UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RONALD BIANCHI AND DEBRA BIANCHI, MADELINE MARINO AND RICHARD BISHOP, MARIE CASTELO AND FRANCISCO CASTELO, JOHN MAHONEY AND LAURA MAHONEY, RON CECCONI AND PATRICIA CECCONI, AND EDA KAUFFMAN AND ROGER ROSENGARTEN, Plaintiffs, v. SAMSUNG ELECTRONICS AMERICA, INC. AND SAMSUNG ELECTRONICS CO., LTD., Defendant.	Case No. 2:17-cv-01263-CCC-MF **PLAINTIFFS' RESPONSE TO DEFENDANT SAMSUNG'S MOTION TO DISMISS** **Motion Return Date: 5-21-2018** **Oral Argument Requested**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT SAMSUNG ELECTRONICS AMERICA, INC.'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Ronald Bianchi and Debra Bianchi, Madeline Marino and Richard Bishop, Marie Castelo and Francisco Castelo, John Mahoney and Laura Mahoney, Ron Cecconi and Patricia Cecconi (collectively, "Plaintiffs"), respectfully submit this memorandum in opposition to Defendant Samsung Electronics America, Inc.'s ("Defendant" or "Samsung") Motion to Dismiss Plaintiffs' First Amended Complaint (hereinafter "FAC").

FACTUAL BACKGROUND

Overview

Plaintiffs represent a proposed class of thousands of consumers who owned and used defective Samsung residential refrigerators with external ice makers built into the French door (the "Ice Makers"). The Defects affect the Ice Makers which result in leaking and slush, over-freezing in the ice compartment, water leakage from the ice house to below the refrigerator crisper trays, fan noise from an over-iced compartment, and "freezing up" (collectively "the Defects"). Samsung identified the Defects in its July 17, 2015 ("TSB 2015")[1] and August 18, 2014 ("TSB 2014") [2] technical service bulletins.

Defendant

Not only by virtue of the Samsung technical service bulletins referenced above, but also by virtue of numerous consumer complaints, Samsung has known of the Defects in the Class Refrigerators for years and has taken no action to recall, repair, or replace the defective Ice Makers or the Class Refrigerators without expense to consumers. Nor has Samsung taken steps to inform and warn consumers of the Defects. In fact, "[a]t all relevant times and continuing to this day, Samsung knowingly, affirmatively, and actively misrepresented and concealed the true character, quality,

[1] *See* Dkt. No. 16, Plaintiffs' FAC at Exhibit 1.

[2] FAC at Exhibit 2.

and nature of the Class Refrigerators." FAC ¶ 84. Defendant's "failure to disclose this non-public information about the defective nature of the Class Refrigerators—information over which it had exclusive control" was unjust and unconscionable, especially "because Plaintiffs and Class Members could not reasonably have known that the Class Refrigerators were [] defective…." *Id.*

Samsung's conduct violates well-established contract, tort, and consumer protection laws, including Virginia, Florida, California, New Jersey, and Pennsylvania.

Plaintiffs' Pre-Purchase Research

Defendant correctly acknowledges that "[p]rior to buying their Refrigerators, each Plaintiff allegedly conducted online research, spoke with salespeople at retail stores, or both." Dfts. Memo at 3 (citing FAC ¶¶ 24-25, 41, 45, 49, 56, 59). However, Defendant wrongly contends that "none of the Plaintiffs alleges personal pre-purchase exposure to any [] statement [Samsung made about the Refrigerators' Ice Makers]." *Id.* In fact, Plaintiffs specifically pled that Plaintiffs were exposed to statements about the defective refrigerators before buying Defendant's product. For example, Plaintiffs allege that a "selling point for the Bianchis, discovered online at the time of Mr. Bianchi's research [during the week prior to the purchase of their Samsung refrigerator], was Samsung's marketing touting that the ice maker in their 22.5 cubic foot Samsung French Door External Dispenser refrigerator 'Ice Master' ice maker would make up to 5.2 pounds of ice per day. FAC ¶ 24. The Mahoneys also allege that they reviewed an advertisement which claimed the Samsung refrigerator's "exterior door-mounted ice maker purportedly could produce up to 10 pounds of ice and store 4.2 pounds," prior to making their refrigerator purchase. *Id.* at ¶ 49. Both of these statements were false. "[T]he Ice Maker[s] never lived up to that Samsung claim." [3] *Id.* The defective Ice

[3] Defendant argues that this statement and others contained in the FAC cannot be attributed to Samsung because they appear on third party retailer websites. This argument fails. First, Plaintiffs allege that the statements are attributable to Samsung
(footnote continues on next page)

Makers did not produce over 5 pounds of ice per day; instead the Ice Makers "ice[d] over and cease[d] to function" altogether, and in some cases became "simply unusable." *Id*. at ¶ 6. Contrary to Defendant's mischaracterization of the facts alleged, this is a clear example of a statement made by Samsung that was untrue.

Because "Samsung made its external door ice makers a featured selling point in its marketing," many putative class members, in addition to named Plaintiffs, were exposed to Defendant's marketing prior to purchasing one of Defendant's refrigerators. *Id.* at ¶ 70. Indeed, "[i]n choosing to purchase their respective Class Refrigerators, all Plaintiffs relied on Samsung's representations in its product descriptions about the easy accessibility of the ice maker and water dispenser and the stated daily ice-making storage and capacity for their respective Class Refrigerators." *Id.* at ¶ 71.

