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DEFENDANT PET BRANDS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE DEFENDANT PET BRANDS LITIGATION This Document Relates To: ALL ACTIONS	Lead Case No. 4:18-cv-00861-JSW (Consolidated with Nos. 4:18-cv-01465; 4:18-cv-01466; 4:18-cv-01099; 4:18-cv-01663; and 4:18-cv-02662) **DEFENDANT BIG HEART PET BRANDS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: November 16, 2018 Time: 9:00 a.m. Judge: Hon. Jeffrey S. White Location: Courtroom 5, 2nd Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 16, 2018 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-entitled court, located at 1301 Clay Street, Oakland, CA 94612, Defendant Big Heart Pet Brands, Inc. ("Defendant") will and hereby does move the Court to dismiss the Amended Consolidated Complaint ("Complaint") of Maclain Mullins, Thomas Roupe, Neil Sebastiano, Nancy Sturm, Kathy Williamson, Mark Johnson, Norman Todd, Betty Christian, Aubrey Thomas, Joyce Brown, Roberta Mayo, Jack Collins, Vivian Jilek, and Rosemarie Schirripa (collectively, "Plaintiffs") with prejudice pursuant to Rules 9(b), 12(b)(1), and 12(b)(6) of the Federal Rules of Civil Procedure for failure to meet heightened pleading requirements, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted.

This motion is based upon this notice of motion and motion, the accompanying memorandum of points and authorities, the contents of the record and the Court file, and any further written or oral submissions that may be presented at or before the hearing on this motion. The Defendant requests that the court dismiss Plaintiffs' complaint in its entirety, with prejudice.

Respectfully submitted,

Dated: August 28, 2018

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By: */s/ Ronald Y. Rothstein*

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STATEMENT OF ISSUES

(1) Whether Plaintiffs' claims should be dismissed under the prudential mootness doctrine because Plaintiffs allege no injury beyond the cost of the goods, which Defendant has compensated by offering full refunds to Plaintiffs and the members of the putative classes, and because the products at issue have already been recalled in cooperation with the FDA.

(2) Whether Plaintiffs' consumer protection, false advertising, misrepresentation, and express warranty claims should be dismissed because Plaintiffs fail to adequately allege, with respect to most of the products at issue, that they read and relied on any representation or, with respect to the remaining products, that any representation was made other than non-actionable puffery.

(3) Whether, under *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 596 (9th Cir. 2012), and its progeny, Plaintiffs lack standing to represent the nationwide or multistate classes for which the complaint alleges claims under California law where there are material differences in states' laws, and key differences between the claims being asserted by Plaintiffs from different states.

(4) Whether Plaintiffs' Amended Consolidated Complaint should be dismissed for failure to meet the pleading requirements of the remaining claims it asserts.

(5) Whether Plaintiffs lack standing to pursue the forms of relief they seek.

SUMMARY OF ARGUMENT

This suit concerns a finding of pentobarbital in Defendant's pet food products in early 2018. After its discovery, Defendant issued (in cooperation with the FDA) a recall of the affected products, and made a public, standing offer to refund any consumer that had purchased them. Plaintiffs nevertheless filed suit. Their suit is not based on any allegation whatsoever of harm to pets, but asserts 47 claims in 13 different states, nearly all of which allege some form of false advertising or misrepresentation. However, Plaintiffs fail to allege a single, actionable statement by the Defendant, and instead simply recite the elements of their claims, relying on misleading generalizations and implication for support. Its lack of factual content makes their complaint untenable. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs' individual claims must be dismissed for several reasons. Plaintiffs' claims are moot, because all of the relief they are seeking has been made available through a standing refund offer. Further, while they rely on broad, unsupported allegations about Defendant's knowledge, actions and intentions, Plaintiffs also do not plead basic facts to support the elements of their claims as required under Federal Rules of Civil Procedure 9(b) and 12(b)(6). Plaintiffs' claims, including all of those based on fraud, and several based on state consumer protection statutes and breach of express and implied warranty, must be dismissed because for the majority of products, Plaintiffs do not allege that they saw or knew of any representation at all. Other claims in these categories fail because Plaintiffs do not support required elements such as notice, privity and standing. The negligence and negligent misrepresentation claims also cannot succeed, because Plaintiffs do not adequately plead elements of those claims, and damages are precluded under the economic loss doctrine. The eight claims that Plaintiffs plead on behalf of a nationwide class must also fail under *Mazza v. American Honda Motor Co., Inc.*, because the laws of the different states are too varied to apply California law across all 50 states, and because nonresident plaintiffs lack standing to assert any claims under California law. 666 F.3d 581, 596 (9th Cir. 2012). For all these reasons, Defendant seeks dismissal of Plaintiffs' entire complaint.

I. PRELIMINARY STATEMENT

In early 2018, upon learning that some of its pet food had been found to contain a chemical called pentobarbital, Defendant took immediate action to address the problem: working with the FDA to recall affected products, offering full refunds to customers (including Plaintiffs and all members of the putative classes), and even offering to pay veterinary bills for concerned pet owners to confirm their pets' well-being. Plaintiffs now seek to maintain 47 claims related to this contamination, on behalf of a putative nationwide class and 13 state subclasses. However, all of these claims are moot because Defendant has ceased selling and recalled the products and made a standing offer to fully compensate Plaintiffs for all of their pleaded damages. As Plaintiffs have no claims that qualify for punitive damages, there is no additional remedy available to them at law.

While Plaintiffs' Amended Consolidated Complaint ("Complaint") consists primarily of provocative material about the risks and harms of pentobarbital to animals, and mud-slinging about Defendant, the gravamen of the Complaint is rooted in alleged false advertising. In fact, not one of Plaintiffs' claims is grounded in any actual or potential harm to pets. Plaintiffs plead their individual claims by offering bare-bones assertions about Defendant's intent, state of mind, and actions. They support these assertions with only inference and implication, citing or "paraphrasing" unrelated statements that Plaintiffs never saw or read, or by repeatedly alleging statements that Defendant never said. They plead no facts to support knowledge, intent or concealment by Defendant, or even to show an affirmative statement about the majority of products in question. Plaintiffs should not be allowed to manufacture claims that seek to duplicate a remedy that remains available to all members of the putative class. Their attempt to do so does not serve consumers, and wastes judicial resources. As there is no injury to address in this litigation, the Court should exercise its discretion under the prudential mootness doctrine to dismiss the Complaint in its entirety.

Beyond the generally conclusory and boilerplate nature of their allegations, Plaintiffs' individual claims all suffer from one or more specific, fatal deficiencies.

To start, Plaintiffs' claims sound in fraud,[1] but the Complaint fails to meet the pleading

[1] Courts have explicitly confirmed this for, at least, the claims of negligent misrepresentation under California, Washington and Tennessee law, statutory consumer protection claims under the CLRA, Ca. FAL, Ca. UCL, Ga. UDTPA, Il. CFA, Minn. DTPA, Minn. UTPA, Minn. FAL, Minn. CFA, and

requirements of Fed. R. Civ. P. 9(b), offering no details of what or how Plaintiffs were misled. Plaintiffs' also plead five fraud-specific claims, including fraudulent concealment (count VIII),[2] fraud under Tennessee law (count XXII), fraud by affirmative misrepresentation under West Virginia law (count XXVI), and fraudulent misrepresentation under Maryland (count XXXII) and Washington law (count XXXVII), but do not show that Defendant acted with knowledge or intent to deceive.

Plaintiffs' 17 state statutory claims[3] fail because Plaintiffs do not allege or support essential elements. Only four of the 16 product labels pictured in the Complaint contain a statement that Plaintiffs are alleged to have read, and that statement ("100% complete and balanced nutrition") is non-actionable puffery. However, Plaintiffs cannot base most of their statutory claims on an omission, because they cannot show that Defendant knew of the contamination. Further, Plaintiffs ignore requirements such as notice, continuing damage and privity, and plead a seemingly-random assortment of claims, one of which (the Minn. CFL) does not even allow a private right of action.

Plaintiffs' eight negligence-related counts, including negligence under California, Tennessee, and West Virginia law (respectively, counts V, XXI, and XXV), and negligent misrepresentation under California and Tennessee, Maryland, Texas, and Washington law (counts I, XX, XXX, XXXIII and XXXVI) fail under the economic loss rule. The California negligence claim also fails because Plaintiffs do not show required elements for the negligence per se evidentiary presumption, and the negligent misrepresentation claims also fail to comply with Rule 9(b), or to show that Defendant

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Wash. UDTPA, breach of express warranty under California, Alabama, Ohio and Washington law, and the various fraud claims under California, Tennessee, West Virginia, Maryland, and Washington law.

[2] As discussed *infra*, section VI.C, this motion will analyze the eight unspecified state law claims as if they are brought under California law.

[3] These are brought under the California Consumer Legal Remedies Act (CLRA) (count II), False Advertising Law (Ca. FAL) (count III) and Unfair Competition Law (Ca. UCL) (count IV), Georgia Unfair & Deceptive Trade Practices Act (Georgia UDTPA) (count IX), Georgia False Advertising Law (Ga. FAL) (count X), Florida Deceptive and Unfair Trade Practices Act (count XI) (Fl. DUTPA), Illinois Consumer Fraud and Deceptive Trade Practices Act (Il. CFA) (count XIV), West Virginia Consumer Credit and Protection Act (WVCCPA) (count XXVII), Maryland Consumer Protection Act (Md. CPA) (count XXXI), Washington Unfair & Deceptive Trade Practices Act (Wash. UDTPA) (count XXXVI), Minnesota Unfair Trade Practices Act (Minn. UTPA) (count XLII), Minnesota Deceptive Trade Practices Act (Minn. DTPA) (count XLIII), Minnesota False Advertising Law (Minn. FAL) (count XLIV), Minnesota Consumer Fraud Act (Minn. CFA) (count XLV), Minnesota Commercial Feed Law (Minn. CFL) (count XLI) New York Deceptive Acts & Practices law (NY DAP) (count XLVI), and New York False Advertising Law (NY FAL) (count XLVII).

provided information to guide others in business transactions.

Plaintiffs' nine breach of express warranty claims under California, Florida, Alabama, Ohio, Tennessee, West Virginia, Texas, Maryland and Washington law (counts VI, XII, XV, XVI, XVIII, XXIII, XXVIII, XXXIV and XXXIX) are facially invalid because they all fail to show an actual express warranty, reliance or proximate causation, and the ones under Alabama, Florida, Ohio, and Texas law also fail because Plaintiffs did not provide pre-suit notice of the alleged breach. Plaintiffs' breach of implied warranty claims under California, Florida, Ohio, Tennessee, West Virginia, Texas, Maryland and Washington law (counts VII, XI, XIII, XVII, XIX, XXIV, XXIX, XXXV and XL) are also invalid, because they fail to show that the product was unfit for ordinary purposes. The claims in Florida, West Virginia, Tennessee, Texas, Maryland and Washington that are based on affirmative statements fail because, once again, Plaintiffs do not plead an actionable statement. In addition, the California, Florida, Ohio, Tennessee, and Washington claims fail because they do not plead privity, and the Ohio, Texas and Maryland claims fail because they do not show that Plaintiffs provided Defendants with notice, as required by those states' laws.

Plaintiffs' class allegations concerning negligent misrepresentation (count I), violation of the CLRA, Ca. FAL and Ca. UCL (counts II-IV), negligence (count V), California breach of express and implied warranty (counts VI-VII) and fraudulent concealment (count VIII) should be dismissed because Plaintiffs attempt to bring individual state law claims on behalf of a nationwide or multistate class, despite their lack of standing and the fact that there are material differences in state law.

Finally, Plaintiffs cannot support a demand for injunctive relief or punitive damages (or maintain claims based on such a demand), because the contested conduct has already ceased and Plaintiffs fail to justify punitive damages.

II. FACTUAL BACKGROUND

In February of this year, Defendant learned of a report indicating that its Gravy Train brand of dog foods[4] had tested positive for the drug pentobarbital. Compl. ¶ 11. Defendant, and its parent company, Smucker, immediately launched an investigation to verify the report, determine where and

[4] The Gravy Train brand comprises a range of food products, *see* Compl., ¶ 2 (identifying different Gravy Train products), which this motion refers to collectively as "Gravy Train."

how the drug had infiltrated its supply chain, and uncover which products might have been affected. Compl. ¶ 12. It also began cooperating with the FDA to investigate possible sources and effects of the drug, and consulted veterinarians and animal nutrition specialists, who confirmed that the pentobarbital would not pose any risk to pets. Compl. Ex. A, at 1.

Once Defendant confirmed the presence of pentobarbital in certain of its products, it acted immediately. A press release was issued to inform the public of all potentially affected products and, despite the minimal risk to animals, Defendant took steps to mitigate concerns by withdrawing potentially affected shipments, and inviting consumers to call with questions. Compl. ¶ 20; *id*. Ex. A, at 1. After investigating and identifying the responsible supplier, Defendant promptly terminated that relationship and shut down the affected manufacturing facility until a new supplier could be located. Compl. ¶ C. Defendant also committed to conduct broader testing in the future, and continued to test affected products in subsequent weeks and keep the public informed. *Id*. Defendant then initiated a voluntary class III recall on specific shipments of Gravy Train.[5] It invited any consumers who had purchased affected products to call or email "for a refund or replacement product." *Id.* Defendant took this voluntary action despite confirmation by the FDA that, "the testing results of Gravy Train samples indicates that the low level of pentobarbital present in the withdrawn products is unlikely to pose a health risk to pets." Compl. ¶ 21. To maximize transparency, Defendant continued posting additional details about its testing and results on its website as it learned new information.[6]

Private veterinarians that Defendant consulted confirmed the FDA's conclusion that the levels

[5] "Gravy Train Canned Wet Dog Food Update," Gravy Train (Feb. 23, 2018, updated Mar. 2, 2018), available at http://www.gravytraindog.com/information (advising consumers that they can call or email "for a refund or replacement product"). This update is incorporated by reference into the Complaint at ¶ 29 and note 19. The Court can take judicial notice of facts "not subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Courts in the Ninth Circuit "routinely take judicial notice of press releases." *In re Am. Apparel, Inc. S'holder Litig.*, 855 F. Supp. 2d 1043, 1062 (C.D. Cal. 2012); *see also In re Netflix, Inc., Sec. Litig.*, 923 F. Supp. 2d 1214, 1218 n.1 (N.D. Cal. 2013) (taking judicial notice of a press release). This is especially appropriate where, as here, the press release forms part of the plaintiff's complaint. *See Weller v. Scout Analytics, Inc.*, 230 F. Supp. 3d 1085, 1089 n.1 (N.D. Cal. 2017) (taking judicial notice of a press release containing a statement at issue in the case).

