material fact"); *Hubbard v. Gen. Motors Corp.*, No. 95 CIV. 4362, 1996 WL 274018, at *7 (S.D.N.Y. May 22, 1996) ("[i]n order to state a claim for fraud or negligent misrepresentation, plaintiff must allege, inter alia, the misrepresentation of a material fact."); *In re Scotts EZ Seed Litig.*, 2013 WL 2303727, at *11 (S.D.N.Y. May 22, 2013) (GBL sections 349 and 350 requires that the defendant's actions were "misleading in a material way") (citing *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000)); *Mednick v. Precor, Inc.*, 320 F.R.D. 140, 148 (N.D. Ill. 2017) ("To state a private cause of action under the ICFA, Plaintiffs must point to a materially deceptive representation or omission that proximately caused their injury."); *Argabright v. Rheem Mfg. Co.*, 201 F. Supp. 3d 578, 606 n.14 (D.N.J. 2016) (Consumer Fraud Act defines "unlawful practice to include 'deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any *material fact*' as prohibited acts" (emphasis added)); *Axon v. Citrus World, Inc.*, 354 F. Supp. 3d 170, 185 (E.D.N.Y. 2018) ("[G]eneralized statements by the defendant . . . do not support an express warranty claim if they are such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely." (internal quotation marks and citation omitted)).

experience an adverse reaction to the Products; and (3) the Products and their ingredients are compliant with applicable standards, and the Complaint does not allege otherwise.

i. The "DevaCurl" Brand Name is, at Best, Non-Actionable Puffery

First, Plaintiffs cannot sustain their labeling claims to the extent they are based on mere "puffery." *See, e.g.*, *Geffner*, 928 F.3d at 200 (holding that non-specific representations about Diet Coke amounted, at most, to inactionable "puffery") (citing *Cohen v. Koenig*, 25 F.3d 1168, 1172 (2d Cir. 1994) (holding that "statements will not form the basis of a fraud claim when they are mere 'puffery' or are opinions as to future events"). Puffery is defined as exaggerated general statements that make no specific claims on which consumers could rely. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 528 (S.D.N.Y. 2003) (finding that "Mightier Kids Meal" is puffery and does not suggest that children who eat a Mightier Kids Meal will become mightier); *Cortinas v. Behr Process Corp.*, 2017 U.S. Dist. LEXIS 85350, at *4 (E.D. Mo. June 5, 2017) ("exaggerated statements and highly subjective claims of product superiority" are non-actionable); *MacNeil Auto. Prods. v. Cannon Auto. Ltd.*, 715 F. Supp. 2d 786, 794-95 (N.D. Ill. 2010) (granting motion to dismiss where alleged warranties were "merely an opinion" and not "affirmations of fact or promises"). For instance, in *In re Scotts EZ Seed Litigation*, the Court found that the statements: "WaterSmart"; "Drought tolerant"; "Grows Anywhere! Guaranteed!"; "Makes the Most of Every Drop"; and "Grows in Tough Conditions! Guaranteed!" were mere puffery. 2013 WL 2303727, at *7. *See also Serrano v. Cablevision Sys. Corp.*, 863 F. Supp. 2d 157, 167 (E.D.N.Y. 2012) (Cablevision's representations that it "provides 'High Speed Internet,' 'Faster Internet,' and 'blazing fast speed' and that 'Optimum Online's lightning-fast Internet access takes the waiting out of the Web,'" constitute non-actionable puffery under the GBL and common law fraud); *See also Pfitzer v. Smith & Wesson Corp.,* 2014 U.S. Dist. LEXIS 19686, at *7 (E.D. Mo. Feb. 18,

2014) (holding statement that products were "safe and dependable" were non-actionable and merely a subjective statement about the products' value).

The name "DevaCurl" is, at best, puffery. Puffery constitutes "[s]ubjective claims about products, which cannot be proven either true or false." *Time Warner Cable*, 497 F.3d at 159 (alteration in original) (quoting *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995)). Here, the name "DevaCurl" is not a claim that can be proven true or false. "Deva" is not an adjective that any reasonable consumer would interpret as making a representation about the ingredients, performance, or safety of the Products. The name "DevaCurl" makes no affirmative or specific representation to consumers, so it cannot form the basis of Plaintiffs' claims. *See Strategic Partners, Inc. v. Vestagen Protective Techs., Inc.*, 2016 U.S. Dist. LEXIS 201278, at *8-9 (C.D. Cal. Nov. 23, 2016) (holding that antimicrobial fabric names "Certainty" and "Certainty Plus" are puffery).

Accordingly, Plaintiffs' claims based on the "DevaCurl" brand name should be dismissed as mere puffery. *See Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013) ("It is well settled that a court may determine as a matter of law that an allegedly deceptive advertisement would not have misled a reasonable consumer.") (citing *Freeman v. Time, Inc.*, 68 F.3d 285, 289 (9th Cir. 1995); *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26, 623 N.Y.S.2d 529, 647 N.E.2d 741 (1995); *S.Q.K.F.C., Inc. v. Bell Atlantic TriCon Leasing Corp.*, 84 F.3d 629, 637 (2d Cir. 1996) (affirming dismissal of a GBL § 349 claim "[s]ince a reasonable consumer would not have been deceived or defrauded by [Defendant's] actions."); Baker v. ADT Corp., No. 15-CV-2038, 2015 U.S. Dist. LEXIS 180138, at *14-15 (C.D. Ill. Oct. 5, 2015) ("It is appropriate in the context of a motion to dismiss, for a court to decide, as a matter of law, whether a statement is non-actionable puffery." (citing cases)).

ii. The Statements are Not Misleading to a Reasonable Consumer

It is well established that statements are actionable only if they are misleading to a reasonable consumer. [16] Plaintiffs do not claim that the 100% statement or the name DevaCurl are

[16] This standard applies uniformly:

- California: *see, e.g.*, *Alvarez v. Ashley Furniture Indus., Inc.*, 2017 U.S. Dist. LEXIS 173869, at *12 (C.D. Cal. Sep. 20, 2017) ("California courts evaluate claims regarding allegedly deceptive advertising — whether brought under the UCL, FAL, CLRA, or as common law fraud claims — under a 'reasonable consumer' standard."); *Ham v. Hain Celestial Grp., Inc.*, 70 F. Supp. 3d 1188, 1193 (N.D. Cal. 2014) ("This standard also applies to common law fraud and negligent misrepresentation claims.")
- Florida: *see, e.g.*, *Maor v. Dollar Thrifty Auto. Grp., Inc.*, 2018 WL 4698512, at *6 (S.D. Fla. Sept. 30, 2018) ("[T]he first element of a FDUTPA claim is only satisfied by evaluating a reasonable consumer in the same circumstances as plaintiff."); *Beaver v. Inkmart, LLC*, No. 12-60028, 2012 WL 3822264, at *4 (S.D. Fla. Sept. 4, 2012) ("Common to both [fraud and negligent misrepresentation] . . . is the requirement that the plaintiff reasonably rely on the statements in question.");
- Georgia: *Raysoni v. Payless Auto Deals, LLC*, 296 Ga. 156, 156-57, 766 S.E.2d 24, 25 (2014) (for fraud claims, consumer must have reasonably relied on the misrepresentation); *Bolinger v. First Multiple Listing Serv.*, 2014 U.S. Dist. LEXIS 135655, at *30 (N.D. Ga. Sep. 26, 2014) (reasonable reliance required for negligent misrepresentation claim).
- Illinois: *see, e.g.*, *Galanis v. Starbucks Corp.*, 2016 U.S. Dist. LEXIS 142380, at *9 (N.D. Ill. Oct. 14, 2016) (applying "reasonable consumer" standard to common law fraud, ICFA); *In re Rust-Oleum Restore Mktg., Sales Practices & Prods. Liab. Litig.*, 155 F. Supp. 3d 772, 818 (N.D. Ill. 2016) (applying standard to negligent misrepresentation claims);
- Kentucky: *Shane v. Bunzl Distribution USA, Inc.*, 2004 WL 7338757, at *1 (W.D. Ky. July 20, 2004) ("[A]n action for fraud requires the plaintiff to demonstrate that he acted in reasonable reliance upon a misrepresentation or suppression of fact."); *Fadel v. Nationwide Mut. Fire Ins. Co.*, 2013 WL 1337390, at *3 (W.D. Ky. Mar. 28, 2013) ("[A]ccording to Kentucky law, claims for intentional and negligent misrepresentation require proof of reasonable reliance.").
- Massachusetts: *Lee v. Conagra Brands, Inc.*, 958 F.3d 70, 76 (1st Cir. May 7, 2020) (finding deception "when it has the capacity . . . to entice a reasonable consumer to purchase the product"); *Lima v. Post Consumer Brands, LLC*, 2019 U.S. Dist. LEXIS 136549, at *27 (D. Mass. Aug. 13, 2019) (applying reasonable consumer standard).
- Minnesota: *see, e.g.*, *In re Gen. Mills Glyphosate Litig.*, 2017 U.S. Dist. LEXIS 108469, at *15-16 (D. Minn. July 12, 2017) (applying reasonable consumer standard to claims based on allegations that product labeling was misleading and deceptive); *McAteer v. Target Corp.*, 2018 U.S. Dist. LEXIS 124923, at *8 (D. Minn. July 26, 2018) (same);
- Missouri: *see, e.g.*, *Anderson v. Ford Motor Co.*, 2020 U.S. Dist. LEXIS 66549, at *6 (W.D. Mo. Feb. 14, 2020) (applying reasonable consumer standard to common law fraud claim); *Martin v. Wrigley*, 2017 U.S. Dist. LEXIS 175502, at *16 (W.D. Mo. Oct. 23, 2017) (applying standard to MMPA and negligent misrepresentation claims);