[6] Press releases about testing and results were posted at http://www.jmsmucker.com/company-news/brand-news-releases-article/2334404.

of pentobarbital posed minimal risk to pet safety, and to this day, there is no proof connecting the miniscule level of pentobarbital to injury or death of any pet. Nevertheless, Defendant offered to reimburse consumers for veterinary fees incurred due to concerns about their pets' health, and has continued to honor this offer wherever consumers have provided documentation of expenses. Defendant has continued to monitor developments and to respond to consumer concerns as they arise.

Defendant has also continued to take remedial action, allowing any consumer who purchased an impacted product to obtain a full refund or replacement product, with or without a receipt, by contacting the company. Defendant published information about that offer on its website and social media pages, and in a press release after the contamination was discovered. In addition, Defendant took affirmative steps to ensure that this would not happen again, implementing a new quality assurance protocol to test its pet products specifically for pentobarbital contamination.

III. PLAINTIFFS' COMPLAINT

The day after the news report aired, Plaintiffs' counsel filed a putative class action complaint against Defendant on behalf of Plaintiff Maclain Mullins. Over the next several months, Plaintiffs' counsel filed complaints on behalf of 13 additional individual plaintiffs from different states. After consolidation, including one action transferred from the Southern District of New York, Plaintiffs filed the operative Complaint on June 14, which includes named Plaintiffs from 14 different states and asserts 47 claims under the laws of 13 different states, related to 16 products sold under Defendant's Gravy Train and Kibbles 'n Bits brands.[7] The Complaint does not assert a single claim based on any alleged harm to a pet. Instead, Plaintiffs allege that Defendant misled them, and that (despite having

[7] Paragraph 2 enumerates the following products upon which they base their claims: These are Gravy Train Chunks in Gravy with Beef Chunks; Gravy Train with Beef Chunks; Gravy Train Chunks in Gravy with T-Bone Flavor Chunks; Gravy Train with T-Bone Flavor Chunks; Gravy Train Chunks in Gravy with Chicken Chunks; Gravy Train with Chicken Chunks; Gravy Train Strips in Gravy Beef Strips; Gravy Train Chunks in Gravy with Lamb & Rice Chunks; Gravy Train Chunks in Gravy Stew; Beef & Gravy Train Chicken, Liver Medley; Chef's Choice Bistro Hearty Cuts with Real Beef, Chicken & Vegetables in Gravy; Home-style Tender Slices with Real Beef, Chicken & Vegetables in Gravy; Bistro Tender Cuts with Real Beef & Vegetables in Gravy; Home-style Meatballs & Pasta Dinner with Real Beef in Tomato Sauce; Chef's Choice Bistro Tender Cuts with Real Turkey, Bacon & Vegetables in Gravy; American Grill Burger Dinner with Real Bacon & Cheese Bits in Gravy. Compl. ¶ 2. No Plaintiffs are alleged to have purchased Gravy Train with T-Bone Flavor Chunks, Gravy Train Chunks in Gravy Stew; Beef and Gravy Train Chicken, Liver Medley; or Kibbles 'n Bits Home-style Meatballs & Pasta Dinner with Real Beef in Tomato Sauce.

been offered full reimbursement) they suffered harm from buying a product that they would not have otherwise purchased.

While this is nothing more than a false advertising lawsuit, for all but four of the products at issue, Plaintiffs have not identified a single representation on any product label. While the Complaint repeatedly makes the bald assertion that "Defendant… claim[ed] that the [products at issue] are pure, healthy, quality, and safe, and offer 100 percent complete and balanced nutrition with the purest ingredients" (Compl. ¶¶ 114), the conspicuous absence of quotation marks reveals that this is not a citation to Defendant's own statements. Likewise, the allegation that Defendant "maintains that it keeps rigorous quality and supplier standards from 'start to finish' and performs three-tier auditing" (Compl. ¶ 40) is not specific to the products or brands at issue. Instead, these statements are merely compilations of words taken from other contexts, paraphrased, or created from whole cloth.

While Plaintiffs plead only that they "read and relied upon the ***labels***" in making their purchasing decisions (Compl. ¶ 118), the only actionable statements they plead, with the exception of one, appear in unrelated general corporate responsibility statements with no direct reference to the Gravy Train or Kibbles n' Bits brands, much less the specific products at issue. These statements describe, in general terms, Defendant's focus on supplier quality and on meeting FDA and other regulatory standards. *See* Compl. ¶¶ 42, 43, 45, 53.[8] They also make broad pronouncements such as "[o]ur supplier management program includes an extensive evaluation of manufacturing locations and a comprehensive testing program that is used to assess the safety and quality of ingredients upon receipt," which have nothing to do with specific products, and which Plaintiffs have not shown are untrue. *See* Compl. ¶ 45. In addition, none of the cited corporate policy documents is available at the websites listed, and the Plaintiffs' citations do not provide dates visited. *Id*. Because the basis of Plaintiffs' claims is that these statements materially misled individual consumers, details about their

[8] Defendant's commitment to following FDA procedures is not news, particularly given its evident cooperation with the FDA here, which is described in part in the Complaint at Paragraphs 15, 19-22, 29-30, 35, Ex. B and C. Beyond their intentionally vague inferences, Plaintiffs offer no evidence that Defendant does not aim to comply with regulatory standards, or that its statements are otherwise false. They attempt to imply that the existence of this policy, on its own, somehow indicates either knowledge of pentobarbital contamination or an intentional misrepresentation by Defendant, but fail to substantiate this logical leap with any factual allegations. Compl. ¶ 44.

accessibility (or lack thereof) and of their alleged placement dates are significant, and the absence of such information is fatal. Further, not a single Plaintiff alleges that he or she ever read—let alone relied upon—any portion of these policy documents. One of the two remaining paragraphs discussing specific representations alleges only that Walmart, a third party, made statements on its website regarding one of the products named in the Complaint. Compl. ¶ 52, fn. 21. Once again, not a single Plaintiff alleges that he or she ever read Walmart's website statements.[9]

Plaintiffs provide 15 pictures of labels of products named in the Complaint,[10] but only four bear the statement "100 percent complete and balanced nutrition," (which is the only alleged statement Plaintiffs indicate they could have seen). Compl. ¶ 113 (a)-(j), (o).[11] However, the Complaint does not allege that Plaintiffs actually viewed any of the pictured labels.

The majority of claims brought on behalf of the various classes are notably lacking in specificity. For each of the 47 counts, the Complaint dutifully parrots some (but not all) legal elements of the claim, but does not allege corresponding facts to support those elements. Instead, Plaintiffs simply repeat vague, overbroad, and unsupported allegations about Defendant's mindset, statements and actions.

Based on the allegations above, Plaintiffs bring eight counts on behalf of a nationwide class and 39 on behalf of state-specific subclasses. *See* Compl. ¶¶ 139-610. On behalf of the purported nationwide class, Plaintiffs allege negligent misrepresentation (Count I); violation of the CLRA (Count II); violation of the Ca. FAL (Count III); violation of the Ca. UCL (Count IV); negligence (Count V); breach of express warranty under California law (Count VI); breach of implied warranty

[9] Specifically, all but one of the Plaintiffs allege that their purchases were made at a "local" store or store in a specific town. Plaintiff Schirripa is alleged to have made purchases from Walmart.com. No Plaintiffs are alleged to have even seen Defendant's website, only to have "read and relied upon the labels." Compl. ¶¶ 71-111, 118. The (partial) image displayed in ¶ 52 cites only to a page on the Walmart website (which presently contains no such image), and offers no further information.

[10] The Complaint does not include a picture for Gravy Train Chunks in Gravy with Chicken Chunks.

[11] Only the pictured labels for Kibbles 'n Bits Home-Style Tender Slices with Real Beef, Chicken & Vegetables in Gravy, Kibbles 'n Bits Bistro Tender Cuts with Real Beef & Vegetables in Gravy, Kibbles 'n Bits Homestyle Meatballs & Pasta Dinner with Real Beef in Tomato Sauce, and Kibbles 'n Bits American Grill Burger Dinner with Real Bacon & Cheese Bits in Gravy include the statement "100 percent complete and balanced nutrition." *See* Compl. ¶¶ 113 (k)-(n). The rest of the labels do not display any other statement upon which Plaintiffs rely. *See, e.g.*, compl. ¶ 116, 161.

under California law (Count VII); and fraudulent concealment (Count VIII).

On behalf of the purported state subclasses, Plaintiffs bring 14 claims under eight other states' consumer protection statutes. Plaintiffs also bring five claims of fraudulent concealment or fraud under the laws of four other states; eight breach of express and seven breach of implied warranty claims under other specific states' laws; two general negligence claims under Tennessee and West Virginia law that, as pleaded, are merely restyled representation claims; and four negligent misrepresentation claims under Tennessee, Texas, Maryland and Washington law.

Plaintiffs seek an injunction preventing sale of the affected products until the pentobarbital is removed (which already occurred), and requiring a recall (which already occurred), restitution (which already occurred), disgorgement (of nonexistent profits), actual damages (available through Defendant's standing refund offer), statutory damages, and punitive damages (despite lacking necessary prerequisites).

IV. LEGAL STANDARDS: RULES 12(b)(6), 9(B), AND 12(b)(1)

Federal Rule of Civil Procedure 12(b)(6) requires dismissal where a plaintiff "fail[s] to state a clam upon which relief can be granted[.]" "A district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a 'lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)). "[A] plaintiff's obligation to provide the 'grounds' of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Rather, "[a] complaint must contain sufficient factual matter accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). Thus, to adequately plead a claim in federal court, Plaintiffs must do more than simply recite the legal elements of their claims. *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216, 1226 (C.D. Cal. 2012). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory,

'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

In addition, "[c]laims sounding in fraud are subject to the heightened pleading requirement of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud 'must state with particularity the circumstances constituting fraud.'" *Wilson v. Frito-Lay N. Am., Inc*., 961 F. Supp. 2d 1134, 1139 (N.D. Cal. 2013) (quoting Fed. R. Civ. P. 9(b)). When a plaintiff "allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim," that claim is said to "sound in fraud" and becomes subject to the heightened pleading requirements of Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009). This is the case even if the word "fraud" is not affirmatively alleged, or if fraud is not a named element of the claim. *See Vess*, 317 F.3d at 1106.

Rule 9(b)'s heightened pleading requirement is designed "to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (quotation omitted). To provide such notice, "the complaint must specify such facts as the times, dates, places, and benefits received, and other details of the alleged fraudulent activity." *Id.* at 672. In other words, averments of fraud must be accompanied by the "who, what, when, where, and how" of the misconduct charged. *Vess*, 317 F.3d at 1103-4.

Complaints also may fail for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When a defendant makes a facial challenge, as Defendant does in this Motion, all material allegations in the complaint are assumed true, and the court must determine whether lack of federal jurisdiction appears from the face of the complaint itself. *See Iqbal*, 556 U.S. at 678. To satisfy Article III standing, a plaintiff must allege: (1) an injury in fact that is concrete and particularized, as well as actual and imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely (not merely speculative) that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000). A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction over the suit. *Id.* at 212-213. These requirements apply with

equal force in food labeling cases. *See, e.g.*, *Avoy v. Turtle Mountain, LLC*, No. 13-cv-0236, 2014 WL 587173, at *3 (N.D. Cal. Feb. 14, 2014).

V. ARGUMENT

A. Plaintiffs' Claims Are Moot Because Defendants Have Offered Plaintiffs and the Putative Class Full Compensation for the Alleged Damages.

The Complaint asserts various claims based on Plaintiffs' purchases of the products, which Plaintiffs allege they would not have made had they known of the presence of pentobarbital. But Defendant has already provided the very relief sought in the Complaint—issuing a product recall and an offer to provide Plaintiffs and putative class members with refunds or product replacements—mooting Plaintiffs' claims because they cannot plausibly obtain anything more through litigation.

Courts have inherent equitable power to find a case prudentially moot "if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits." *Winzler v. Toyota Motor Sales, U.S.A. Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (Gorsuch, N.); *see also* 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 3533.1 (3d ed.) ("Doctrines of judicial administration run parallel to the remedial doctrines."); *Nasoordeen v. F.D.I.C.*, No. CV 08–05631 MMM, 2010 WL 113588, at *6 (C.D. Cal. Mar. 17, 2010) (collecting cases applying the prudential mootness doctrine within the Ninth Circuit).

Courts regularly exercise this power to dismiss product cases where a recall provides all or most of the relief sought by the plaintiffs. *See, e.g.*, *Winzler*, 681 F.3d at 1215; *Hadley v. Chrysler Gp. LLC*, No. 13-13665, 2014 WL 988962, at *5 (E.D. Mich. Mar. 13, 2014); *Cheng v. BMW of N. Am., LLC*, No. 12-09262, 2013 WL 3940815, at *4 (C.D. Cal. July 26, 2013). *Cf. Spencer-Lugo v. INS*, 548 F.2d 870, 870 (9th Cir. 1977) (per curiam) (declaring case moot under Article III where INS agreed to everything the other party had demanded). Similarly, in *Tosh-Surryhne v. Abbott Labs. Inc.*, the court found that a recall and offer to refund defective products rendered the plaintiff's claims moot. No. 10-2603, 2011 WL 4500880, at *3-5 (E.D. Cal. Sept. 27, 2011).

Here, Defendant has already provided all the relief Plaintiffs could plausibly claim. Defendant has recalled the products, Compl. ¶ 29, and offered to refund or replace customers' purchases.[12]

[12] "Gravy Train Canned Wet Dog Food Update," Gravy Train (Feb. 23, 2018, updated Mar. 2, 2018),

Although Plaintiffs purport to seek additional, punitive damages, they cannot do so under applicable law. In sum, Defendant has voluntarily provided all the relief Plaintiffs can request. The anticipated benefits of the Court's remedial decree do not justify the trouble of fully litigating the merits. *See Winzler*, 681 F.3d at 1210. The Court should therefore dismiss the Complaint in accordance with the prudential mootness doctrine.

B. Plaintiffs' Vague Allegations Fall Far Short Under Rule 9(b).

Each of Plaintiffs' counts relies on identical, boilerplate allegations of a "uniform course of fraudulent conduct," alleging that Defendant "fraudulently" misrepresented the contents of its products, and "intentionally" chose to omit necessary information on its product labels. *See, e.g.*, Compl. ¶ 51. Such allegations must satisfy the heightened pleading requirements of Rule 9(b), even if fraud is not a necessary element of each individual claim. *Vess*, 317 F.3d at 1103-04 ("Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)"). "To satisfy this standard, the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Lieberson v. Johnson & Johnson Consumer Cos, Inc*., 865 F. Supp. 2d 529, 539 (D.N.J. 2011). "Further, if [a] plaintiff claims a statement is false or misleading, the plaintiff must set forth what is false or misleading about a statement, and why it is false." *Benkle v. Ford Motor Co.*, 2017 WL 9486154, at *3 (C.D. Cal. Dec. 22, 2017).

All of Plaintiffs' counts allege fraud or a subspecies of fraud. Examples include negligent misrepresentation under California, Washington and Tennessee law, consumer protection claims under the CLRA, Ca. FAL, Ca. UCL, Ga UDTPA, Il. CFA, Minn. DTPA, Minn. UTPA, Minn. FAL, Minn. CFA and Wash. UDTPA, breach of express warranty under California, Alabama, Ohio and Washington law, and fraud, fraudulent concealment or fraudulent misrepresentation claims under California, Tennessee, West Virginia, Maryland, and Washington law.[13] *See, e.g., Gilmore v. Wells*

available at http://www.gravytraindog.com/information (advising consumers that they can call or email "for a refund or replacement product"). Although Plaintiffs allege that some of the affected products are still listed on internet retailers' websites (Compl. ¶ 67), these products too, are subject to the recall, and so a court order to withdraw the affected products would be redundant.

[13] A chart of case law finding that each of these claims sounds in fraud is attached as Ex. 1.

Fargo Bank N.A., 75 F. Supp. 3d 1255, 1270 (N.D. Cal. 2014) ("negligent misrepresentation is a species of fraud, and, hence, must be pleaded in accordance with Rule 9(b)"); *In re Apple & AT & T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1075 (N.D. Cal. 2011) ("Rule 9(b)'s heightened pleading standards apply to CLRA and UCL claims as well because those claims are 'grounded in fraud' or 'sound in fraud.' For the same reason, courts have also applied Rule 9(b) to claims under California's FAL."); *Water & Sanitation Health, Inc. v. Rainforest All., Inc.*, No. C15-75RAJ, 2015 WL 12657110, at *2-3 (W.D. Wash. Dec. 29, 2015) (when based on misrepresentations that the speaker knows or should know are false, claims under the Wash. UDTPA sound in fraud); *Arabian v. Organic Candy Factory*, No. 217CV05410ODWPLA, 2018 WL 1406608, at *3 (C.D. Cal. Mar. 19, 2018) (claims for breach of express warranty and breach of implied warranty sound in fraud and are subject to Rule 9(b) where "the plaintiff alleges a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of a claim.") (citations omitted); *Whye v. Concentra Health Servs., Inc.*, 583 F. App'x 159, 161 (4th Cir. 2014)) (a plaintiff must plead fraudulent misrepresentation claims with particularity); *Nunez v. Best Buy Co.*, 315 F.R.D. 245, 248 (D. Minn. 2016) ("[Rule 9(b) applies to all claims premised on fraud, including 'claims of false advertising, deceptive trade practices, unlawful trade practices, and consumer fraud.'"). These cases indicate that Rule 9(b) applies to all of the counts, including fraud, negligence, breach of warranty, and violation of consumer protection statutes where, as here, they are based on allegations of fraudulent conduct.

To avoid dismissal, a plaintiff must plead the elements of the above claims with particularity. For example, a plaintiff pleading a claim under the Il. CFA must show, among other things, that the defendant intended that the plaintiff rely on the deception. Here, rather than alleging facts to support such intent, Plaintiffs offer a vague assertion that "Defendant intended that Plaintiff Sturm and the Illinois Subclass would rely on the deception in purchasing the [products]." Compl. ¶ 269. This boilerplate allegation fails to meet the pleading requirements because it offers no facts whatsoever to support the alleged intent. Similarly, in pleading their Wash. UDTPA claim, Plaintiffs allege "Defendant engaged in unfair competition and unfair, unlawful, or fraudulent business practices by making material misrepresentations that the [products] were pure, quality, healthy, and safe for

consumption and by knowingly, intentionally, and/or negligently concealing … the fact that the [products] were adulterated with pentobarbital." Compl. ¶ 485. This ambiguous allegation is patently inadequate for the purposes of Rule 9(b). Plaintiffs offer no facts about when or where the alleged conduct occurred, nor do they specifically identify the source of the alleged misrepresentations. The remaining claims in this group are similarly lacking in specificity. *See, e.g.*, Compl. ¶ 159 (pleading Plaintiffs' FAL claim with discussion of "Defendant's claims that the [products] are healthy and safe for consumption" without providing any information about which actual claims, if any, the allegation refers to); Compl. ¶ 545 ("Defendant represented that its [products] were pure, quality, healthy, safe, made of wholesome ingredients, and were 100 percent balanced nutrition.").

The particularity requirement is not an academic exercise in a case like this, where the content of the alleged statements is essential to the assessment of Plaintiffs' claims. Plaintiffs' theory is grounded in fraud, yet the Complaint fails to allege facts such as "when," "what" and "how." Plaintiffs' broad allegations provide Defendant no notice whatsoever of the specific statements that were seen by the purported class members, or where and when they saw any such statements. Compl. ¶¶ 71-111. Instead, they offer only bare, boilerplate assertions that the elements of their claims have been met. Particularly here, Rule 9(b) exists to afford Defendant with "notice of the particular misconduct which is alleged … so that [Defendant] can defend against the charge." *Neubronner*, 6 F.3d at 671. Plaintiffs' own pleading illustrates this purpose, with its vague, conclusory, and often indecipherable allegations. Because their allegations fall far short of the pleading requirements imposed by Rule 9(b), and the Complaint provides no details of the purportedly "fraudulent" conduct, the Complaint is subject to dismissal. *See Vess*, 317 F.3d at 1106.

C. Plaintiffs' Claims Under Unspecified State Laws Fail.

Plaintiffs' first claims of negligent misrepresentation, negligence, and fraudulent concealment are purportedly brought on behalf of "the Classes," and fail to specify the state whose laws they are brought under. *See* Compl. ¶¶ 139-146, 174-180, 202-212. This motion will assume these claims are brought under California law, and will analyze them based on that assumption in succeeding sections. However, the fact that the governing state is not specified makes these claims patently defective, and mandates their dismissal. *Romero v. Flowers Bakeries, LLC*, finding that a plaintiff's "failure to allege

which state law governs [their] common law claim[s] is grounds for dismissal." No. 14-CV-05189-BLF, 2016 WL 469370, at *12 (N.D. Cal. Feb. 8, 2016).

D. Plaintiffs' Fraud Claims Do Not Show Knowledge or Intent to Deceive.

Plaintiffs plead five claims of common law fraud that include California fraudulent concealment, Tennessee fraud, West Virginia fraud by affirmative misrepresentation, and Maryland and Washington fraudulent misrepresentation. Generally, a plaintiff pleading these claims must show concealment or misrepresentation of a material fact, done with the intent to defraud, and that the listener acted on that information with resulting damage. *See, e.g.*, *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124, 162, 189 Cal. Rptr. 3d 31, 60 (Cal. 2015) (fraudulent concealment in California requires a showing that "the defendant intended to defraud the plaintiff by intentionally concealing or suppressing [a material] fact," and that the plaintiff suffered damages); *Dog House Invs., LLC v. Teal Props., Inc.*, 448 S.W.3d 905, 916 (2014) (fraud in Tennessee requires intentional misrepresentation of a material fact, and related damage); *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (2002) (in West Virginia, "[f]raudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud."); *Sass v. Andrew*, 152 Md. App. 406, 430 (Ct. Spec. App. Md. 2003) (actionable fraudulent misrepresentation "must be made with deliberate intent to deceive."); *Adams v. King Cty.*, 164 Wash. 2d 640, 662, 192 P.3d 891, 902 (2008) (a plaintiff claiming fraud must allege facts to indicate, among other things, the speaker's knowledge that his material statement is false and his intent that the listener should act on it, as well as resulting damages); *Crisman v. Crisman*, 85 Wash. App. 15, 21, 931 P.2d 163, 166 (1997), as amended on denial of reconsideration (Feb. 14, 1997) (absent an affirmative duty to disclose, fraudulent concealment requires, among other things, that the defendant acted knowingly with the intention that the defendant act on his misrepresentation).

Essential to a fraud claim is intentional concealment or knowing misrepresentation. "Fraud is never presumed, and where it is alleged facts sustaining it must be clearly made out." *Homestead Group, LLC. v. Bank of Tenn.*, 307 S.W.3d 746, 751 (Tenn. 2009). Indeed, courts in this Circuit have made it clear that vague, nonspecific allegations are inadequate to support such claims. *See, e.g.*,

Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1041 (9th Cir. 2011) (a complaint must allege more than labels and conclusions and must include sufficient facts to support a cognizable legal theory); *Facebook, Inc. v. Grunin*, 77 F. Supp. 3d 965, 970 (N.D. Cal. 2015) ("To plead a fraud claim, the complaint must allege sufficient facts to show… knowledge of the falsity.")

Plaintiffs here fail to provide the requisite support for this claim. Although the Complaint is replete with boilerplate references like "intent" and "conceal," it provides nothing more than conclusory allegations. The Complaint provides no facts whatsoever to indicate Defendant was aware of the presence of pentobarbital, or that it took affirmative steps to hide that presence from consumers. Plaintiffs do not cite a shred of evidence to support their allegations and instead offer bare, unsupported assertions that Defendant knew about the presence of pentobarbital in the product, and intentionally concealed it. *See, e.g.*, Compl. ¶¶ 203-204 ("Defendant "knew [the product] was adulterated with pentobarbital," and that it "made misrepresentations of material fact … as a means of concealing the true nature and quality of the [products]."); Compl. ¶ 346 ("Defendant … knew its representations… were false because the [products] are adulterated and contain pentobarbital"). However, even they acknowledge that the issue was caused by tainted supply, rather than some action by the Defendant. Compl. ¶ 40. Similarly, in pleading fraudulent misrepresentation under Washington law, Plaintiffs allege the necessary "special duty" based on the same boilerplate assertions that Defendant had "exclusive knowledge" of the contamination, and "actively conceal[ed]" such contamination from Plaintiffs with little more.

Despite these boilerplate allegations, Plaintiffs provide no facts to support the requisite knowledge or intent. Instead, they cite irrelevant historical events that they allege should circumstantially have moved Defendant to mistrust its suppliers, such that it would independently "confirm the safety, quality, and reputation" of its purchased source materials. Compl. ¶ 38. Plaintiffs then cite to a 2009 E. coli outbreak, a 2010 recall of cooked beef, a 2013 E. coli poisoning, a 2015 animal rights issue and a 2017 beef recall, but do not attempt to connect the tallow supplier from this case to the prior events. Compl. ¶ 39. They then reference an entity called MOPAC and allege that it

received euthanized horses,[14] in an attempt to imply that Defendant should have been alert to the possibility that pentobarbital may be present in the tallow it was sourcing. Compl. ¶ 40. Finally, Plaintiffs reference an event in 2001 where they allege, "analyses by the FDA found residue of the sedative." Compl. ¶ 41. However, Plaintiffs do not attempt to connect these events with any affirmative requirement for Defendant to have done more than it did to uncover the contamination at issue. Events from 17 years ago and alleged E. coli incidents and recalls of unrelated products for reasons Plaintiffs omit, do not establish the requisite knowledge, intent or concealment required to plead common law fraud. None of these circumstances or events establish Defendant either knew or should have known of the presence of pentobarbital, or that it sought to conceal it from consumers.

E. All of Plaintiffs' State Statutory Consumer Protection Claims Fail.

Plaintiffs plead 17 state consumer protection law violations in nine states. These include the CLRA, Ca. FAL and Ca. UCL, Ga. UDTPA, Ga. FAL, Fl. UDTPA, Il. CFA, WVCCPA, Md. CPA, Wash. UDTPA, Minn. CFL, Minn. UTPA, Minn. DTPA, Minn. FAL, Minn. CFA, NY DAP, and NY FAL. Beyond Plaintiffs' failure to comply with Rule 9(b), as discussed *supra*, section VI.B, the Complaint reveals fatal pleading defects that mandate dismissal.

1. Plaintiffs Do Not Allege Any Actionable Affirmative Misrepresentations.

Several of Plaintiffs' state statutory claims require an affirmative statement as an element of the claim and cannot be based on an alleged omission. *See, e.g.*, *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1141 (9th Cir. 2012) (noting that a manufacturer is generally not liable under the CLRA for omission of an unknown latent defect); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 838, 51 Cal. Rptr. 3d 118, 128 (Cal. 2006), *as modified* (Nov. 8, 2006) ("We cannot agree that a

[14] Plaintiffs cite to the third-party website for the Equine Protection Network, which offers a list for horse owners of facilities that may accept dead horses for rendering. The list mentions multiple entities with names that contain the word "MOPAC." Compl. ¶ 37, fn.14. However, they provide no facts that would indicate which, if any of these "MOPAC" entities is purportedly affiliated with Defendant's supplier, and in what context. They also offer a printed exhibit, purportedly from an unidentified organization called "Animals Angels." However, the printout they offer directly contradicts the argument for which it is cited, because it indicates that none of the listed MOPAC plants provide euthanasia. Further, both of these (presumably Internet-based) third-party citations should be disregarded, as "information appearing on [] third party websites is not a proper subject of judicial notice because it is not capable of accurate and ready determination." *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1029 (C.D. Cal. 2015).

failure to disclose a fact one has no affirmative duty to disclose is 'likely to deceive' anyone within the meaning of the [Ca.] UCL")); *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1023 (N.D. Cal. 2016) ("When the crux of a plaintiff's [Ca.] FAL claim is that the defendant did not make any statement at all about a subject, then a claim under the FAL may not advance."); Ga. Code Ann. § 10-1-421(a) (the Georgia false advertising statute is implicated when promotional documents contain "statements about the performance or disposition of the goods or service that the seller knows or reasonably should know are untrue or fraudulent"); *Graphic Commc'ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014) (the Minn. CFA does not permit omission-based claims except where the defendant had a special duty[15] to disclose the omitted facts).