actually false. Instead, using a tortured interpretation of both, they claim that an express statement and a brand name stand for a more general proposition that the products are "gentle" or are formulated without any "harsh ingredients." Even assuming that the Products caused adverse reactions (an essential and, as argued herein, implausible assumption in the Complaint that Deva Concepts vigorously disputes), Plaintiffs' claims fail because Plaintiffs' interpretation that the Products are "gentle" or formulated without "harsh ingredients"[17] does not suggest to a reasonable consumer that they could never suffer an adverse reaction. Reasonable consumers understand that products—whether it is food, cosmetics, or cleaning products; whether they are completely natural or synthetic or chemical—have the potential of causing an adverse reaction in some consumers.

- New Jersey: *see, e.g., Hemy v. Perdue Farms, Inc.*, 2011 U.S. Dist. LEXIS 137923, at *58-59 (D.N.J. Nov. 30, 2011) (applying reasonable consumer standard to claim that Perdue's advertising statements inferred that the USDA certified Perdue's use of "Humanely Raised" and "Raised Cage Free" labels); *Hall v. Welch Foods, Inc.*, 2019 U.S. Dist. LEXIS 126803, at *28 (D.N.J. July 9, 2019) (applying reasonable consumer standard to claim that Welch's label misleads the average consumer regarding the healthfulness of Welch Fruit Snacks);
- New York: *see, e.g.*, *Rodriguez v. Cheesecake Factory Inc.*, 2017 U.S. Dist. LEXIS 213746, at *12 (E.D.N.Y. Aug. 11, 2017) (applying reasonable consumer standard to NY Deceptive Trade Practices Act claims and common law fraud claims); *Marcus v. AT&T Corp.*, 138 F.3d 46, 64 (2d Cir. 1998) (applying reasonable consumer standard to negligent misrepresentation claim).
- Pennsylvania: *Lisowski v. Henry Thayer Co.*, 2020 U.S. Dist. LEXIS 214247 at *23-41 (W.D. Pa. Nov. 17, 2020) (applying reasonable consumer to claims that personal care products are falsely advertised as "natural" to deceive customers to pay a premium under PA UTPCPL and negligent and fraudulent misrepresentation); *Commonwealth v. Golden Gate Nat'l Senior Care LLC*, 648 Pa. 604, 625-26 (2018) (discussing reasonable consumer standard).

Because Plaintiffs' unjust enrichment claim depends on the same conduct that underlies their fraud-based and/or breach of express warranty claims, unjust enrichment should be dismissed on the same grounds. *See, e.g.*, *Rugg v. Johnson & Johnson*, 2018 U.S. Dist. LEXIS 101727, at *5 (N.D. Cal. June 18, 2018) (dismissing unjust enrichment claim that is dependent on claims for violation of consumer protection statutes).

[17] To be clear, Plaintiffs do not assert claims based on the terms "gentle" or without "harsh ingredients." Deva Concepts asserts this argument only to the extent that Plaintiffs claim that the 100% statement or the DevaCurl brand name somehow *imply* overall gentleness.

For example, in Rugg v. Johnson & Johnson is instructive. 2018 U.S. Dist. LEXIS 101727 (N.D. Cal. June 18, 2018), the court dismissed plaintiffs' claim that a "hypoallergenic" label on baby products was misleading. *Id.* at *1. The plaintiffs alleged that based on the "hypoallergenic" term, consumers expect that the products contain no ingredients that could cause a negative reaction. *Id.* at *7. The court disagreed, finding it "completely implausible that a reasonable consumer would understand the use of the term 'hypoallergenic' on a product's label to mean that the product does not contain any ingredients, in any concentration, which could 'sensitize' the skin, cause cancer, or have any other negative effect, regardless of whether such effect constitutes an allergic reaction." *Id.* at *8.

Here, the term "gentle" or its alleged converse, "harsh," are even less specific, affirmative, and factual than "hypoallergenic"; in fact, such representations could be considered non-actionable puffery and could be dismissed on that ground as well. *See* McAteer v. Target Corp., 2018 U.S. Dist. LEXIS 124923, at *10-11 (D. Minn. July 26, 2018) (finding terms "gentle" and "hypoallergenic" used to describe makeup remover wipes to be non-actionable puffery). Regardless, reasonable consumers understand that a substance placed on their skin or hair can cause an unintended adverse reaction, and Deva Concepts never warrants that an adverse reaction is impossible. Because of this common, reasonable understanding, Plaintiffs' allegation that Deva Concepts' marketing of the Products as "gentle" was deceptive because some consumers suffered adverse reactions is implausible and unsustainable as a matter of law.

iii. The Products' Labeling is Not Misleading Because the Products and their Ingredients Comply With all Applicable Standards, which Plaintiffs Do Not Dispute

Plaintiffs' claims are implausible because they do not allege—nor could they—that the use or concentrations of any ingredient in the Products are unsafe or violate any applicable regulations or standards. In fact, the very sources relied on in the Complaint disclose that there are standards

and regulations governing the use of the ingredients, and there is no allegation that the Products violate any. For example, the Environmental Working Group website and safecosmetics.org both rely on organizations, such as the Cosmetic Ingredient Review, that issue standards or regulations regarding ingredients used in the Products. *See, e.g.*, Compl. ¶ 118, n.38 (citing https://www.ewg.org/skindeep/ingredients/703111-IODOPROPYNYL_BUTYLCARBAMATE/ which indicates that the Cosmetic Ingredient Review has issued recommendations for safe use and restrictions on concentration); Compl. ¶ 120, n.41 (citing http://www.safecosmetics.org/get-the-facts/chemicals-of-concern/phenoxyethanol/ , which indicates that phenoxyethanol is approved in concentrations up to one percent). These standards comport with reasonable consumers' expectations regarding products such as DevaCurl's: Products as a whole can still be reasonably considered gentle and safe even where they contain ingredients that, in unsafe formulations or concentrations, can become harsh or dangerous. Here, there is no plausible allegation that the Products contain concentrations that violate any standards or regulations or are otherwise unsafe. In the absence of any other plausible theory of causation, because there is no plausible allegation that DevaCurl's Products contain unsafe levels or formulations of any ingredients,[18] Plaintiffs' were never misled about the quality or contents of the Products.