Plaintiffs allege certain affirmative statements by Defendant, but none can be considered advertising for the products at issue. For example, Plaintiffs cite the statement "providing safe, healthy, and high-quality food" with "the purest ingredients." Compl. ¶ 53. Setting aside that these statements are classic forms of puffery, they never appear together with the labels or advertisements for Defendant's products. Rather, they are plucked from a corporate responsibility report on Defendant's website, which does not discuss any specific products.[16]

Plaintiffs further allege "Defendant chose to advertise, label, and market its products" as "pure, high quality, healthy and safe for dogs to ingest" (Compl. ¶ 55), but do not actually identify any such statements in connection with the products at issue. Defendant is aware of no label or advertisement that makes this claim and none are cited or identified in the Complaint. Finally, the Complaint alleges "Defendant promises to its consumers that all products meet USDA, AAFCO and FDA standards" without citing any product labels or advertising, and instead citing Defendant's corporate responsibility webpage. Compl. ¶ 56. This citation does not indicate when and in what context the quote was on the webpage, or that any named plaintiff ever viewed or relied on it. None of these non-

[15] A special duty may arise where one party has a confidential or fiduciary duty to the other, or has exclusive knowledge of or access to material facts. *Graphic Commc'ns*, 850 N.W.2d at 695. None of these circumstances exists here.

[16] Notably, the URL that Plaintiffs cite contains a report that was posted in 2017. Plaintiffs make no allegation about previous reports. However, at least some Plaintiffs' purchases ended as early as January 2015 (Compl. ¶ 71), well before the cited report was published.

existent or extraneous statements from remote webpages is actionable as a matter of law. *Richards v. Safeway, Inc.*, No. 13-cv-04317-JD, 2014 WL 12703716, at *2 (N.D. Cal. 2014) (dismissing claims that did not appear on the product's label).

Only one of the statements Plaintiffs plead appears on any product label.[17] That statement, "100% complete & balanced nutrition," appears on four Kibbles n' Bits cans.[18] *See, e.g.*, Compl. ¶¶ 113 (k), (l), (m), 116, 161. However, that precise labelling statement has already been deemed by another federal court to be "mere puffery" that "is not capable of being proven true or false" and that cannot support a claim based on an alleged misrepresentation. *Blue Buffalo Co. v. Nestle Purina Petcare Co.*, No. 4:15 CV 384 RWS, 2015 WL 3645262, at *10 (E.D. Mo. June 10, 2015).

Courts in this Circuit have similarly found vague or indefinite advertising statements that cannot be proven true or false to be non-actionable under California's consumer protection laws. *See, e.g.*, *Carrea v. Dreyer's Grand Ice Cream, Inc*., 475 F. App'x 113, 115 (9th Cir. 2012) ("original" and "classic" non-actionable); *Viggiano v. Hansen Nat. Corp*., No. 12–cv–10747 MMM, 2013 WL 2005430, at *11 n.42 (C.D. Cal. May 13, 2013) ("premium all-natural flavors" non-actionable); *Fraker v. KFC Corp*., 2006 U.S. Dist. LEXIS 79049, at *9–11 (S.D. Cal. Oct. 19, 2006) ("highest quality ingredients," "balanced diet plan," and "part of a sensible diet" non-actionable)). Similarly, a claim subject to multiple possible interpretations also cannot support a misrepresentation claim. *See It's Just Lunch Int'l LLC v. Nichols*, No. EDCV061127VAPOPX, 2009 WL 10668457, at *7 (C.D. Cal. May 21, 2009) ("proven" is non-actionable, because it "could mean so many things—longevity of the IJL system, profitability for the franchisor, the number of franchises—that a statement the system was 'proven' can neither be demonstrably true nor false.").[19]

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[17] The Complaint names 16 products (Compl. ¶ 2), but provides pictures of only 15 product labels (Compl. ¶ 113). With respect to the remaining product, Gravy Train Chunks in Gravy with Chicken Chunks, the Complaint does not contain any well-pleaded facts about any representations on the label, so the analysis for all claims related to this product is the same as it is for each of the 11 products for which the depicted labels show no representations.

[18] Notably, one of these products, Kibbles 'n Bits Home-style Meatballs & Pasta Dinner with Real Beef in Tomato Sauce, does not appear to have been purchased by any Plaintiff. In addition, only three of the 14 Plaintiffs are alleged to have purchased a product that contained this statement: Kathy Williamson of Ohio, Jack Collins of Maryland, and Rosemary Schirripa of New York. The other named Plaintiffs only claim to have purchased Gravy Train products. Compl. ¶¶ 71-110.

[19] Courts have come to the same conclusion when considering the term "complete," explaining that

Plaintiffs offer no explanation of how "100 percent complete & balanced nutrition" is or should be defined, or under what circumstances a food product will merit that label. Since the phrase is "[in]capable of being proven true or false" in any "specific and measurable" sense, it falls squarely within the definition of "puffery." It is therefore not actionable, and any statutory claims based on the four Kibbles 'n Bits labels must fail. *See Azoulai v. BMW of N. Am. LLC*, No. 16-CV-00589-BLF, 2017 WL 1354781, at *8 (N.D. Cal. Apr. 13, 2017).

2. Plaintiffs Did Not See or Rely on Any Affirmative Statements They Assert.

Plaintiffs' claims also must be dismissed because they do not allege that they read and relied on any representations other than the labels.[20] *See, e.g., Delacruz v. Cytosport, Inc.*, No. C 11-3532 CW, 2012 WL 1215243, at *9 (N.D. Cal. Apr. 11, 2012) (dismissing Ca. UCL, Ca. FAL and CLRA claims to the extent they were based on statements that the plaintiff did not allege she read or relied on in purchasing the product); *Nelson v. Pearson Ford Co.*, 112 Cal. Rptr. 3d 607, 638 (2010) (reliance is required for money damages under the CLRA); *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 322, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011) (standing under the Ca. FAL or Ca. UCL, a plaintiff requires reliance on the alleged misrepresentation); *De Bouse v. Bayer*, 922 N.E. 2d 309, 316 (Ill. 2009) (reliance is required under the Il. CFA because a "plaintiff must actually be deceived by a statement or omission that is made by the defendant"); *Duxbury v. Spex Feeds, Inc.*, 681 N.W. 2d 380, 393-94 (2004), citing Minn. Stat. § 325F.69 (plaintiffs asserting Minn. CFA claims must show reliance on the purported false information).

While the Complaint quotes various corporate policies and website excerpts, Plaintiffs allege only that they "read and relied upon the labels of the [products] in making their purchasing decisions." Compl. ¶ 118. Notably absent is any allegation a plaintiff ever read or relied upon any of the cited

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"advertising terms like 'complete' are puffery because they are subjective and cannot be proven true or false." *See, e.g., Stokely–Van Camp, Inc. v. Coca–Cola Co.*, 646 F. Supp. 2d 510, 526 (S.D.N.Y. 2009) (citing *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995)).

[20] Any allegations regarding statements that Plaintiffs are not alleged to have read may be stricken from the Complaint under Rule 12(f) and cannot be the basis for a misrepresentation claim. *See Lanovaz v. Twinings N. Am. Inc.*, No. 12-cv-02646-RMW, 2013 WL 2285221, at *4 (N.D. Cal. May 23, 2013) ("the court strikes the claim 'natural source of protective antioxidants' and 'ideal source of antioxidants' from paragraph 133 because the [Plaintiff] does not allege anywhere else in the SAC that she read these statements on the website and relied on them.").

statements from Defendant's webpage and corporate policies. And since the statement "100 percent complete and balanced nutrition" has been held to constitute non-actionable puffery, as a matter of law, it cannot be the basis for the asserted claims. *Blue Buffalo*, 2015 WL 3645262, at *10. As Plaintiffs have failed to show that they read or relied on any allegedly misleading statement, or link such statement to the products in question, their claims should be dismissed.

3. Plaintiffs Do Not Plausibly Allege that Defendant Had Knowledge of Any Omitted Information.

When based on an allegedly misleading omission, Plaintiffs' claims require a showing that Defendant knew of the products' contamination at the time of their sale to Plaintiffs, and chose to omit disclosing it. *See, e.g.*, *Arroyo v. TP-Link USA Corp.*, No. 5:14-cv-04999-EJD, 2015 WL 5698752, at *9 (N.D. Cal. Sept. 29, 2015) (indicating that CLRA claims may be based on omissions solely where the Defendant had exclusive knowledge of the omitted fact);[21] *Luskin's, Inc. v. Consumer Prot. Div.*, 353 Md. 335, 367, 726 A.2d 702, 717 (1999) ("The omissions proscribed by [the Md. CPA] clearly require that the concealment, suppression or omission of any material fact be knowing."); *Kommer v. Ford Motor Co.*, No. 117CV296LEKDJS, 2017 WL 3251598, at *4 (N.D.N.Y. Jul. 28, 2017) (a plaintiff asserting an omission-based claim under the NY FAL or NY DAP must show that the business possessed the omitted information).

Plaintiffs offer only speculative and conclusory allegations that in no way suggest Defendant had the requisite knowledge to support their claims. For example, they imply that Defendant must have known of the contamination because it maintains rigorous quality and supplier standards. Compl. ¶¶ 40-46. However, these types of conclusory allegations are inadequate to show knowledge. *See, e.g.*, *Burdt v. Whirlpool Corp.*, 2015 WL 4647929, at *4 (N.D. Cal. Aug. 5, 2015); *Wilson*, 668 F.3d at 1146 (rejecting allegation that the defendant's "access to the aggregate information and data" meant it necessarily had knowledge). Because Plaintiffs allege no facts that actually indicate knowledge, each of the claims in this category must fail.

4. Plaintiffs Have Not Complied with Statutory Notice Requirements.

[21] As discussed in section VI.E.2, *infra*, courts generally do not allow claims under the CLRA and Ca. UCL to be based on anything other than affirmative misrepresentation. However, *Arroyo* offers a narrow exception where a defendant has exclusive knowledge of the omitted fact.

Plaintiff Aubrey Thomas alleges a violation of the WVCCPA (Compl. ¶¶ 383-394); however, he fails to plead (or comply with) the basic, essential notice requirement required by that statute. It states that, "no action may be brought … until the consumer has informed the seller ... in writing and by certified mail of the alleged violation and provided the seller ... twenty days from receipt of the notice of violation to make a cure offer." *Harrison v. Porsche Cars N. Am., Inc.*, No. 15-0381, 2016 WL 1455864, at *2 (W. Va. Apr. 12, 2016) (citing W. Va. Code § 46A–6–106(b), and dismissing a WVCCPA claim where the plaintiff "did not specifically notify [the defendant] of the alleged violation of the WVCCPA, or of his intent to sue at least twenty days prior to filing suit."). Courts have confirmed that such notice is obligatory. *Stanley v. Huntington Nat'l Bank*, No. 1:11CV54, 2012 WL 254135, at *7 (N.D. W.Va. Jan. 27, 2012) (stating that the plaintiff's failure to comply with notice requirements set forth in West Virginia Code § 46A–6–106(b), which are "mandatory prerequisites to filing suit," barred a WVCCPA claim). The notice must clearly indicate the plaintiff's intent to sue under the WVCCPA. *Harrison*, 2016 WL 1455864, at *2; *Bennett v. Skyline Corp.*, 52 F. Supp. 3d 796, 812 (N.D.W. Va. 2014) ("[C]ourts will grant a defendant's motion to dismiss when the notice letter fails even to mention the WVCCPA."). Moreover, the notice cannot be substituted by the filing of a complaint. *Waters v. Electrolux Home Prod., Inc.*, 154 F. Supp. 3d 340, 354 (N.D.W. Va. 2015).

Here, Plaintiff Thomas makes no allegation that he provided Defendant with 20 days' notice that specifically (or even generally) mentions a WVCCPA violation, or with an opportunity to cure. *See* Compl. ¶¶ 383-394. Thus, as in the above-cited cases, the WVCCPA claim must be dismissed.

5. Plaintiffs Allege Only Past Wrongs, Inappropriate for Injunction.

Three of Plaintiffs' misrepresentation-based claims provide for injunction as their sole remedy in a private action. These include the Ga. UDTPA (*Moore-Davis Motors, Inc. v. Joyner*, 556 S.E.2d 137, 140 (Ga. 2001) ("the sole remedy available under the UDTPA is injunctive relief")), the Ga. FAL (*Clark v. Aaron's, Inc.*, 914 F. Supp. 2d 1301, 1307 (N.D. Ga. 2012) (injunction is the exclusive remedy for violations of § 10-1-420 et seq.)), and the Minn. DTPA (Minn. Stat. Ann. § 325D.45 (injunctive relief and costs/attorney's fees are the only remedies for a violation of this statute)). "[T]o be entitled to injunctive relief, a plaintiff must establish that he is a person likely to be damaged by a deceptive trade practice of another." *Moore-Davis Motors*, 556 S.E. 2d at 140 (citing OCGA § 10–1–

373(a)). "An injunction is only available to remedy future wrongs and does not afford a remedy for what is past." *Terrill v. Electrolux Home Prod., Inc.*, 753 F. Supp. 2d 1272, 1291 (S.D. Ga. 2010) (citing *Catrett v. Landmark Dodge, Inc.*, 253 Ga. App. 639, 644 (2002)) (internal quotation marks omitted). Courts have therefore dismissed claims under these statutes where based entirely on past wrongs. *See, e.g.*, *Terrill*, 753 F. Supp. 2d at 1291-1292; *Tusen v. M&T Bank*, No. CV 16-4339 (PAM/KMM), 2017 WL 4990524, at *4 (D. Minn. Oct. 31, 2017) (citing *Gardner v. First Am. Title Ins. Co.*, 296 F. Supp. 2d 1011, 1020 (D. Minn. 2003)) ("The MDTPA only 'provides relief from future damage, not past damage'").

Here, Plaintiffs' fraud claims rely entirely on prior conduct, alleging that, for example, "the Defendant engaged in deceptive trade practices … when it claimed that the [products] were pure, quality, healthy, and safe for consumption." *See, e.g.*, Compl. ¶ 215 (pleading the Ga. UDTPA claim). Plaintiffs cannot plausibly allege any claim for future harm, because Defendant voluntarily ceased sales and issued a recall of the products, and offered refunds to all purchasers. As Plaintiffs have not established a likelihood of future harm, these three claims must be dismissed.

6. The Florida DUTPA Claims Are Unsupported.

Plaintiffs pleading a claim under the Fl. DUTPA must show (1) an unfair or deceptive practice; (2) causation; and (3) actual damages. *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). Named Florida Plaintiff Neil Sebastiano does not show a deceptive act or unfair practice, or causation under the statute. A practice is unfair under the Fl. DUTPA if it offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *See, e.g.*, *Exim Brickell, LLC v. Bariven, S.A.*, No. 09-CV-20915, 2011 WL 13131263, at *41 (S.D. Fla. Aug. 16, 2011) (denying a Fl. DUTPA claim because "[w]hile the evidence definitively show[ed] that [the defendant] breached the… contract by supplying defective goods, there [wa]s no evidence that breach was intentional, much less any factual support that [it] engaged in immoral, unethical, oppressive, or unscrupulous behavior."). A practice is deceptive when a defendant makes a representation or omission that is likely to mislead a consumer acting reasonably in the circumstances, to the consumer's detriment. *Casa Dimitri Corp. v. Invicta Watch Co. of Am., Inc.*, 270 F. Supp. 3d 1340, 1353 (S.D. Fla. 2017). Plaintiff Sebastiano fails to show an unfair trade practice because he does

not allege that Defendant's actions were immoral, unethical, oppressive or unscrupulous. This prong cannot be met simply by showing that the defendant supplied defective goods, or with bare allegations that the defective goods were supplied intentionally. *Casa Dimitri*, 270 F. Supp. 3d at 1353-1354 (granting summary judgment on a Fl. DUTPA claim where the plaintiff had not provided facts indicating that the defendant intended to act in an immoral, deceitful, or unscrupulous way). Plaintiff Sebastiano has also not shown that Defendant's actions were deceptive, because he has not specified any representation that deceived him or shown that Defendant intended to deceive anyone. *Id.* Accordingly, the Fl. DUTPA claim must fail.

7. Plaintiffs Have No Standing Under the Minn. Commercial Feed Law.

Plaintiff Vivian Jilek asserts a claim under the Minn. CFL that must fail because that statute does not create a private right of action. The Minn. CFL sets labelling, manufacturer licensing, and product requirements for any commercial feed manufactured or distributed in the state, and prohibits the "misbranding" or "adulteration" of that feed. Minn. Stat. Ann. §§ 25.341; 25.35-25.38. It allows the commissioner to enforce those requirements, and to inspect facilities where commercial feeds are manufactured or stored. Minn. Stat. Ann. § 25.40-25.41. Nowhere does the statute authorize enforcement action by an individual purchaser. Plaintiff Jilek provides no explanation as to why she should be allowed to step into the shoes of Minnesota's commissioner and prosecutors. The Court should therefore construe the statutory language strictly, and find Plaintiff Jilek lacks standing to enforce this statute.

F. Plaintiffs' Negligence and Negligent Misrepresentation Claims Fail.

Plaintiffs' negligence counts are a haphazard mess. Plaintiffs assert a negligence claim in Count V that includes allegations of negligence per se (Compl. ¶ 175), violations of "statutory duties" under the Ca. FAL and CLRA (Compl. ¶ 176), and of other unnamed "statutory duties under Federal, [sic] various state laws." Compl. ¶ 177. Plaintiffs also assert negligence claims under Tennessee (count XXI) and West Virginia (count XXV) law. Plaintiffs further allege negligent misrepresentation claims under California (count I), Tennessee (count XX), Texas (count XXX), Maryland (count XXXIII), and Washington (count XXXVIII) state law. These tort-based negligence claims are barred by the economic loss doctrine, and are missing the required elements of duty, causation and damages. As to

the negligent misrepresentation claims, they fail to comply with Rule 9(b) and Plaintiffs do not fall within the zone of persons such claim is intended to protect.

1. Negligence Under Count V Fails.

The first negligence claim (count V) appears to rely on an allegation of negligence per se, stating that Defendant "violated its statutory duties under California's CLRA and FAL," and "violated its statutory duties under Federal, [sic] various state laws by selling adulterated pet food." Compl. ¶¶ 174-180. California's negligence per se statute does not create a separate cause of action but rather an evidentiary presumption with strict requirements. Such presumption can only be applied where: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from the type of occurrence the statute, ordinance, or regulation was meant to prevent; and (4) the injured person was among the class of persons the statute was intended to protect. Cal. Evid. Code § 669(a). Plaintiffs fail to plead any of these essential criteria. Rather, Plaintiffs' negligence per se assertion alleges that: (1) "Defendant violated its statutory duties under California's CLRA and FAL…" and "under Federal, [sic] various state laws," and that (2) "Defendant's violations of these statutes were a substantial factor in the harm suffered by Plaintiffs." Compl. ¶¶ 176-178. However, it fails to allege that (a) the violation caused injury or death to a person or property, (b) the death or injury was from an occurrence that the laws in question (here, the CLRA and FAL) were intended to prevent, or (c) that Plaintiffs are from the class of people the statutes aim to protect. The FAL and CLRA are consumer protection statutes, which clearly do not aim to address death or injury as contemplated by the negligence per se evidentiary presumption. Further, Plaintiffs fail to allege that they are among the class of people those statutes intend to protect from death or injury. As Plaintiffs fail to plead three of the four essential negligence per se criteria, these allegations cannot stand. Compl. ¶ 175.

The negligence per se claim also fails because Plaintiffs have not plausibly alleged a violation of either of their designated underlying statutes, California's CLRA and FAL.[22] Courts will dismiss a

[22] While Plaintiffs also allege that "Defendant violated federal, [sic]various state laws," any negligence per se claim based on an underlying violation other than the specifically-named CLRA and FAL claims cannot stand, because "[n]otice pleading requirements suggest that plaintiff must plead the specific statute on which he bases his claim for negligence per se." *Harris v. Burlington N. Santa Fe R.R.*, 2013

negligence per se claim where the underlying violation is not validly pleaded. *See, e.g.*, *Hernandez v. First Am. Loanstar Tr. Servs.*, 2010 WL 1445192, at *3 (S.D. Cal. Apr. 12, 2010); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 866 (N.D. Cal. 2011). This requires the plaintiff to properly plead each element of the underlying violation. *See generally, id*. (dismissing a negligence per se claim based on a CLRA violation where the plaintiff had not shown that he was a "consumer," under the statute); *Hernandez*, 2010 WL 1445192, at *2-3 (dismissing a negligence per se claim where the underlying FAL violation was not pleaded in compliance with Rule 9(b)).

Here, as noted in section VI.B, *supra*, Plaintiffs' claims under the CLRA and FAL sound in fraud, and accordingly must be pleaded with particularity. *In re Apple & AT & T*, 802 F. Supp. 2d at 1075. Yet, they fail to comply with Rule 9(b), because they do not allege the "when," "what" and "how" of their claims. *See id*. In addition, as discussed in more detail in section C, *supra*, Plaintiffs' FAL and CLRA claims must be based on an affirmative misrepresentation, or at the very least, a knowing omission, but the only affirmative statement they allege is non-actionable puffery, and they fail to plausibly allege that Plaintiffs knew or should have known of the contamination. As the *Hernandez* court made clear, because the CLRA and FAL-based claims fail, any negligence per se claim premised on their validity must also fail.

2. The Negligence and Negligent Misrepresentation Claims Fail Because Their Alleged Damages Are Precluded by the Economic Loss Doctrine.

Plaintiffs' negligence claims under California, Tennessee and West Virginia law fail because they do not allege injury or compensable damages. Plaintiffs' five negligent misrepresentation counts, under California, Tennessee, Texas, Maryland and Washington law, fail for the same reason. The sole basis for these negligence-related claims is that Defendant "did not impart correct and reliable disclosures concerning the true nature, quality, and ingredients" of its products, and that it represented that the products were "pure, quality, healthy, safe for consumption, made of wholesome ingredients, and are 100 percent complete and balanced nutrition." Compl. ¶¶ 337, 338.[23] These are simply false

WL 12122668, at *2 (C.D. Cal. July 12, 2013). Thus, the only permissible underlying claims are those named in the pleading: the FAL and CLRA.

[23] As noted previously, Plaintiffs do not quote this statement, nor do they allege that Defendant ever actually said any part of it. Rather, they paraphrase and combine different statements by Defendant,

advertising allegations, recast as negligence claims, and do not show a cognizable negligence theory. Apart from the fact that the allegedly "misleading" representations are nothing more than puffery and general laudatory statements in unrelated corporate policy documents that generally do not appear on the product labels or advertisements, the only injuries Plaintiffs allege are the products' purchase costs. *See* Compl. ¶ 179.

A negligence claim must be dismissed where the complaint fails to plausibly allege actual losses suffered by the plaintiff. *See, e.g.*, *Pajas v. Cty. of Monterey*, No. 16-CV-00945-LHK, 2016 WL 6563357, at *6-7 (N.D. Cal. Nov. 4, 2016). Plaintiffs assert "they would not have purchased [the products] at all had they known of the presence of pentobarbital" (Compl. ¶ 340) and that they "have suffered actual damages because they purchased" the products (Compl. ¶ 374). These are not actionable damages in a negligence claim, because they are precluded under the economic loss doctrine. That doctrine prevents a plaintiff from pursuing a negligence action based solely on economic losses, where the plaintiffs' injuries are better addressed through contract remedies. *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 488-489 (Tenn. 2009). California and West Virginia also follow this doctrine. *See, e.g.*, *Elsayed v. Maserati N. Am., Inc.*, 215 F. Supp. 3d 949, 961 (C.D. Cal. 2016) (manufacturer liability in negligence actions "is limited to damages for physical injuries; no recovery is allowed for economic loss alone") (internal quotation marks omitted); *Aikens v. Debow*, 208 W. Va. 486, 494, n.4 (W. Va. 2000) ("The prohibition against economic recovery in tort in the absence of physical impact is apparent in the context of product liability actions, in which the economic losses are essentially contractual and allocable by the parties, as reflected in purchase price warranties, or insurance.").[24] Here, Plaintiffs simply ignore the economic loss doctrine, claiming entitlement to purely economic damages based solely on the purchase price of the dog food. *See, e.g.*, Compl. ¶ 108 ("Plaintiff Jilek was injured by purchasing the [products] that had no value or *de minimis*

from different contexts, to create the broad statements on which this and other allegations are based.

[24] There are exceptions to this rule where there is (1) personal injury, (2) physical damage to property, (3) a "special relationship" between the parties, or (4) some other common law exception to the rule. *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 961 (S.D. Cal. 2012). However, Plaintiffs have not alleged, and could not support, the existence of any of these special circumstances.

value as they were adulterated."). Since a standing refund offer was instituted immediately and has existed ever since the contamination was discovered, and since any damages are fully recoverable under a contract theory, Plaintiffs' negligence claims are precluded and must be dismissed as a matter of law.

Plaintiffs' negligent misrepresentation claims are subject to the economic loss rule in Texas, Washington and California. *See Sterling Chem., Inc. v. Texaco Inc*., 259 S.W. 3d 793, 797 (Tex. App. 2007) ("Under the economic loss rule, a plaintiff may not bring a claim for negligent misrepresentation unless the plaintiff can establish that he suffered an injury that is distinct, separate, and independent from the economic losses recoverable under a breach of contract claim."); *Alejandre v. Bull*, 159 Wash. 2d 674, 677 (Wash. 2007) (denying recovery for "an economic loss within the scope of the parties' contract, [because] the economic loss rule precludes any recovery under a negligent misrepresentation theory."); *Frye v. Wine Library, Inc*., 06–5399 SC, 2006 WL 3500605, at *3 (N.D. Cal. Dec. 4, 2006) ("As Plaintiff's negligent misrepresentation claim can be characterized as relating to Defendant's inducement of Plaintiff to contract, there is also no question of it being barred by the economic loss rule.").

In Maryland, negligent misrepresentation is an exception to the economic loss rule, but only where such claim is based on a duty independent of the one established by the contract. *Sun-Lite Glazing Contractors, Inc. v. J.E. Berkowitz, L.P.*, 37 F. App'x 677, 680 (4th Cir. 2002) (internal quotations omitted) (citing *Heckrotte v. Riddle*, 224 Md. 591, 168 A.2d 879, 882 (Md. 1961)) ("Maryland jurisprudence requires that the alleged duty be independent of any contractual obligation. Thus, the mere negligent breach of a contract… is not enough to sustain an action in tort."). Here, Plaintiffs' negligent misrepresentation claim alleges that defendant "breached its duty… by providing false, misleading, partial disclosures, and/or deceptive information regarding the true nature, quality, and ingredients of the [products]" in order to "induce Plaintiff Collins and the Maryland Subclass to purchase the [products]." Compl. ¶¶ 448-449. Thus, the duty alleged is based entirely on representations made as part of the parties' sales contract, rendering Maryland's exception inapplicable. Because Plaintiffs have not alleged compensable tort-based damages, their negligent misrepresentation claims in Texas, Washington, Maryland and California must be dismissed.

3. Plaintiffs' Negligent Misrepresentation Claims Fail Because They Do Not Plead That Defendant Supplied Information to Guide Others in Their Business Transactions.

To plead negligent misrepresentation, generally a plaintiff must show: (1) the defendant was acting in the course of its business, profession, or employment; (2) the defendant supplied false information for the guidance of others in its business transactions; (3) the defendant failed to exercise reasonable care in obtaining or communicating the information; and (4) the plaintiff justifiably relied on the false information. *See* Restatement (Second) of Torts § 552 (1977); *Sears v. Gregory*, 146 S.W.3d 610, 621 (Tenn. 2004) (Koch, J. dissenting) (listing the same elements under Tennessee law); *Bryant v. Country Life Ins. Co.*, 414 F. Supp. 2d 981, 1001 (W.D. Wash. 2006) (same under Washington law); *Willis v. Marshall*, 401 S.W.3d 689, 698 (Tex. Ct. App. 2013) (the same under Texas law); *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 117 F. Supp. 3d 1092, 1111 (C.D. Cal. 2015); *Griesi v. Atl. Gen. Hosp. Corp.*, 360 Md. 1, 11 (Md. 2000).