[18] To the contrary, sources relied on in the Complaint actually show that DevaCurl uses only safe and recommended concentrations of all ingredients, which is confirmed by rigorous testing. *See, e.g.*, https://www.factsaboutdevacurl.com/us/frequently-asked-questions (cited at Compl., ¶ 11 n.8) (section on "testing") (last visited Nov. 12, 2020); https://www.devacurl.com/us/curl-101/product-philosophy (cited at Compl., ¶ 101(a) n.26) (section on "extensive product testing") (last visited Nov. 12, 2020).https://www.factsaboutdevacurl.com/us/frequently-asked-questions (cited at Compl., ¶ 11 n.8) (last visited Nov. 12, 2020) (noting that DevaCurl uses "approved, effective preservatives that have been comprehensively assessed by the FDA and Cosmetic Ingredient Review (CIR), as well as our own independent clinical safety testing. We monitor emerging scientific research and regulatory developments to ensure our formulations remain non-toxic" and that "The US FDA and Europe's Scientific Committee on Consumer Safety have both confirmed that phenoxyethanol is safe for use as a preservative at levels up to 1%. The amount of phenoxyethanol used in our products is below these regulatory safety standards and is safe").

Accordingly, there are numerous grounds under which this Court should dismiss Plaintiffs' claims for breach of express warranty, negligent misrepresentation, common law fraud, and violation of consumer protection statutes based on their allegations that the 100% claim and the name "DevaCurl" was false or misleading.

II. Plaintiff's Fraud-Based Claims Are Not Pled with the Requisite Particularity Under Rule 9(b)

At a minimum, Plaintiffs are required to plead the "who, what, when, where, and how" of their fraud-based claims under Rule 9(b).[19] Plaintiffs' claims fall woefully short. All we know with

[19] In addition to common law fraud, Rule 9(b) applies to claims for negligent misrepresentation and the violation of various consumer protection statutes:

- California: *see, e.g.*, *Davidson v. Apple, Inc.*, 2017 WL 976048, at *8 (N.D. Cal. Mar. 14, 2017) (finding misrepresentation claim deficient "[i]n the absence of any allegations that Plaintiffs encountered a representation made by Defendant—let alone what those representations were, when they were made, and why they were false[.]"); *In re Arris Cable Modem Consumer Litig.*, 2018 WL 288085, at *8 (N.D. Cal. Jan. 4, 2018) ("[A] plaintiff does not satisfy Rule 9(b) when the plaintiff generally identifies allegedly misleading statements but fails to specify which statements the plaintiff actually saw and relied upon.");
- Florida: *see, e.g.*, *CWELT-2008 Series 1045 LLC v. PHH Corp.*, 2020 WL 2744191, at *4 (S.D. Fla. May 27, 2020) ("Moreover, claims under the FDUTPA are subject to the federal rules' 'heightened' pleading standard under Rule 9(b)."); *Pruco Life Ins. Co. v. Brasner*, 2011 WL 2669651, at *4 (S.D. Fla. July 7, 2011) ("This Court agrees that Rule 9(b) governs negligent misrepresentation claims in Florida because such claims "sound in fraud rather than negligence.");
- Georgia: *see, e.g.*, *Singleton v. Petland Mall of Ga. LLC*, 2020 U.S. Dist. LEXIS 108661, at *9 (N.D. Ga. Mar. 18, 2020) ("The common law claim of negligent misrepresentation is subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)"); *Hampson v. Am. Mortg. Exch., Inc.*, U.S. Dist. LEXIS 167942, at *16 n.15 (N.D. Ga. Jan. 21, 2011) (UPTPA claims premised on allegations of fraud are subject to Rule 9(b));
- Illinois: *see, e.g.*, *Abc-Naco, Inc. v. Deruyter*, 1999 U.S. Dist. LEXIS 11025, at *7 (N.D. Ill. July 13, 1999) (negligent misrepresentation subject to heightened pleading standard when claim is "premised on allegations of fraudulent conduct"); *De Bouse v. Bayer AG*, 922 N.E.2d 309, 313 (Ill. 2009) (ICFA claims, including element of causation, must be pled with particularity);
- Kentucky: *see, e.g., Kempf v. Lumber Liquidators, Inc.*, 2017 WL 4288903, at *5 (W.D. Ky. Sept. 27, 2017) ("…Rule 9(b) heightened pleading standard applies to KCPA claims."); *House v. Bristol-Myers Squibb Co.*, 2017 WL 55876, at *9 (W.D. Ky. Dec. 29, 2016) ("A plaintiff alleging a negligent misrepresentation claim under Kentucky law must meet the heightened pleading requirements of Rule 9(b).");

any degree of particularity is that Plaintiffs bought Products that were labeled "100% Sulfate Paraben Silicone Free." The Complaint alleges that the labels stated that the Products were formulated specifically for curly hair, but the Complaint fails to specify the allegedly fraudulent language. *See Dimuro v. Clinique Labs., LLC*, 572 F. App'x 27, 30 (2d Cir. 2014) ("Rule 9(b) requires that a complaint '(1) ***specify the statements that the plaintiff contends were fraudulent,*** (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why

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- Massachusetts: *see, e.g.*, *Munsell v. Colgate-Palmolive Co.*, 463 F. Supp. 3d 43, 52 (D. Mass. 2020) ("The 'heightened pleading requirement' of Fed. R. Civ. P. 9(b) applies to claims of misrepresentation made pursuant to Chapter 93A"); *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (applying Rule 9(b) to negligent misrepresentation);
- Minnesota: *see, e.g.*, *Moua v. Jani-King of Minn., Inc.*, 613 F. Supp. 2d 1103, 1112 (D. Minn. 2009) (applying Rule 9(b) to claims for common law fraud, violation of MSFAA); *In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F. Supp. 3d 1304, 1311 (D. Minn. 2014) (applying Rule 9(b) standard to negligent misrepresentation and omission claims); *Rilley v. MoneyMutual, LLC*, 2017 WL 3822727, at *8 (D. Minn. Aug. 30, 2017) ("Claims under the MCFA must be pleaded with particularity under Rule 9(b)."); *Tacheny v. M&I Marshall & Ilsley Bank*, 2011 WL 1657877, at *6 (D. Minn. Apr. 29, 2011) ("A plaintiff alleging a violation of the DTPA must meet the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure."); *Podpeskar v. Makita U.S.A. Inc.*, 247 F. Supp. 3d 1001, 1010 (D. Minn. 2017) ("The heightened pleading requirement of Fed. R. Civ. P. 9(b) applies to Podpeskar's UTPA and FSAA claims, as well as his fraud claims.");
- Missouri: *see, e.g.*, *Webb v. Dr Pepper Snapple Grp., Inc.*, 2018 U.S. Dist. LEXIS 71270, at *4 (W.D. Mo. Apr. 25, 2018) (Rule 9(b) "provides a heightened pleading requirement for claims involving allegations of fraud, negligent misrepresentation, or intentional misrepresentation"); *Wright v. Bath & Body Works Direct, Inc.*, 2012 U.S. Dist. LEXIS 199761, at *15 (W.D. Mo. July 10, 2012) (dismissing MMPA claim for failure to plead causation with sufficient particularity);
- New Jersey: *see, e.g.*, *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007) (applying Rule 9(b)'s heightened pleading standard for common law fraud and violation of the NJCFA);
- New York: *see, e.g.*, *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 583 (2d Cir. 2005) (stating negligent misrepresentation claims under New York law "must be pled in accordance with the specificity criteria of Rule 9(b)"); *Stoltz v. Fage Dairy Processing Indus., S.A.*, 2015 U.S. Dist. LEXIS 126880, at *80 (E.D.N.Y. Sep. 22, 2015) ("Where an unjust enrichment claim is premised on allegations of fraud, the heightened pleading standard under Rule 9(b) applies"); and
- Pennsylvania: *see, e.g.*, Webb v. Volvo Cars of N.A., 2018 U.S. Dist. LEXIS 49095, at *13 (E.D. Pa. Mar. 26, 2018) (in addition to a UTPCPL claim, a negligent misrepresentation claim alleging fraudulent activity must be pled with particularity under Rule 9(b)).

the statements were fraudulent.'" (emphasis added) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)). As to "when," Plaintiffs' allegation of a broad span of years in which they purchased the Products or the Class Period as a whole is insufficiently particular to satisfy Rule 9(b)'s requirement that Plaintiffs plead "when the statements were made." *See id.*; *see also* Compl. ¶ 175 (identifying the "when" as "continuously throughout the applicable Class periods"); *In re Crude Oil Commodity Litig.*, 2007 U.S. Dist. LEXIS 47902, at *20 (S.D.N.Y. June 28, 2007) (holding that "absent the delineation of the class period, there is no date specified of when any of the purportedly manipulative acts were performed by defendants or their coconspirators. Courts have consistently held that such a lengthy time-frame fails to satisfy the particularity requirement of Rule 9(b)").