Here, in pleading their negligent misrepresentation claims, Plaintiffs repeat many of the same, boilerplate allegations that they offer in support of their other claims. However, none of these claims includes any allegation that Defendant supplied information to guide Plaintiffs in their business transactions. *See, e.g.*, Compl. ¶¶ 139-146 (pleading negligent misrepresentation under California law without mentioning the "guidance of others in… business transactions"), ¶¶ 328-335 (the same under Tennessee law); ¶¶ 415-421 (the same under Texas law); ¶¶ 445-453 (the same under Maryland law); ¶¶ 502-510 (the same under Washington law). Indeed, Plaintiffs could not plausibly plead such an allegation as information supplied for the guidance of others in the course of a business transaction includes information provided in the course of a business or professional service, by people such as lenders, auditors, physicians, real estate brokers, accountants, and similar specialized service providers and experts in the course of their work. *See, e.g.*, Restatement (Second) of Torts § 552 (limiting liability for negligent misrepresentation to business and professional persons who negligently provide information for the guidance of others); *Hodge v. Craig*, 382 S.W.3d 325, 344-45 (Tenn. 2012) (restating the Restatement's limitation in Tennessee); *Willis*, 401 S.W.3d at 698-99 (limiting liability for negligence to information transferred by a professional to a known party, for a known purpose). This is because "[t]he theory of negligent misrepresentation permits plaintiffs who are not parties to a

contract for professional services to recover from the contracting professionals" when they are harmed by their negligence. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999). Our research does not indicate any court has applied it to advertising statements (or omissions) in the relevant states. For this reason, Plaintiffs' claims fail as a matter of law.

4. Plaintiffs' Negligent Misrepresentation Claims Fail Because They Do Not Comply with Rule 9(b).

A plaintiff alleging negligent misrepresentation must also show that the defendant made the misrepresentation "without reasonable ground for believing it to be true." *UMG Recordings*, 117 F. Supp. 3d at 1111; *see also, e.g.*, *Sears*, 146 S.W.3d at 621 (Koch, J. dissenting) (a plaintiff claiming negligent misrepresentation in Tennessee must show the defendant failed to use reasonable care in obtaining or communicating the information); *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.*, 2005 WL 2207037, at *1 (W.D. Wash. Aug. 29, 2005) (allegations of negligent misrepresentation under Washington law must be pleaded with particularity). Moreover, in California and Tennessee, courts have expressly found negligent misrepresentation claims sound in fraud, and are subject to the heightened pleading requirements of Rule 9(b). *Gilmore*, 75 F. Supp. 3d at 1270 (the Northern District "agrees with the line of cases that hold that negligent misrepresentation is a species of fraud, and, hence, must be pleaded in accordance with Rule 9(b)")); *Pugh v. Bank of Am.*, No. 13-2020, 2013 WL 3349649, at *16 (W.D. Tenn. July 2, 2013) ("courts in Tennessee have concluded that claims 'of negligent misrepresentation must be pled with the particularity … under Rule 9(b).'") (citation omitted). Thus, Plaintiffs' pleading must indicate when, where and how the alleged conduct took place.

Disregarding these strict requirements, Plaintiffs rely on boilerplate statements, maintaining only that Defendant "failed to use reasonable care in its communications, marketing, and representations," and that it "breached its duty… by providing false, misleading, partial disclosures and/or deceptive information." Compl. ¶¶ 330, 333. They allege no facts to indicate that Defendant failed to use reasonable care in making the communications alleged in the Complaint. Instead, they rely solely on the fact that a problem arose, infer negligence based on that fact alone, and make no connection between any alleged misrepresentation, resulting reliance and injury. The federal pleading

standards for this type of claim make this kind of bare assertion patently inadequate. *See, e.g.*, *Todd Cty. v. Barlow Projects, Inc.*, No. CIV.04-4218ADM/RLE, 2005 WL 1115479, at *4 (D. Minn. May 11, 2005) (stating that the defendants "did not meet appropriate standards of care in their professional work" and that misrepresentations "were repeatedly stated" was inadequate, because it did not provide the who, what, when, where and how of the alleged misrepresentation). As Defendant did not know about the problem and certainly did not make any statements relating to the problem, these counts require dismissal.

G. Plaintiffs Have Failed to Show a Breach of Warranty.

Plaintiffs' plead breach of express warranty under the laws of nine states, including: California (Cal. Com. Code § 2313, count VI), Florida (Fla. Stat. § 672.313, count XII), Alabama (Ala. Code § 7-2-313, count XV), Ohio (Ohio Rev. Code Ann. § 1302.26, count XVI), Tennessee (Tenn. Code Ann. § 47-2-313, count XVIII), West Virginia (W. Va. Code § 46-2-313, count XXIII), Texas (Tex. Bus. & Com. Code § 2.313(a), count XXVIII), Maryland (Md. Code Com. Law § 2-313, count XXXIV) and Washington (Wash. Rev. Code § 62A.2-313, count XXXIX).

1. Plaintiffs Have Not Stated a Claim for Breach of Express Warranty.

Although the elements of a breach of express warranty claim differ from state to state, what is common among them is that they require an express statement by the seller and that the buyer relied on that statement, as well as resulting damages. *See, e.g.*, *Tyree v. Boston Sci. Corp.*, No. 2:12-CV-08633, 2014 WL 5359008, at *5 (S.D. W.Va. Oct. 20, 2014) (discussing breach of express warranty under West Virginia law); *Boyd v. TTI Floorcare N. Am.*, 230 F. Supp. 3d 1266, 1272 (N.D. Ala. 2011) (under Alabama law). Florida, Alabama, Ohio and Texas also require that a Plaintiff show that the seller was notified of the breach and failed to cure within a reasonable time. *Jovine v. Abbott Lab., Inc.*, 795 F. Supp. 2d 1331, 1339-1340 (S.D. Fla. 2011); *Galoski v. Stanley Black & Decker, Inc.*, 2015 WL 5093443, at *4 (N.D. Ohio Aug. 28, 2015).

a. Defendant Did Not Make Any Express Warranties.

To sufficiently plead breach of express warranty, Plaintiffs must "'identify a specific and unequivocal written statement' about the product that constitutes an 'explicit guarantee.'" T*&M Solar & Air Conditioning, Inc. v. Lennox Int'l Inc.*, 83 F. Supp. 3d 855, 875 (N.D. Cal. 2015). "[A] plaintiff

must provide 'specifics' about what the warranty statement was, and how and when it was breached." *Id.* (quoting *Minkler v. Apple, Inc.*, 65 F. Supp. 3d 810, 816-17 (N.D. Cal. Aug. 20, 2014)). "[T]o constitute an actionable express warranty, the statement regarding the product must be 'specific and measurable.'" *In re Nexus 6P Prod. Liab. Litig.*, 293 F. Supp. 888, 936 (N.D. Cal. 2018) (citing *Azoulai*, 2017 WL 1354781, at *8). Where a plaintiff fails to differentiate which statements apply to which products, the express warranty claims related to that product must fail. *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1106 (N.D. Cal. 2017). Promotional statements, expressions of opinion or belief, and puffery are insufficient to create an actionable warranty. *See, e.g.*, *Barrette Outdoor Living, Inc. v. Vi-Chem Corp.*, No. 2:13-CV-289, 2015 WL 12547568, at *6 (E.D. Tenn. Aug. 31, 2015); *Gricco v. Carver Boat Corp., LLC*, No. CIV. JFM-04-1854, 2005 WL 3448038, at *3 (D. Md. Dec. 15, 2005), *aff'd sub nom. Gricco v. Carver Boat Corp.*, 228 F. App'x 347 (4th Cir. 2007); *Giovinale v. JP Morgan Chase Bank, N.A.*, No. CV H-16-986, 2017 WL 1092312, at *5 (S.D. Tex. Mar. 23, 2017) ("A statement that is mere puffing or the seller's opinion does not give rise to an actionable warranty. Vague or imprecise representations are mere opinion and do not give rise to an express warranty.") (citations omitted). Generalized statements about a brand or company are inadequate to create an express warranty for one of that company's specific products. *Barrette Outdoor Living*, 2015 WL 12547568, at *6 ("A company's resume does not create an express warranty for every product it produces.").

Here, in an attempt to create the appearance of an express warranty, Plaintiffs allege several generalized statements about Defendant's manufacturing and sourcing, but as discussed *supra*, section V.E.1, only one alleged statement is specific to the products in question. For example, Plaintiffs allege, "Defendant made express representations" that the products "are pure, quality, healthy, and safe for consumption," and that the products "comply with all applicable regulations." *See, e.g.*, Compl. ¶¶ 182-183. These general laudatory statements, contained in corporate policy documents or that are fabricated from whole cloth, are not express warranties for the products at issue in this lawsuit. Similarly, Plaintiffs cite Defendant's corporate responsibility statement that it employs "an extensive evaluation of manufacturing locations and a comprehensive testing program that is used to assess the safety and quality of ingredients" (Compl. ¶ 45), and that it "performs tier-three auditing." Compl. ¶

40. However, these statements are not product-specific, do not discuss the products in question or promise that the company will test and uncover problems with every single product or item that goes into or out of its manufacturing facilities. These are not "express representations" or a "'specific and unequivocal written statement' about the product[s] that constitutes an 'explicit guarantee.'"[25] The only labelling statement Plaintiffs assert for their express warranty claims—100% complete and balanced nutrition—appears on only four Kibbles 'N Bits products, and is non-actionable puffery. *See, e.g.*, *Blue Buffalo Co*, 2015 WL 3645262, at *10. As with Plaintiffs' statutory consumer protection claims, such puffery cannot support a claim for breach of express warranty. *See, e.g.*, *White v. R.J. Reynolds Tobacco Co.*, No. CIV.A.H-99-1408, 2000 WL 33993333, at *2 (S.D. Tex. Sept. 27, 2000) ("Texas courts have differentiated statements of puffing or opinion from statements of warranty."); *Podpeskar v. Makita U.S.A. Inc.*, 247 F. Supp. 3d 1001, 1009 (D. Minn. 2017) (under Minnesota law, "warranties must be more than 'mere puffery.'"); *Bobb Forest Products, Inc. v. Morbark Indus., Inc.*, 151 Ohio App. 3d 63, 81 (2002) ("'puffing' or merely stating the seller's opinion does not amount to an express warranty."); *Castaneda v. Fila USA, Inc.*, No. 11-CV-1033-H BGS, 2011 WL 7719013, at *4 (S.D. Cal. Aug. 10, 2011) ("statements are non-actionable puffery, and do not constitute an express warranty on which a reasonable consumer could rely."). Without an actionable express warranty, these claims must fail.

b. Plaintiffs Do Not Allege Knowledge, Reliance or Proximate Causation.

A claim for breach of express warranty requires either knowledge or reliance, plus proximate causation.[26] The Complaint does not satisfy these requirements, because no Plaintiff he or she read an actionable warranty statement. A plaintiff cannot rely on or be harmed by a statement that he or she did not even read. *See, e.g.*, *Dopson-Troutt v. Novartis Pharm. Corp.*, No. 8:06-CV-1708-T-24, 2014 WL 1418100, at *3 (M.D. Fla. Apr. 11, 2014) ("To satisfy the "basis of the bargain" requirement, Plaintiff must prove that she 'read, heard, saw or knew' the statement [that] she alleges constituted a

[26] Many state laws refer to this as the promise becoming "part of the basis of the bargain," but the meaning is the same – a plaintiff must have relied on it in purchasing the allegedly warrantied items.

warranty."); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 831 P.2d 724, 731 (Wash. 1992) ("Recovery for breach of an express warranty is contingent on a plaintiff's knowledge of the representation."); *Moncada v. Allstate Ins. Co.*, 471 F. Supp. 2d 987, 997 (N.D. Cal. 2006) (dismissing warranty claim where plaintiffs offered no evidence that they had read or relied upon a website's representations); *Coffey v. Dowley Mfg.*, 187 F. Supp. 2d 958, 973 (M.D. Tenn. 2002) (dismissing express warranty claim where "it [was] not clear that [plaintiff] ever read or specifically relied on these affirmations"); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 676 (Tex. 2004) ("[u]nder Texas law, we have said that reliance is . . . not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty (to a certain extent).").

Setting aside their barebones labels and boilerplate conclusions (*e.g.*, that Defendant's representation "became part of the basis of the bargain" (Compl. ¶ 184), and that "Plaintiffs and the Classes reasonably relied on the express warranties by Defendant" (*e.g.*, Compl. ¶ 190)), Plaintiffs do not allege any facts to support the knowledge, reliance or causation elements. They do not claim that they read or even knew the statements that do not appear on any labels. *See, e.g.*, *supra* § III; *see also* Compl. ¶ 118 (alleging that "Plaintiffs read and relied upon the labels of the [products] in making their purchasing decisions."). Because they fail to allege that they read and relied on an actionable express statement, Plaintiffs cannot support reliance or proximate causation, requiring dismissal.

c. Plaintiffs Did Not Provide Notice or Opportunity to Cure.

Plaintiffs claiming breach of express warranty under Florida, Alabama, Ohio and Texas law must show that they provided the defendant with pre-suit notice and an opportunity to cure. *Sclar v. OsteoMed, L.P.*, No. 17-23247-CIV, 2018 WL 559137, at *2 (S.D. Fla. Jan. 24, 2018) (where a complaint "does not allege that Plaintiffs complied with Florida's pre-suit notice requirement, Plaintiffs have failed to state a claim for breach of express warranty."); *Hobbs v. Gen. Motors Corp.*, 134 F. Supp. 2d 1277, 1285-1286 (M.D. Ala. 2001) (granting summary judgment on a breach of express warranty claim against a remote manufacturer because there was no evidence or allegation that the plaintiffs had given notice prior to filing suit); *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Ents., Inc.*, 50 N.E.3d 955, 960 (Ohio 2015) (notice is required for breach of warranty claims in Ohio); *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 705-706 (5th Cir. 2014) (failure to notify a

seller of the alleged breach bars a breach of warranty claim in Texas). The notice requirement "enables the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's liability to the buyer." *Gen. Matters, Inc. v. Paramount Canning Co.*, 382 So. 2d 1262, 1264 (Fla. 1980) (internal quotation marks omitted). "A notice sent at the same time as the lawsuit is filed does not provide sufficient time to accomplish these purposes." *Clay v. CytoSport, Inc.*, *No*. 3:15-CV-00165-L-AGS, 2018 WL 3648061, at *5 (S.D. Cal. July 31, 2018) (considering a claim brought under Florida law); *Hobbs*, 134 F. Supp. 2d at 1285 ("the filing of a lawsuit is not considered to be sufficient notice under Alabama law"); *McKay*, 751 F.3d at 706 (commencement of litigation does not satisfy Texas' notice requirement). Further, Defendant's independent knowledge of the breach does not mitigate the knowledge requirement. *St. Clair v. Kroger Co.*, 581 F. Supp. 2d 896, 902-903 (N.D. Ohio 2008) (grocery store's independent knowledge of alleged breach of warranty did not satisfy Ohio's pre-litigation notice requirement).

Here, Plaintiffs do not allege that they provided pre-suit notice. Clearly, they could not support such an allegation, because they filed their Complaint immediately after learning of the problem and made no attempt to contact Defendant before doing so. Defendant therefore had no opportunity to cure before the suit was filed, as required under these statutes.[27] Thus, even if there had been an express warranty by Defendant (there was not), Plaintiffs' complete failure to comply with the notice requirements under Florida, Alabama, Ohio and Texas law would already mandate dismissal of their claims in those states.

2. Plaintiffs' Breach of Implied Warranty Claims Lack Critical Elements.

Plaintiffs plead breach of implied warranty under the laws of eight states, including California (Cal. Com. Code § 2314, count VII), Florida (Fla. Stat. § 672.314, count XIII), Ohio[28] (count XVII), Tennessee (Tenn. Code Ann. § 47-2-314, count XIX), West Virginia (W. Va. Code § 46-2-314, count

[27] Even through suit had already been filed, Defendant took immediate action to correct the problem by offering a refund to any purchaser for the full cost of the products at issue, and addressing the damages as completely as could be contemplated under the "opportunity to cure" requirements.

[28] Unlike their other breach of implied warranty claims, Plaintiffs do not provide a statutory basis for their breach of implied warranty claim under Ohio law (Count XVII), but their pleading language alleges that "the [products] are not fit for [sic] the ordinary purposes." Such allegations are governed by Ohio Rev. Code Ann. § 1302.27(d)(3), and this motion will analyze that claim accordingly.

XXIV), Texas (Tex. Bus. & Com. Code § 2.314, count XXIX), Maryland (Md. Code Com. Law § 2-314, count XXXV) and Washington law (Wash. Rev. Code § 62A.2-314, count XL). *See* Ex. 2 for the elements of these claims.

a. Plaintiffs Cannot Succeed on Their Implied Warranty Counts.

There are two types of breach implied warranty theories: (1) a general warranty in all sales contracts that the product is "fit for the ordinary purposes for which such good is used"; and (2) it does not "conform to the promises or affirmations of fact made on the container or label if any." *Hadley*, 243 F. Supp. 3d at 1106 (citing Cal. Com. Code § 2314(2)).

Here, Plaintiffs plead breach of implied warranty under both theories under the laws of Tennessee (Compl. ¶ 320), West Virginia (Compl. ¶ 364), Texas (Compl. ¶ 408), Maryland (Compl. 471), and Washington (Compl. ¶ 527). Plaintiffs also allege breach of implied warranty under California (Compl. ¶ 197) and Ohio (Compl. ¶ 300) law under only the first theory, that the products "were not fit for their ordinary purpose." First, where the claim alleges that the products are not fit for their ordinary purpose, the plaintiff must show that it "did not possess even the most basic degree of fitness for ordinary use." *Mocek v. Alfa Leisure, Inc.*, 114 Cal. App. 4th 402, 406 (2003). Plaintiffs cannot succeed based on the first theory because they fail to show that the products lacked "even the most basic degree of fitness." This is a false advertising case, not product liability, and is not grounded on any physical harm to any pets. Courts have held that "[a] breach of warranty cannot result if the product operates as it was intended to and does not malfunction during its useful life." *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 527 (C.D. Cal. 2012). As confirmed by the FDA, "the testing results of Gravy Train samples indicates that the low level of pentobarbital present in the withdrawn products is unlikely to pose a health risk to pets." Compl. ¶ 21. Despite containing this chemical, the products were used as intended and provided nutrition to pets. As such, the first type of breach of implied warranty claim cannot succeed and must be dismissed because it did not lack even the most basic degree of fitness.

Second, Plaintiffs allege breach of implied warranty in Florida (Compl. ¶ 255), Tennessee (Compl. ¶ 320), West Virginia (Compl. ¶ 364), Texas (Compl. ¶ 408), Maryland (Compl. ¶ 471) and Washington (Compl. ¶ 527) based on the second "promises or affirmations" theory. Here, Plaintiffs

identify the same statements that they rely upon for their breach of express warranty claims. In pleading their claim in Florida, the Complaints refers to the label generally but do not specify any affirmations or promises. (Compl. ¶¶ 253-262.) However, "[w]hen an implied warranty of merchantability cause of action is based solely on whether the product in dispute '[c]onforms to the promises or affirmations of fact" on the packaging of the product, the implied warranty of merchantability claim rises and falls with express warranty claims brought for the same product." *Hadley*, 243 F. Supp. 3d at 1106.

Moreover, where a complaint fails to differentiate which statements apply to which products, both warranty claims (express and implied) must fail, because overarching statements about a company's products or aspirations of compliance with standards and regulations as a whole are inadequate to create a warranty. *Id.* With the exception of the "100 percent complete and balanced nutrition" statement on four labels, Plaintiffs fail to connect the remaining statements, which either appear in general corporate policy documents or come from whole cloth, to any products. Because the breach of express warranty claims fail, so too should the implied warranty claims based on the same alleged statements.

Third, for the California claim, the Complaint refers to §§ 113075 and 113090 of the California Health & Safety Code (Compl. ¶ 194), and in Ohio, to Ohio Rev. Code Ann. § 923.48(A) (Compl. ¶ 298), seemingly as a basis to plead the breach of implied warranty claims. However, no court in either state (based on our research) has ever found a connection between a violation of those statutes and a breach of implied warranty claim, requiring dismissal.

Fourth, California, Florida, Ohio, Tennessee and Washington require that a plaintiff alleging breach of implied warranty show that he was in privity with the seller. *See, e.g.*, *Haley v. Bayer Healthcare Pharm. Inc*., No. SACV 16-546-JLS (EX), 2016 WL 10966426, at *3 (C.D. Cal. June 9, 2016) ("Under California law, privity between parties is generally required for claims of breach of an implied warranty"); *Cooper v. Old Williamsburg Candle Corp*., 653 F. Supp. 2d 1220, 1225 (M.D. Fla. 2009) ("[t]o sustain a claim for breach of implied warranty under Florida law, the plaintiff must demonstrate that he is in privity with the defendant."); *Caterpillar Fin. Servs.*, 50 N.E.3d at 962 (in Ohio, "in order to sustain a contract-based breach of implied warranty claim, the parties must be in

privity."); *Travis v. Ferguson*, No. M201600833COAR3CV, 2017 WL 1736708, at *2 (Tenn. Ct. App. May 3, 2017) (finding that the plaintiff did not have a cause of action for breach of implied warranty because he had not shown privity, which was required under Tenn. Code Ann. § 47–2–314); *Thongchoom v. Graco Children's Prod., Inc.*, 117 Wash. App. 299, 307, 71 P.3d 214, 219 (2003) (in Washington, "[p]rivity is also required for a breach of an implied warranty claim"). "[F]or parties to be in privity of contract they must have contracted with each other.". *What constitutes privity of contract*, 3 Anderson U.C.C. § 2-314:343 (3d. ed.). Where privity of contract is required, a plaintiff purchaser may not maintain a claim against a manufacturer with whom he is not directly in privity. *See, e.g., Voelker v. Porsche Cars N. Am., Inc.*, 353 F.3d 516 (7th Cir. 2003) (dismissing breach of implied warranty claim where buyer had purchased the product through an intermediary, and was not in privity with the product's manufacturer).

Here, none of Plaintiffs from these states (or any other state) purchased the products directly from Defendant. *See, e.g.*, Compl. ¶¶ 77, 84, 87, 93 (indicating Plaintiffs purchased products from local retailer). Plaintiffs attempt to get around this lack of privity by alleging that they "are the intended beneficiaries of the expressed and implied warranties." Compl. ¶ 126. However, courts have explicitly rejected the argument that there is an exception to the privity requirement for intended party beneficiaries. *See, e.g., Savett v. Whirlpool Corp.*, No. 12 CV 310, 2012 WL 3780451, at *10 (N.D. Ohio Aug. 31, 2012) (rejecting a retail customer's claim that he was an intended third-party beneficiary and therefore in privity with the product manufacturer); *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1083 (N.D. Cal. 2011) ("No reported California decision has held that the purchaser of a consumer product may dodge the privity rule by asserting that he or she is a third-party beneficiary of the distribution agreements linking the manufacturer to the retailer who ultimately made the sale."). Because Plaintiffs were not in privity with Defendant, the implied warranty claims in California, Florida, Ohio, Tennessee and Washington must also fail.

Fifth, Ohio, Texas and Maryland require a plaintiff claiming breach of implied warranty to show that he provided pre-suit notice of the alleged injury. *See, e.g., Lincoln Elec. Co. v. Technitrol, Inc.*, 718 F. Supp. 2d 876, 883 (N.D. Ohio 2010) ("Ohio courts and federal courts applying Ohio law have continued to hold that a plaintiff must notify a defendant of the alleged breach prior to the

complaint."); *Polanco v. Innovation Ventures, LLC*, No. 7:13-CV-568, 2014 WL 12599332, at *4 (S.D. Tex. May 5, 2014) (dismissing a claim of breach of implied warranty because the plaintiffs did not allege that they had provided the defendant with pre-suit notice and an opportunity to cure); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 542 (D. Md. 2011) ("notification to a seller within a reasonable time is a prerequisite for claiming a breach of implied warranty");[29] *Firestone Tire & Rubber Co. v. Cannon*, 53 Md. App. 106, 452 A.2d 192 (1982), *aff'd*, 295 Md. 528, 456 A.2d 930 (1983) (notice must be given prior to suit). A plaintiff buyer has the burden to allege and prove proper notice. *Id.* at *3 (S.D. Tex. May 5, 2014) (citing *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 189 (Tex. 1996)).

While Plaintiffs assert, in a conclusory manner, "Defendant has received sufficient notice of its breaches of express and implied warranties," the Complaint lacks factual allegations to support this assertion. Compl. ¶ 117. Plaintiffs' allegations that Defendant "had notice of the real ***risk*** pentobarbital may appear in the [Products] ***if*** the manufacturing and sourcing were not properly monitored" (Compl. ¶ 121 (emphasis added)) and similar allegations that Defendant was "on notice" of the alleged breach (Compl. ¶ 188), do not even come close to supporting a claim that Plaintiffs provided Defendant notice regarding "a claimed breach of the warranty of fitness," which is exactly what Texas courts require. *Lochinvar*, 930 S.W. 2d at 189. In pleading their Texas breach of warranty claim, Plaintiffs allege only, "Defendant was on notice of this breach as it was aware of the presence of pentobarbital and/or the use of euthanized animals" in its products. Compl. ¶ 412. However, merely alleging knowledge does not substitute for the actual notice Plaintiffs were obligated to provide. In the absence of any allegation of the requisite notice, Plaintiffs' claims of breach of implied warranty under Ohio, Texas and Maryland law must be dismissed.

[29] While Maryland case law indicates that the notice must be given to the immediate seller, rather than to the manufacturer, Plaintiffs do not allege that they gave notice to either one, so the distinction does not affect the viability of their claim. Further, Maryland courts have recognized that "a manufacturer has a distinct interest in whether an aggrieved consumer notifies his immediate seller of a breach[, and that i]t is only logical, therefore, that a consumer's failure to observe this requirement should provide the manufacturer with an affirmative defense." *Lloyd v. Gen. Motors Corp.*, 575 F. Supp. 2d 714, 723 (D. Md. 2008).

b. All of Plaintiffs' Warranty Claims Are Moot.

To avoid dismissal, plaintiffs alleging a breach of warranty must show that they suffered damages. *See, e.g.*, *T & M Solar*, 83 F. Supp. 3d at 872 (California); *Sparger v. Newmar Corp.*, No. 12-81347-CIV, 2014 WL 3928556, at *6 (S.D. Fla. Aug. 12, 2014) (Florida); *Polaris Indus., Inc. v. McDonald*, 119 S.W.3d 331, 336 (Tex. Ct. App. 2003) (Texas). "[A] plaintiff's burden of alleging damages is not discharged by simply postulating some purely hypothetical or inchoate injury which may or may not manifest itself in the future." *Rosa v. Am. Water Heater Co.*, 177 F. Supp. 3d 1025, 1051 (S.D. Tex. 2016). Rather, "[f]or a plaintiff's damages to be legally cognizable the plaintiff must have already suffered some sort of concrete, actual, palpable injury." *Id*. In this case, Plaintiffs allege that they "sustained damages as they paid money for the [products] that were not what Defendant represented." *See, e.g.*, Compl. ¶ 303. However, the pleaded damages are not adequate to support a breach of warranty claim, because Defendant, immediately upon learning of the problem, issued a standing offer to compensate fully all affected consumers.