Moreover, the Complaint fails to sufficiently allege the "how." First, the Complaint does not allege that the 100% claim is false or that the Products were *not* formulated specifically for curly hair. As a result, the Complaint is devoid of any sufficiently particular allegation of how these statements were fraudulent. *See Dimuro*, 2013 U.S. Dist. LEXIS 195526, at *11. Second, the Complaint is lacking any plausible theory of causation. The Court may assume as true that certain consumers who purchased DevaCurl Products also suffered physical symptoms such as hair loss, but the Complaint lacks a plausible allegation as to *how* the Products, which contain extensively tested ingredients that are ubiquitous in the cosmetics industry, caused these symptoms.

Accordingly, Plaintiffs' fraud-based claims should be dismissed under Rule 9(b).

III. The Facts Alleged in the Complaint Directly Contradict Plaintiffs' Claims of Intent, Concealment and Failure to Warn

Plaintiffs' fraud and failure to warn claims should be dismissed for two additional reasons, grounded in both common sense and Plaintiffs' failure to plausibly allege all of the elements of their claims. *See Iqbal*, 556 U.S. at 663-64 ("[D]etermining whether a complaint states a plausible

claim is context-specific, requiring the reviewing court to draw on its experience and common sense.").

First, Plaintiffs are required to plausibly allege that Deva Concepts intended[20] to defraud consumers, which Plaintiffs fail to plausibly do here. *See, e.g.*, *Graham v. Bank of America, N.A.*, 226 Cal. App. 4th 594, 606 (2014); *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010); *Home Depot U.S.A., Inc. v. Wabash Nat. Corp.*, 724 S.E. 2d. 53 (Ga. Ct. App. 2012); *Lagen v. Balcor Co.*, 653 N.E.2d 968, 972 (Ill. App. 1995); *Prather v. Abbott Labs.*, 960 F. Supp. 2d 700, 715 (W.D. Ky. 2013); *Stolzoff v. Waste Sys. Int'l., Inc.*, 792 N.E.2d 1031, 1038 (Mass. Ct. App. 2003); *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 373 (Minn. 2011); *Boland v. Saint Luke's Health Sys.*, 588 S.W.3d 879, 883 n.7 (Mo. 2019); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 367 (N.J. 1997); *Tuosto v. Philip Morris USA Inc.*, 672 F. Supp. 2d 350 (S.D.N.Y. 2009); *Ross v. Foremost Ins. Co.*, 998 A.2d 648, 654 (Pa. Super. 2010). Plaintiffs' conclusory allegations of intent defy plausibility in light of all of the contradictory allegations in the Complaint. *See, e.g.*, Compl. ¶¶ 280, 297, 350-51, 373, 441, 467, 505, 558. Deva Concepts openly and publicly addresses Plaintiffs' claims of adverse reactions on their website, the very source on which Plaintiffs rely heavily to support their claims. *See* Compl. *passim* (citing devacurl.com 24 times). Deva Concepts went so far as to create a new, separate website dedicated exclusively to addressing these same concerns and complaints. *See* https://www.factsaboutdevacurl.com/us (cited at Compl. ¶ 126 n.45) (last visited Nov. 12, 2020). Plaintiffs point to alleged misrepresentations throughout the websites and then expect the Court to ignore the surrounding context, where Deva Concepts

[20] Although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally" under Fed. R. Civ. P. 9(b), courts have cautioned that because "we must not mistake the relaxation of Rule 9(b)'s specificity requirement regarding condition of mind for a license to base claims of fraud on speculation and conclusory allegations[,] . . . plaintiffs must allege facts that give rise to a strong inference of fraudulent intent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006).

publicly addresses the very same complaints Plaintiffs make here. This publicity defies Plaintiffs' claims that Deva Concepts had any intent to deceive or conceal. Moreover, as explained more fully below, the Complaint fails to adequately allege that Deva Concepts had any knowledge of a defect, which it then intended to conceal.

Plaintiffs fail to plausibly allege a theory of concealment. Plaintiffs' sole support for the claim that Deva Concepts knew of product defects or health risks and concealed them are complaints lodged with the FDA and posted on social media. *See* Compl. ¶¶ 18, 154. There are two issues with this allegation: first, Plaintiffs fail to sufficiently allege that Deva Concepts had knowledge of any FDA complaints or of complaints posted to social media; and second, even if Plaintiffs did have knowledge of these complaints, Plaintiffs fail to plead any facts showing that Deva Concepts had knowledge of any particular defect that caused Plaintiffs' injuries and that Deva Concepts then concealed (nor do Plaintiffs allege what that defect is). *See, e.g. Schechter v. Hyundai Motor Am.*, 2019 U.S. Dist. LEXIS 126021, at *19 (D.N.J. July 29, 2019) (Plaintiffs failed to plead that defendant had notice of consumer complaints posted online and, even if they did, the complaints "do not indicate that Defendants had knowledge of the Powertrain Defect as to Plaintiff's model vehicle at the time of Plaintiff's lease"); *Resnick v. Hyundai Motor Am., Inc.*, 2017 U.S. Dist. LEXIS 67525, at *43 (C.D. Cal. Apr. 13, 2017) (holding that quality control mechanisms, online consumer complaints, and indications that some consumers called customer service were all insufficient to plead defendant's knowledge of a widespread defect); *Berenblat v. Apple, Inc.*, 2010 U.S. Dist. LEXIS 46052, 2010 WL 1460297, at *9 (N.D. Cal. Apr. 9, 2010) ("[T]he complaints on Apple's consumer website merely establish the fact that some consumers were complaining. By themselves they are insufficient to show that Apple had knowledge that the memory slot in fact was defective and sought to conceal that knowledge from consumers."). Thus, Plaintiffs cannot sustain their concealment claims on such speculative and threadbare allegations,

which are insufficient to allow any reasonable inferences about Deva Concepts' knowledge of the cause of Plaintiffs' personal injuries.

Similarly, Deva Concepts does not have a duty to warn where there is nothing about which to warn. *See, e.g.* https://www.factsaboutdevacurl.com/us/frequently-asked-questions (cited at Compl. ¶ 11 n.8) ("Are you considering a recall? No. Based on all the evidence we have – which includes independent testing of our products – we stand by the quality and safety of our products.") (last visited Nov. 18, 2020); https://www.devacurl.com/us/curl-101/product-philosophy (cited at Compl. ¶ 101(a) n.26) (section on "extensive product testing") (last visited Nov. 12, 2020). Deva Concepts' extensive investigation has not uncovered any ingredients, defects, or other issues that could cause the adverse reactions alleged in the Complaint, nor do Plaintiffs plausibly how the Products could have been the cause. There is either another cause for Plaintiffs' symptoms, or Plaintiffs suffer from an idiosyncratic allergy or sensitivity of which Deva Curl has no duty to warn. *See, e.g.*, *Adelman-Tremblay v. Jewel Cos.*, 859 F.2d 517, 523 (7th Cir. 1988) ("Most jurisdictions . . . will not generally hold manufacturers or sellers strictly liable for failure to warn of the possibility of a rare allergic reaction."); *Smith v. Phx. Seating Sys., LLC*, 894 F. Supp. 2d 1088, 1093 (S.D. Ill. 2012) ("a consumer who suffers an allergic reaction to a product without any identifiable defect may not generally invoke strict liable [*sic*] to recover from a manufacturer or seller" (citing Annotation, Products Liability: Strict Liability in Tort Where Injury Results From Allergenic (Side-Effect) Reaction to Product, 53 A.L.R.3d 298, § 3 (1973) ("[A] product, faultlessly manufactured and containing no impurities, is not rendered defective per se, within meaning of the doctrine of strict liability in tort, by the mere fact that it causes injury to certain individuals who, because of hypersensitivity or other peculiarity of makeup, suffer an allergenic or idiosyncratic reaction when exposed thereto.")); *Kaempfe v. Lehn & Fink Prods. Corp.*, 21 A.D.2d 197, 203 (App. Div. 1st Dept. 1964) ("It has been universally held that a person, who

sustains harm due solely to an unusual hypersensitiveness to a reasonably safe product, may not recover against the seller or manufacturer on such theory.").