Generally, where goods do not conform to an express warranty, the damages comprise "the difference between the value of the goods accepted by the buyer and the value of the goods had they been as warranted." *Dagher v. Ford Motor Co.*, 238 Cal. App. 4th 905, 928, 190 Cal. Rptr. 3d 261, 277 (Cal. Ct. App. 2015) (citing *Daugherty*, 144 Cal. App. 4th at 830). In this case, however, no such palpable injury presently exists, because all affected consumers have already been (or have the right to be) compensated for the entire cost of the product. It would make no sense to allow Plaintiffs to pursue an action merely to duplicate a remedy that already exists and has existed from the moment Defendant learned of the problem. Plaintiffs' alleged injury is therefore inadequate as a matter of law, because their purchase payments (the only damages that Plaintiffs allege to have suffered) have already been made available, in their entirety. *See, e.g.*, *Jensvold v. Town & Country Motors, Inc.*, 162 Vt. 580, 587 (Vt. 1994) (where buyers return products for a refund of the purchase price, breach of warranty damages are unavailable). Because Plaintiffs fail to allege existing damages that are compensable under a breach of warranty theory, all of their warranty claims must be dismissed.

H. Plaintiffs May Not Maintain Claims on Behalf of a Nationwide Class.

Plaintiffs' definitions and grouping of classes under which they attempt to plead their

nationwide class are confusing, haphazard, unwieldy, and illogical and completely fail under California law. The Complaint pleads a nationwide class, which it defines as the "Class." Compl. ¶ 127. It pleads subclasses from 13 different states (Compl. ¶ 128) which it defines collectively as "Subclasses." It then attempts to define the "Classes" as the "Class and Subclasses," collectively. Compl. ¶ 129. Plaintiffs attempt to bring counts I–VIII under five California statutes and three California common law claims on behalf of "the Classes."

These definitions are hopelessly confusing and cannot be reconciled. As pleaded, Plaintiffs are attempting to certify 13 separate subclasses in each of their home states (except Mullins' home state of Kentucky) and a separate multistate subclass consisting of the same 13 subclasses under eight separate California laws. However, 12 of these subclasses are, by definition, not alleged to have made any purchase in or have any connection with California. Plaintiffs are also attempting to certify a nationwide class under eight California laws despite the fact that analogous laws of the 50 states vary significantly from California law. This attempt fails as a matter of law because Plaintiffs lack standing and they are barred under binding Ninth Circuit precedent.

1. Plaintiffs Do Not Have Standing to Bring Nationwide Claims Under California Law.

"Article III standing is a threshold inquiry that must be undertaken at the outset of a case, before the Court proceeds any further." *In re Capacitors Antitrust Litig.*, 154 F. Supp. 3d 918, 924 (N.D. Cal. 2015). Article III standing for state consumer protection law claims requires "in-state injury in the form of an in-state purchase." *Id.* at 927. This and other federal courts in California have dismissed state law class claims before the class certification stage for lack of standing where named plaintiffs neither reside in nor otherwise interacted with the state. *See, e.g.*, *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1075 (N.D. Cal. 2015) ("the named Plaintiffs do not have standing to assert claims from states in which they do not reside or did not purchase [the product]"); *Mollicone v. Universal Handicraft, Inc.*, No. 216CV07322CASMRWX, 2017 WL 440257, at *9 (C.D. Cal. Jan. 30, 2017) (finding that "the majority of courts . . . have concluded that when a representative plaintiff is lacking for a particular state, all claims based on that state's laws are subject to dismissal") (listing cases) (citation omitted). Here, the 13 non-California Plaintiffs lack standing to bring their claims under

California law, as they neither live in, nor purchased Defendant's products in California. Only Plaintiff, Mark Johnson, is alleged to have purchased a product and reside in California but his connection to California does not confer standing on the foreign plaintiffs, so the eight claims on which they seek to certify a nationwide class based on California law must be dismissed.

2. *Mazza* Precludes a Nationwide Class Based on California Law Claims.

California's choice-of-law rules require that the court apply the laws of the jurisdiction in which each transaction took place, precluding application of California law to the proposed nationwide class or the 13 multistate subclasses, and requiring dismissal. *See Mazza*, 666 F.3d at 596. With class action claims, the *Mazza* analysis is "controlling, even at the pleading phase." *Cover v. Windsor Surry Co.*, No. 14-CV-05262-WHO, 2016 WL 520991, at *5 (N.D. Cal. Feb. 10, 2016) ("Multiple California district courts have applied *Mazza* at a motion to dismiss stage.").[30]

"California law may only be used on a classwide basis if the interests of other states are not found to outweigh California's interest in having its law applied." *Mazza*, 666 F.3d at 590 (quotations omitted). This requires the Court to determine: (1) whether there is a material difference between the different jurisdictions' laws; (2) if so, whether, under the circumstances, each jurisdiction's interest in the application of its own law creates a conflict; and (3) if there is a conflict, which jurisdiction's interest would be more impaired by application of the other's laws. *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1007 (N.D. Cal. 2014). Applying this test, courts have consistently concluded that out-of-state residents may not bring claims under California's consumer protection and other laws related to out-of-state purchases. *See, e.g.*, *Mazza*, 666 F.3d at 589-94 (9th Cir. 2012) (material variations in state unfair competition laws would make nationwide class treatment inappropriate); *Brandon Banks v. Nissan N. Am., Inc.*, No. C 11-2022 PJH, 2012 WL 8969415, at *1 (N.D. Cal. Mar. 20, 2012) (under *Mazza*, plaintiffs may not assert UCL and CLRA claims as a nationwide class action); *Granfield v. NVIDIA Corp.*, 2012 WL

[30] Some courts "have declined, even after *Mazza*, to conduct the choice-of-law analysis at the pleading stage." *Doe v. Successfulmatch.com*, 2014 WL 1494347, *7 (N.D. Cal. Apr. 16, 2014). However, most have found that *Mazza*'s choice-of-law analysis "is not appropriate to delay until class certification." *Frenzel*, 76 F. Supp. 3d at 1007 (N.D. Cal. 2014). *See also Frezza v. Google, Inc.*, 2013 WL 1736788, at *6 (N.D. Cal. Apr. 22, 2013) ("the principle articulated in *Mazza* applies generally and is instructive even when addressing a motion to dismiss."). *Davison v. Kia Motors Am., Inc.*, 2015 WL 3970502, at *2 (C.D. Cal. June 29, 2015).

2847575, at *3 (N.D. Cal. July 11, 2012) (citing *Mazza*, 666 F.3d at 593-94) ("In a class action lawsuit alleging violations of consumer protection laws, each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place."). The same conclusion is necessary here.

At the first step, a conflict exists because there are significant and material differences in the elements of the different states' consumer protection, false advertising, and warranty statutes, and the common law claims of negligent misrepresentation, negligence, and fraudulent concealment. These material differences have been consistently recognized by courts as barring a nationwide class under California law. *E.g.*, *Mazza*, 666 F.3d at 591 (finding material differences where California's consumer protection statutes, unlike those of some other states, required plaintiffs to demonstrate reliance but did not have a scienter requirement). *See also Andren v. Alere, Inc.*, No. 16CV1255-GPC(AGS), 2017 WL 6509550, at *17 (S.D. Cal. Dec. 20, 2017) (finding, based on a chart submitted by the defendant, material differences in the elements of different states' consumer protection and deceptive trade practices laws); *Darisse v. Nest Labs, Inc.*, 2016 WL 4385849, at *9 (N.D. Cal. Aug. 15, 2016) ("As recognized in *Mazza*, the other 49 states' consumer protection statutes differ significantly from California's UCL, FAL, and CLRA.").

Conflicts exist between California's warranty laws and the warranty laws of the other states, including the requirements of reliance and privity. *See In re Gen. Motors Corp. Dex–Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 319–21 (S.D. Ill. 2007); *In re Hitachi Television Optical Block Cases*, 2011 WL 9403, at *6 (S.D. Cal. Jan. 3, 2011). For example, in breach of implied warranty claims, 31 states do not require privity of contract where only economic damages are involved, while 18 states clearly require privity between the parties in cases involving purely economic loss. *Powers v. Lycoming Engines*, 272 F.R.D. 414, 420 (E.D. Pa. 2011). Similarly, the court in *Kramer v. Wilson Sporting Goods Co.*, 2013 WL 12133670, at *5 (C.D. Cal. Dec. 13, 2013), recognized that "there are significant and material differences between California law and the laws of other states" with respect to fraud and misrepresentation. *See id*. (collecting cases); *accord Van Mourik v. Big Heart Pet Brands, Inc.*, 2018 WL 1116715, at *2 (N.D. Cal. Mar. 1, 2018) (noting that "[i]t is well-established that [common law fraud, intentional misrepresentation, and other claims] vary materially among the states"). These and

other differences are described throughout this brief, and are further illustrated in several charts, attached as Exs. 3-9.[31] As material differences exist, such as "essential requirements to establish the claim" and "the types of relief or remedies available" across the 50 states, the Court must proceed to the second step. *See Gianino v. Alaver Corp.*, 846 F. Supp. 2d 1996, 1102 (C.D. Cal. 2012).

At the second step, courts recognize that "every state has an interest in having its law applied to its resident claimants." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001). "[A] jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders." *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 97 (Cal. 2010) (citations omitted). States' independent interests in "balancing the range of products and prices offered to consumers with the legal protections afforded to them" are strong enough to preclude the nationwide imposition of California law. *Mazza*, 666 F.3d at 592-93.

Finally, each state's interests would be impaired by the application of another state's laws to its own residents, and to transactions within that state. "[I]f California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." *Id.* at 593. California law, which prioritizes the site of the injury, supports referring each class member's claim to the jurisdiction where he bought the products. *See Hernandez v. Burger*, 102 Cal. App. 3d 795, 802, 162 Cal. Rptr. 564 (1980) ("[W]ith respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest."), cited with approval by *Abogados v. AT & T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000).[32] This is particularly important in a case like this, where the substantive basis of the claims differs as each Plaintiff in his or her respective state purchased products bearing different labels. For example, only three named plaintiffs, Williamson (Ohio, Compl. ¶ 86), Collins (Maryland, Compl. ¶ 104), and Schirripa (New York, Compl. ¶ 110), none of whom is from or made their purchases in California, is alleged to have purchased products

[31] Versions of these charts have been submitted in prior cases where courts in this circuit have dismissed attempts to bring California claims on behalf of a nationwide class. While some entries may be outdated, the majority are still applicable, and the chart shows that there are material differences between relevant laws throughout the country.

[32] The Senate expressed the same sentiment when passing the Class Action Fairness Act, stating that "courts should not attempt to apply the laws of one state to the behaviors that occurred in other jurisdictions[,]" S. Rep. No. 109–14, at 61 (2005), 2005 U.S.C.C.A.N. 3, 62-63.

with the "100% complete and balanced nutrition" decal. Applying California law to conduct that took place exclusively in other states would substantially impair those states' interests.

As foreign citizens' claims must be governed by the laws of the states where they purchased the products or reside, the Court should dismiss the eight claims brought on behalf of a nationwide or multi-state class. *See Frenzel*, 76 F. Supp. 3d at 1008 (dismissing breach of warranty, CLRA, UCL, and FAL claims where Plaintiff did not allege that he purchased the product in California).

I. Plaintiffs Lack Standing to Seek Injunctive Relief.

"To establish standing for injunctive relief, a plaintiff must allege not only that he has 'suffered or is threatened with concrete and particularized legal harm,' but also that there is 'a sufficient likelihood that he will again be wronged in a similar way'" without an injunction. *Richards*, 2014 WL 12703716, at *3. Here, Plaintiffs seek to "enjoin[] Defendant from selling the Contaminated Dog Foods until pentobarbital is removed." Compl. Prayer for Relief, ¶ B (103:11-12), *see also* Prayer for Relief, ¶ C (103:13-14) (seeking to "enjoin[] Big Defendant from selling the "Contaminated Dog Foods," which are defined as dog foods containing pentobarbital); Prayer for Relief, ¶ E (103:17-19) (seeking to enjoin Defendant "from continuing the unlawful practices alleged herein," which are dependent on the presence of pentobarbital). The prayer further seeks an order requiring Defendant to "engage in a corrective advertising campaign and engage in any further necessary affirmative corrective action, such as recalling existing products." Prayer for Relief, ¶ D (103:15-16).

However, as the Complaint reflects, Defendant has already (a) ceased selling any products containing pentobarbital (¶¶ 65-66); recalled the products at issue in concert with the FDA (Compl. ¶¶ 15, 29-30); and commenced a corrective marketing campaign. Compl. ¶¶ 22, 25-26, Exs. A-E. In other words, there is nothing left for this Court to enjoin, and any claim seeking solely injunctive relief must be dismissed as moot. *See supra*, VI.E.4.

J. Plaintiffs Have Not Adequately Pleaded a Claim for Punitive Damages.

Plaintiffs' prayer for relief also makes the general request that the court issue "[a]n order requiring Defendant to pay punitive damages on any count so allowable." However, they cannot allege any basis for the Court to grant such damages, because Plaintiffs have not alleged the required elements. "In a lawsuit against a corporate defendant, 'to prevail on a claim for punitive damages, a

plaintiff must establish both oppression, fraud, and malice' and that the conduct at issue was performed or ratified by an officer, director, or managing agent by clear and convincing evidence." *Graham v. Wal-Mart Stores, Inc.*, No. 2:14-02916, 2017 WL 3783101, at *4 (E.D. Cal. Aug. 31, 2017) (quoting *Holtzclaw v. Certainteed Corp.*, 795 F. Supp. 2d 996, 1021 (E.D. Cal. 2011)). Here, Plaintiffs offer boilerplate language throughout their Complaint implying Defendant knew or might have known of the contamination, but have actually pleaded no facts whatsoever to indicate oppression, fraud, and malice by an officer, director, or managing agent of Defendant. Therefore, they cannot support their allegations of oppression, fraud, and malice, or that Defendant intended to cause injury, acted with cruelty, or knowingly and intentionally misrepresented or concealed material facts. Therefore, their Complaint fails to support a punitive damages claim, requiring dismissal.

Further, the majority of Plaintiffs' causes of action do not permit punitive damages. New York, Florida, Maryland, and West Virginia do not authorize the recovery of punitive damages under their consumer protection statutes, nor are punitive damages recoverable for breach of warranty in those states. Moreover, Plaintiffs cannot rely on California law to justify such damages, because "[t]he Supreme Court has indicated that awarding punitive damages for conduct committed outside a jurisdiction may violate due process." *See Keegan*, 284 F.R.D. at 551 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003)). Here, as discussed above, 13 of the 14 named Plaintiffs neither reside nor made their purchases in California. Plaintiffs cannot obtain punitive damages for these Plaintiffs from this California-based court.

VI. CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court dismiss all of Plaintiffs' claims with prejudice.

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