Accordingly, Plaintiffs fail to plausibly allege the intent, knowledge, and duty to warn required for their claims of concealment, fraud, and failure to warn.

IV. Plaintiffs Fail to Adequately Plead Causation in Support of Their Negligence Claims

Plaintiffs' negligence claims should be dismissed for failure to plausibly allege the element of causation.[21] *See Morrison v. Hoffmann-La Roche, Inc.*, U.S. Dist. LEXIS 135291, at *18 (E.D.N.Y. Sep. 29, 2016) (noting that under both strict products liability and negligence claims "the consumer assumes the burden in demonstrating that a defect in the product was a substantial factor in causing the injury"). As a general matter, Plaintiffs fail to allege any particular defect or plausible theory as to how the Products caused their alleged personal injuries. *See Corwin v. Conn. Valley Arms, Inc.*, 74 F. Supp. 3d 883, 888-89 (N.D. Ill. 2014) (negligence claim dismissed where the complaint lacked non-conclusory factual allegations detailing how the product was defective and caused the alleged damages). Although Plaintiffs refer to various ingredients in the Complaint, they fail to allege in a non-speculative manner that any ingredient or Product as a whole caused their physical symptoms. Nor do they provide any basis for inferring that *dozens* of DevaCurl Products all had the capacity of causing the physical injuries alleged in the Complaint, without alleging a common ingredient or defect that could lead to such a widespread result. While their allegations suggest that it is *possible* that certain ingredients could cause some of the symptoms alleged in the Complaint, Plaintiffs stop short of making their claims *plausible*, as *Twombly* and *Iqbal* require. *See Nelson v. Am. Home Prod. Corp.*, 92 F. Supp. 2d 954, 957 (W.D. Mo. 2000) ("a submissible case on causation is made where the evidence is susceptible to a reasonable inference

[21] Causation is uniformly an element of a negligence claim. *See, e.g.*, *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 534, (2009); *Delgado v. Laundromax, Inc.*, 65 So. 3d 1087, 1089 (Fla. 3d DCA 2011); *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218 (1st Dept 2005).

that injuries to plaintiff resulted from defendant's product"). The Complaint permits the inference that Plaintiffs share two things in common—they purchased DevaCurl Products and they suffered hair loss or scalp irritation. But there is nothing in the Complaint that makes a plausible connection between the Products and the physical symptoms. This type of conclusory and speculative pleading does not permit the Court to draw a reasonable inference that Deva Concepts was negligent.

With regards to their negligent failure to warn claim, Plaintiffs must allege that, but for Deva Concepts' failure to warn, the alleged injury would not have occurred. *See Park-Kim v. Daikin Indus.*, 2016 U.S. Dist. LEXIS 158056, at *19-20 (C.D. Cal. Nov. 14, 2016). Plaintiffs do not plausibly allege that they would not have purchased or used the Products had Deva Concepts provided any warnings, or that the provision of warnings would have prevented adverse reactions. *See* Compl. ¶ 241 (conclusory allegation that "[a]s a direct and proximate result of Defendant's failure to adequately warn consumers that use of the Products could cause the adverse reactions described herein, Plaintiffs and the Class have suffered damages as set forth herein").

Accordingly, Plaintiffs' three negligence claims should be dismissed.

V. Plaintiffs Fail to Adequately Plead a Price Premium Theory of Injury

This case can be cut in half by dismissing Plaintiffs' conclusory allegations of a price premium. In particular, Plaintiffs assert two theories of injury: personal injury and economic injury through the payment of a premium for the Products. Plaintiffs' price premium theory lacks any factual support whatsoever—Plaintiffs allege that they paid a premium for the Products, and that is it. *See, e.g.* Compl. ¶ 23 (alleging merely that "[h]ad Plaintiffs and other Class members known that Defendant's Products would cause hair loss, scalp irritation, and other problems, they would not have purchased the Products or would not have paid a premium price."); ¶ 111 ("Defendant's labeling and marketing, which is false and misleading, allows it to command a premium price for the Products—far and above what normal hair care products cost."); *see also* ¶¶ 157, 262, 338.

Conclusory allegations are not entitled to a presumption of truth, and courts have routinely held that such an unsupported allegation fails to sustain a claim. *See, e.g. DaCorta v. AM Retail Grp., Inc.*, 2018 WL 557909, at *9 (S.D.N.Y. Jan. 23, 2018) (stating that "Plaintiff's apparent belief that simply alleging the word 'premium' will suffice, is simply incorrect" and holding that the plaintiff failed to plead any connection between the alleged misrepresentation and the value of the product); *O'Hara v. Diageo-Guinness, USA, Inc.*, 306 F. Supp. 3d 441, 458 (D. Mass. 2018) ("the allegation that plaintiff paid a price premium as a result of defendants' deception is, by itself, too conclusory and speculative to state a claim for injury or damages" (internal quotation marks omitted)); *Babaian v. Dunkin' Brands Grp. Inc.*, 2018 U.S. Dist. LEXIS 98673, at *19 (C.D. Cal. June 12, 2018) (rejecting "conclusory" price premium claim where complaint "fails to allege facts sufficient to support an inference that Plaintiff suffered an economic injury from the purported misrepresentation regarding the contents of the doughnuts he purchased"). Because the Complaint lacks any facts or plausible basis for connecting the alleged misrepresentation to the price of the product, Plaintiffs fails to adequately allege that they suffered a cognizable economic injury.

VI. Plaintiffs Lack Article III Standing for Many of Their Claims

Article III of the Constitution limits the jurisdiction of federal courts to the resolution of actual "cases" and "controversies." U.S. Const. art. III, § 2. "To have such Article III standing, the plaintiff [must have] alleged such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.à.r.l.*, 790 F.3d 411, 417 (2d Cir. 2015) (internal quotation marks omitted) (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975)). Whether a Plaintiff has Article III standing is a threshold question in every federal case that "determine[s] the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. "To satisfy the irreducible constitutional minimum of [Article III] standing, a plaintiff must demonstrate (1) a

personal injury in fact (2) that the challenged conduct of the defendant caused and (3) which a favorable decision will likely redress." *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (citations and internal quotation marks omitted). "If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim." *Id.* (citations and internal quotation marks omitted).

Standing is required regardless of whether a case is brought on behalf of an individual or as a putative class action. In the case of a class action, there must be "a named plaintiff sufficient to establish jurisdiction over each claim advanced." *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 112 (2d Cir. 2013). As such, "named plaintiffs who represent a class must allege and show that they personally have been injured, not that the injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Mahon*, 683 F.3d at 64 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citations, internal quotation marks, and alterations omitted)).

While "Article III standing is generally a prerequisite to class certification," *Okla. Police Pension & Ret. Sys. v. U.S. Bank Nat. Ass'n*, No. 11-CV-8066, 2013 WL 6508843, at *5 n.3 (S.D.N.Y. Dec. 12, 2013), "[a]t this preliminary stage of the litigation, the only relevant standing inquiry is that of the named plaintiffs," *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp. 2d 356, 377 (E.D.N.Y. 2010).

There are no parties before the Court who have alleged standing to assert claims under any states other than: California, Florida, Georgia, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, New Jersey, New York, and Pennsylvania, and, therefore, dismissal of claims (or striking assertions of class claims) as to other states is required. *See In re HSBC BANK, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d 34, 49–50 (E.D.N.Y.) ("In this case, the Court finds that the Plaintiffs may only assert a state claim if a named plaintiff resides in, does business in, or

has some other connection to that state."), *on reconsideration*, 14 F. Supp. 3d 99 (E.D.N.Y. 2014); *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 230 (S.D.N.Y. 2012) (holding named plaintiffs in putative securities class action only had standing to assert claims relating to funds in which they had purchased shares, plaintiffs could not allege an injury traceable to funds in which they did not personally invest).

A. Plaintiffs Lack Standing to Sue Over a Product They Never Purchased

Generally, it is well established that a plaintiff lacks standing to sue for a product they never purchased, because that product has not harmed them. The "irreducible constitutional minimum" of Article III standing requires three elements: (1) injury-in-fact, (2) causation, and (3) redressibility. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[I]n a class action, the named plaintiffs must themselves have standing to sue; it is not sufficient to show that 'an injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Hart v. BHH, LLC*, 2016 U.S. Dist. LEXIS 59943, at *3-6 (S.D.N.Y. May 5, 2016) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). A plaintiff "clearly lacks standing [to] assert claims" for products they "did not purchase[.]" *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 158 (2d Cir. 2012); *Elkind v. Revlon Consumer Prods. Corp.*, 2015 U.S. Dist. LEXIS 63464, at *10 (E.D.N.Y. May 14, 2015) ("Because they have not purchased the Powder, Plaintiffs have not been injured in the "personal and individual way" required by Article III."); *Smith v. Atkins Nutritionals, Inc.*, 2018 U.S. Dist. LEXIS 208266, at *18-19 (W.D. Mo. May 8, 2018) ("Plaintiff's standing to represent a class of purchasers is limited to those products she purchased.").

Courts in this Circuit "are split as to whether plaintiffs have standing to assert claims relating to products they themselves did not purchase, but which are substantially similar to products they did purchase." *Hart*, 2016 U.S. Dist. LEXIS 59943, at *7 (quoting *Quinn v.*

Walgreen Co., 958 F. Supp. 2d 533, 541 (S.D.N.Y.2013)). To be sure, some "courts in this Circuit have held that, subject to further inquiry at the class certification stage, a named plaintiff has standing to bring class action claims under state consumer protection laws for products that he did not purchase, so long as those products, and the false or deceptive manner in which they were marketed, are 'sufficiently similar' to the products that the named plaintiff did purchase." *Mosley v. Vitalize Labs, LLC*, 2015 U.S. Dist. LEXIS 111857, 2015 WL 5022635, at *7 (E.D.N.Y. Aug. 24, 2015). In this case, however, the Court need not even reach this inquiry because Plaintiffs fail to satisfy the threshold requirement of pleading similarities between the Products they purchased and those they did not. Plaintiffs have conceded that they assert claims based on Products no class representative ever purchased[22], yet their Complaint fails to identify any common ingredients or other similarities between the Products that would confer standing at this juncture. Accordingly, the Court should dismiss any claims based on Products that Plaintiffs did not purchase.

B. Plaintiffs Lack Standing to Seek Injunctive Relief

Plaintiff's claims for injunctive relief should be dismissed for lack of standing under Federal Rule of Civil Procedure 12(b)(1). To establish standing to pursue a claim for injunctive relief, a plaintiff must adequately plead a "real or immediate threat" of injury. *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983)). If a consumer will not purchase a product in the future, he does not have standing to seek injunctive relief. *See Kommer v. Bayer Consumer Health,* 710 F. App'x 43, 44 (2d Cir. 2018) (summary order); *DaCorta v. AM Retail Grp., Inc.*, No. 16-CV-01748 (NSR), 2018 WL 557909, at *4 (S.D.N.Y. Jan. 23, 2018) (holding that the plaintiff's claim that she would not have purchased the product "but for" the alleged misrepresentation "is effectively a concession

[22] *See* Smith Cert., Ex. B, at 29:8-15 (Plaintiffs' counsel representing that "the Court will see that these 12 women purchased 27 of the 31 products that are at issue").

that she does not intend to purchase the product in the future"); *Izquierdo v. Mondelez Int'l, Inc.*, No. 16-CV-04697 (CM), 2016 WL 6459832, at *5 (S.D.N.Y. Oct. 26, 2016) (dismissing claims for injunctive relief in a slack-fill case where plaintiff alleges that he will not purchase the product again in its allegedly misleading packaging); *Spiro v. Healthport Techs., LLC*, 73 F. Supp. 3d 259, 270-71 (S.D.N.Y. 2014) (noting that past exposure to illegal conduct cannot sustain a plausible inference that the plaintiff is "in danger of being wronged again").

Here, Plaintiffs claim that they would not have purchased the Products but for the alleged misrepresentations, but that they would "consider purchasing the Products again if [they] could trust the labeling and marketing. . . ." Compl. ¶¶ 34-93. These allegations fail to allege any "real or immediate threat" of future injury by the Products, with their current packaging, marketing, and formulations, because their allegation is contingent on changes to the Products. Thus, their alleged future injury is only possible, not "real or imminent." Courts have rejected similar attempts to allege standing where plaintiffs allege that they would purchase the product if the labeling or marketing is changed. *See Buonasera v. Honest Co.*, 208 F. Supp. 3d 555, 564-65 (S.D.N.Y. 2016) (holding plaintiff does not have standing when he would only consider purchasing product again if it was reformulated); *Izquierdo v. Mondelez Int'l, Inc.*, U.S. Dist. LEXIS 149795, at *12-13 (S.D.N.Y. Oct. 26, 2016). Since Plaintiffs fail to plausibly allege that they would purchase the Products in the future, Plaintiffs lack standing to seek injunctive relief.

C. Plaintiffs Lack Standing to Assert Negligence, Strict Liability, Unjust Enrichment, Fraud or Negligent Misrepresentation and Under the Laws of All 50 States Simply by Asserting a "Nationwide Class"

Plaintiffs also cannot bring state law based claims under the laws of all 50 states and the District of Columbia, as there are no allegations showing any connection by of the named Plaintiffs to all of those states. *In re HSBC Bank, USA, N.A. Debit Card Overdraft Fee Lit.*, 1 F. Supp. 3d 34, 49 (E.D.N.Y. 2014). "Plaintiffs may only assert a state claim if a named plaintiff resides in,

does business in, or has some other connection to that state." *Id.; see also Parks v. Dick's Sporting Goods, Inc.,* 05–CV–6590 (CJS), 2006 WL 1704477, at *2 (W.D.N.Y. June 15, 2006) ("the Court finds that the plaintiff . . . lacks standing to assert state-law claims arising under the laws of states other than New York, since he was never employed by defendant anywhere other than New York.")).

There is good reason for this rule—Plaintiffs cannot plead claims under state laws for which there are absolutely no allegations connected to those states. For this alternative reason, Counts II through VII are invalid as a matter of law as it would pertain to states other than those of the Plaintiffs.

VII. The Law of the 11 At-Issue States Provide Additional Reasons for Dismissal

A. California

Plaintiffs Baldyga's and Cohen's claims fail for additional reasons. First, their equitable claims for unjust enrichment, alleged violation of the UCL, and alleged violation of the FAL—as well as their claims for equitable relief under the CLRA—should all be dismissed because Plaintiffs expressly seek damages based on the same allegations and thus have an adequate remedy at law. *See Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); *Zapata Fonseca v. Goya Foods, Inc.*, 2016 U.S. Dist. LEXIS 121716, at *20 (N.D. Cal. Sep. 8, 2016); *Madrigal v. Hint, Inc.*, 2017 WL 6940534, at *4-5 (C.D. Cal. Dec. 14, 2017). Second, their breach of implied warranty claims fail due to lack of privity under California law. *Stewart v. Electrolux Home Prods.*, 304 F. Supp. 3d 894, 915 (E.D. Cal. 2018); *Barrera v. Samsung Electronics America, Inc.*, 2018 WL 10759180, at *11 (C.D. Cal. Dec. 7, 2018). Third, Baldyga's and Cohen's breach of express warranty claims fail because they did not provide meaningful notice of breach and opportunity to remedy. *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011)(dismissing Complaint when "Plaintiffs sent their notice letter simultaneously with the complaint"). Plaintiff Baldyga's notice

letter is dated April 6, 2020 (Compl. ¶212), the same day that she filed her Complaint (*See Baldyga v. Deva Concepts, LLC*, N.D. Cal. No. 5:20-cv-02330). Plaintiff Cohen never provided notice. To the extent the Court finds that Plaintiffs' warranty claims fail, then their MMWA claims fail as well. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 958 n.2 (9th Cir. 2009).[23]

B. Florida

Plaintiff Petersen and Nunez's claims fail for additional reasons under Florida law. First, their claims for breach of express warranty and breach of implied warranty fail due to lack of privity**.** *Dixon v. Allergan USA, Inc.*, No. CV 14-61091-CIV, 2015 WL 12915671, at *3 (S.D. Fla. May 28, 2015). Second, because the warranty claims fail due to lack of privity, the MMWA claim also fails. *Melton v. Century Arms, Inc.*, 243 F. Supp. 3d 1290, 1304 (S.D. Fla. 2017). Third, the unjust enrichment claim fails because no direct benefit was conferred on Defendant to the extent products were purchased from third-party retailers (and Plaintiffs allege that all of the Products were purchased from third-party retailers). *Johnson v. Catamaran Health Sols.*, LLC, 687 F. App'x 825, 830 (11th Cir. 2017). Finally, the unjust enrichment claim also fails because it is duplicative of Plaintiff's other causes of action. *Licul v. Volkswagen Grp. of Am., Inc.*, No. 13-61686-CIV, 2013 WL 6328734, at *7-8 (S.D. Fla. Dec. 5, 2013).

C. Georgia

Stephanie Williams's claims are subject to dismissal for additional reasons under Georgia law. First, her unjust enrichment claim is subject to dismissal because it is duplicative of her other causes of action. *See DeLoach v. Gen. Motors*, 369 S.E.2d 484, 486 (Ga. Ct. App. 1988). In the alternative, her unjust enrichment claim is quasi-contract, and cannot survive to the extent she also

[23] This principle applies to every Plaintiffs' MMWA claim, not just California. To the extent the Court dismisses the warranty claims under any State law, then that Plaintiff's MMWA claim should also be dismissed. *See id.* (explaining that claims under the MMWA "require the plaintiffs to plead successfully a breach of state warranty law").

alleges an express contract through her breach of express warranty claim. *See Am. Casual Dining, Ltd. P'ship v. Moe's Sw. Grill, L.L.C.*, 426 F. Supp. 2d 1356, 1372 (N.D. Ga. 2006).

Third, Ms. Williams' breach of express warranty claim should be dismissed because, under Georgia law, "a plaintiff must show that the warrantor had notice of the defect" and "the warrantor must also have a reasonable opportunity to repair the defect," both of which Plaintiff fails to adequately allege. *Monticello v. Winnebago Indus., Inc.*, 369 F. Supp. 2d 1350, 1357 (N.D. Ga. 2005). Plaintiff Williams provided no notice to Deva Concepts and the Complaint does not allege that she has. Compl. ¶ 212.

Fourth, her breach of implied warranty claim should be dismissed for lack of privity. *See Monticello, 369 F. Supp. 2d at 1361* ("Because Plaintiff is not in privity with Defendants, Plaintiff may not maintain a cause of action against them for breach of the implied warranty of merchantability.")(citing *Cobb County Sch. Dist. v. MAT Factory, Inc.,* 215 Ga.App. 697, 452 S.E.2d 140, 145-46 (1994) (stating that if a defendant is not the seller to the plaintiff-purchaser, the plaintiff cannot recover on the implied warranty arising out of the prior sale by the defendant to an original purchaser, such as the distributor or retailer from whom plaintiff purchased the product).

Fifth, Ms. Williams' UDTPA claim should be dismissed to the extent she seeks monetary relief, as "the only relief available under the UDTPA is injunctive relief." *Hampson v. Am. Mortg. Exch., Inc.*, 2011 U.S. Dist. LEXIS 167942, at *16 n.15 (N.D. Ga. Jan. 21, 2011). Finally, Plaintiffs' MMWA claim must be dismissed to the extent her warranty claims are also dismissed. *See Paws Holdings v. Daikin Indus.,* No. CV 116-058, 2017 U.S. Dist. LEXIS 24684, at *48 (S.D. Ga. Feb. 22, 2017) ("MMWA claims that are dependent on a now-dismissed state-law warranty claim must also be dismissed.").

D. Illinois

The claims of Erika Martinez-Villa and Tahira Shaikh fail for additional reasons under Illinois law. First, Shaikh's claim for unjust enrichment is barred because it is duplicative of her contract-based claims. *See Lake v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 923 (N.D. Ill. 2013). Second, claims based on economic losses, like Plaintiffs' price premium theory of damages, are barred by the economic loss doctrine. *See Ibarolla v. Nutrex Research, Inc.*,2012 U.S. Dist. LEXIS 155721, at *14 (N.D. Ill. Oct. 31, 2012). Third, Shaikh's claim for breach of implied warranty based on economic losses fails due to lack of privity. *See Lake*, 964 F. Supp. 2d at 910-11. Fourth, because personal injury claims are not cognizable under the MMWA and because her economic loss claims fail due to lack of privity for her implied warranty claims, her MMWA claim cannot survive. *See id.* at 920. Fourth, Shaikh's ICFA claim fails because it is based on the same allegations underlying her claim of breach of express warranty. *Greenberger v. GEICO General Ins.*, 631 F.3d 392, 399 (7th Cir. 2011). Finally, Shaikh fails to state a claim under the UDTPA because the statute only allows a plaintiff to recover for injunctive relief, which Plaintiffs cannot obtain here. *See supra*, Section VII; *Lake*, 964 F. Supp 2d at 918-19.

E. Kentucky

Plaintiff Petersen's claims fail for additional reasons under Kentucky law. First, the claim for breach of express warranty and breach of implied warranty fails due to lack of privity**.** *Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952, 968 (E.D. Ky. 2019); *Sims v. Atrium Med. Corp.*, 349 F. Supp. 3d 628, 643 (W.D. Ky. 2018). Second, because the warranty claims fail due to lack of privity, the MMWA claim also fails. *Melton v. Century Arms, Inc.*, 243 F. Supp. 3d 1290, 1304 (S.D. Fla. 2017). Third, the claim for a violation of Kentucky's Consumer Protection Act ("KCPA") also fails due to a lack of privity. *Mitchell v. GM LLC*, No. 3:13-CV-498-CRS, 2014 U.S. Dist. LEXIS 43943, at *28-29 (W.D. Ky. Mar. 31, 2014). Fourth, the unjust enrichment

claim fails because no direct benefit was conferred on Defendant to the extent Products were purchased from third-party retailers. *Simpson v. Champion Petfoods USA, Inc.*, 397 F. Supp. 3d 952, 969 (E.D. Ky. 2019). Finally, the unjust enrichment claim also fails because it is duplicative of the other causes of action asserted. *Busch v. Wells Fargo Home Mortg., Inc.*, No. 5:16-cv-210-JMH, 2017 WL 82473, at *7 (E.D. Ky. Jan. 9, 2017).

F. Massachusetts

Plaintiff Marcy McCreary's claims fail for additional reasons under Massachusetts law. First, as a quasi-contract claim, her claim for unjust enrichment should be dismissed because she also alleges an express contract through her claim for breach of express warranty. *See Platten v. HG Bermuda Exempted Ltd.*, 437 F.3d 118, 130 (1st Cir. 2006). Second, Plaintiff's statutory claim should be dismissed because she failed to provide adequate notice as required by M.G.L.A. ch. 93A § 9(3). A plaintiff alleging a claim under Mass. Gen. Laws ch. 93A, § 9 is required to provide a written demand for relief to the potential defendant *no less than* ***thirty days*** *before filing suit*. Mass. Gen. Laws ch. 93A, § 9(3). This demand requirement "is not merely a procedural nicety, but, rather, 'a prerequisite to suit.'" *Rodi v. S. New Eng. Sch. of Law*, 389 F.3d 5, 19 (1st Cir. 2004) (quoting *Entrialgo v. Twin City Dodge, Inc.,* 368 Mass. 812, 812, 333 N.E.2d 202 (1975)). McCreary sent a notice letter dated February 19, 2020 (Compl. ¶212) and filed suit one day later on February 20, 2020 (*Ciccia v. Deva Concepts LLC*, 1:20-cv-1520).

G. Minnesota

Plaintiff Lauren Petersen's claims[24] fail for additional reasons under Minnesota law. First, implied warranty claims are subsumed by strict products claims in Minnesota. Where a plaintiff claims strict products liability and personal injury, implied warranty claims are effectively

[24] Lauren Petersen is the only Plaintiff that provided proper pre-suit notice, having sent a letter to Deva Concepts dated August 26, 2020, when she was included for the first time as a plaintiff in the Consolidated Complaint filed on October 2, 2020. *See* Minn. Stat. § 336.2-607(3).

preempted in Minnesota. *See, e.g., Kapps v. Biosense Webster, Inc*., 813 F. Supp. 2d 1128, 1161-62 (D. Minn. 2011); *Johnson v. Johnson & Johnson (In re Levaquin Prods. Liab. Litig.)*, 752 F. Supp. 2d 1071, 1079 (D. Minn. 2010); *Continental Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 463 (Minn. App. 1984); *Kruszka v. Novartis Pharms. Corp.*, 2014 U.S. Dist. LEXIS 68439, at *46-47 (D. Minn. 2014). In a personal injury case, where there are claims of both strict products liability and breach of implied warranty claims, "[t]he implied warranty claim cannot stand as a matter of law and must be dismissed." *Kruszka*, 2014 U.S. Dist. LEXIS 68439, at *47; *Cont'l Ins. Co. v. Loctite Corp.*, 352 N.W.2d 460, 463 (Minn. Ct. App. 1984).

H. Missouri

Plaintiff Shewmaker's claims fail for additional reasons under Missouri law. First, Plaintiffs negligence claims based on a price premium theory are barred by the economic loss doctrine. *See Budach v. NIBCO, Inc.*, 2015 U.S. Dist. LEXIS 150714, at *15 (W.D. Mo. Nov. 6, 2015). Second, her claims for breach of express warranty are barred due to her failure to provide adequate pre-suit notice. *See id.* at *12. Plaintiff Shewmaker never provided notice. Compl. 212. Finally, her claims for unjust enrichment are barred as duplicative of her express warranty claim. *See Kuhns v. Scottrade, Inc*., 868 F.3d 711, 718 (8th Cir. 2017).

I. New Jersey

Plaintiff Diana Hall's claims fail for additional reasons under New Jersey law. Except for breach of express warranty, "all claims for harm caused by a product under New Jersey law, *regardless of the theory underlying the claim*, are governed by the [New Jersey Products Liability Act ("NJPLA") N.J.S.A. 2A:58C-1 et seq.,]" and the NJPLA "is the *exclusive remedy* for such actions and other claims are subsumed within the statutory cause of action." *Calender v. NVR Inc.*, 548 F. App'x 761, 764 (3d Cir. 2013) (emphases added). Here, because Plaintiff Hall's claims are "premised upon a product's manufacturing, warning, or design defect, that claim must be brought

under the [NJ]PLA with damages limited to those available under that statute; [NJ]CFA claims for the same conduct are precluded." *Sun Chem. Corp. v. Fike Corp.*, 243 N.J. 319, 336 (2020). Accordingly, the claims for negligence (Compl. ¶¶ 218-25), negligent failure to warn (Compl. ¶¶ 229-41), design defect (Compl. ¶¶ 244-53), unjust enrichment (Compl. ¶¶ 254-67), and breach of implied warranty (Compl. ¶¶ 323-42) are subsumed under the NJPLA for Plaintiff Hall and the New Jersey sub-class and must be dismissed.

J. New York

The claims of Plaintiffs Alanna Hall and Rachel Muniz fail for additional reasons under New York law. First, Plaintiffs' negligence-based claims fail because Plaintiffs do not identify – nor could they – the existence of any special relationship that would create to a duty owed to Plaintiffs. This is particularly significant where the parties have no actual privity of contract. *See Stoltz v. Fage Dairy Processing Indus., S.A.*, 2015 U.S. Dist. LEXIS 126880, at *73-74 (E.D.N.Y. Sep. 22, 2015) (citation omitted) (noting that in "the commercial context, a closer degree of trust between the parties than that of the ordinary buyer and seller is required to establish the 'existence of . . . a special relationship . . . [capable of] giv[ing] rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech.'" *See also DeBlasio v. Merrill Lynch & Co.*, U.S. Dist. LEXIS 64848 at *5, 33 (S.D.N.Y. July 27, 2009) (dismissing negligent misrepresentation claim because allegedly misleading statements made on defendants' websites and in their advertisements did not give rise to special relationship); *Drullinsky v. Tauscher Cronacher Eng'rs*, 831 N.Y.S.2d 359, 359 (Sup. Ct. 2006) ("[T]here must be something more than an ordinary consumer merchant relationship to give rise to a special relationship."). Second, Plaintiffs' implied warranty of merchantability claim fails because of the lack of privity of contract, *see Westchester Cnty. v. Gen. Motors Corp.*, 555 F. Supp. 290, 294 (S.D.N.Y.1983); *Tomasino v. Estee Lauder Companies Inc.*, 44 F. Supp. 3d 251, 262-63 (E.D.N.Y.

2014), and their express warranty claims are barred due to their failure to provide adequate pre-suit notice. *Id.* at 260.

Lastly, Plaintiffs' unjust enrichment claim must also fail because it is duplicative of their tort claims. *See Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 289 (S.D.N.Y. 2015) (citing *Corsello v. Verizon N.Y., Inc.*, 944 N.Y.S.2d 732,790 (2012)) ("Plaintiffs have failed to show how their unjust enrichment claim 'differs from [their] ... tort claims[,]' which seek relief from the same conduct, and therefore 'it must be dismissed' under New York law."). *See also Ebin v. Kangadis Food Inc.*, 2013 U.S. Dist. LEXIS 174174 at *7 (S.D.N.Y. Dec. 11, 2013) (dismissing unjust enrichment claim as duplicative of fraud and breach of warranty claims).

K. Pennsylvania

Plaintiff Tami Nunez's unjust enrichment claim is subject to dismissal under Pennsylvania law. As a quasi-contract claim, her claim for unjust enrichment should be dismissed because she also alleges an express contract through her claim for breach of express warranty. *See Benefit Tr. Life Ins. Co. v. Union Nat'l Bank,* 776 F.2d 1174, 1177 (3d Cir. 1985). Plaintiffs' assertion of class claims on behalf of a Pennsylvania class under the Pennsylvania Unfair Trade Practices and Consumer Protection Law "PUTPCPL") should be stricken because the requirements of justifiable reliance and ascertainable loss require individual treatment "renders the case unsuitable for class treatment." *Lewis v. Ford Motor Co*., 263 F.R.D. 252, 264 (W.D. Pa. 2009); *Marshall v. Hyundai Motor Am*., 334 F.R.D. 36 (S.D.N.Y. 2019)(applying to PUTPCPL and GBL § 349).

CONCLUSION

For the reasons set forth above, Plaintiffs cannot maintain all of the causes of action alleged in their Complaint, and the Court should grant Deva Concepts' Motion to Dismiss.

Dated: New York, New York

January 28, 2021

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