The Class Refrigerators' Limited Warranties

Defendant states that each Plaintiff's purchase of Defendant's refrigerators were accompanied by a one-year Limited Warranty.[4] But the limited warranty is unenforceable because it is unconscionable given its terms and the disparity of the parties' bargaining power. *Id.* at ¶¶ 98, 229, 231, 233. For example, Defendant provided a warranty period insufficient for the known Defects, as the Defects often occur after the warranty period expires and well before the usual end of useful life for a refrigerator.

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and those allegations must be accepted as true at the pleading stage of the litigation. Second, Defendant's contention defies common sense; for the argument to be true, retailers like Sears, Home Depot, Lowe's, and Best Buy would have to independently write individual product descriptions and specifications for each of the thousands of products they sell – an absurd proposition. Instead, the retailers rely on manufacturers to supply the product descriptions, specifications, and other details about their products. The statements are clearly attributable to Samsung.

[4] To the extent Defendant relies on materials it submitted with its motion which are beyond the four corners of the FAC, they should not be considered. *Howard v. New Jersey Div. of Youth & Family Servs*., 398 F. App'x 807, 811 (3d Cir. 2010) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.") (internal quotations and citation omitted).

Id. at ¶¶ 29, 42, 46, 57, 65 ("life expectancy of a standard refrigerator is 10-16 years. The Plaintiffs' Class Refrigerator only lasted 15 months until it developed an unfixable defect"), 231 (Samsung knew the defective products "would fail well before the end of the refrigerator's expected useful lives"), 233. The time limits imposed by the limited warranty "unreasonably favor Samsung" and are "inadequate to protect" consumers. *Id*. at ¶ 231. Plaintiffs and Class Members had "no meaningful choice in determining [said] time limitations" – they were set unilaterally by Defendant. *Id*. If the bargaining positions had not been so disparate and Defendant had made Plaintiffs privy to the defective nature of the refrigerators, then Plaintiffs "would have bargained for a warranty that covered repair of the Defects and/or replacement of the Class Refrigerators for an extended period or purchased a totally different refrigerator that did not have the Defects." *Id*. at ¶ 233.

Even if enforceable, the Limited Warranty was not always applied fairly by Defendant. *See e.g.*, *id*. at ¶ 53 ("Although [the Mahoney's] refrigerator was not delivered and installed until January 18, 2016, their warranty period was deemed by Samsung to have ended on December 31, 2016"). Some Plaintiffs made claims within the scope of the warranty and within the warranty period. *Id.* at ¶¶ 50, 60. Other Plaintiffs' complaints were not covered by Samsung under the warranty and/or were deemed to be outside the time limitations of the warranty. *See e.g.*, *id.* at ¶¶ 29, 42, 46, 57. Often, the Defects manifested themselves after the warranty had expired. *Id.* at ¶¶ 29 (Defects manifested "not long after the refrigerator/ice-maker's one-year warranty expired"), 42, 46, 57. Despite knowing of the widespread Defects, Defendant failed to cover the expense or to repair or replace the ice makers when the Defects manifested outside the warranty period. *Id.* at ¶¶ 6, 7, 35, 36, 42, 47, 52, 57, 61, 66, 88, 122.

Plaintiffs' Dealings with Defendant

Samsung attempts to distance itself from the sale of its defective refrigerators – disclaiming representations because they appear on third party retailer websites,

claiming no pre-sale communication with Plaintiffs, etc. This is a red herring. Samsung was intrinsically involved with each sale. First, Defendant "designed and manufactured the Class Refrigerators, intending Plaintiffs and Class Members to be the ultimate users of these appliances." *Id.* at ¶ 99. Second, Defendant marketed and made representations about their refrigerators to the public in order to entice consumers to purchase their defective products. *Id.* at ¶¶ 24, 63, 70, 205, 258, 260. Third, Defendant directly interacted with Plaintiffs and consumers with regard to their complaints, specifically the known Defects. *Id.* at ¶¶ 31, 42, 43, 47, 51, 52, 57.

Plaintiffs' Allegations Regarding Their Refrigerators

The Bianchis (Virginia)

Defendant states that "[t]he Bianchis made no *warranty* claim to [Defendant] regarding th[e] alleged problems." Dfts. Memo at 5 (emphasis added). The Bianchis made no such claim because the defects did not manifest themselves until shortly after the one-year warranty expired. FAC ¶ 29. The Bianchis struggled with finding a solution and/or to repair the defective Ice Maker. *Id.* at ¶¶ 29-39. Eventually, the Bianchis replaced the Ice Maker with the same model as the one originally installed. *Id.* at ¶ 35. The replacement suffered the same Defects as the original. *Id.* "The ice maker continues to require hair-dryer heating to remove the ice maker and auger motor and manual defrosting of ice buildup every one to two weeks" which requires an arduous process that "takes two to three hours" including "defrosting and removing the ice maker and auger motor, defrosting the ice build-up in ice house, and defrosting the refrigerator for approximately 25 minutes…." *Id.* at ¶ 38. For a time, the Bianchis "started purchasing 10-pound bags of ice for home use rather than continu[ing] with expenditures and labor in a futile effort to repair their defective ice maker." *Id.* But "Mr. Bianchi is [back] continuing to do the 'disassemble-and-defrost-the-ice-maker-procedure' every two weeks." *Id.* at ¶ 39. "[T]he same problems…continue to this day." *Id.* at ¶ 35.

The Marino Plaintiffs (Florida)

"In January of 2017," apparently after the one-year warranty had expired, "[Marino and Bishop's] ice maker began producing and leaking water rather than producing ice. In addition, there was ice buildup in the ice maker and slushy ice." *Id.* at ¶ 42. After a technician identified a Defect and repaired the Ice Maker, "[w]ithin one week, the same problems returned...." *Id.* at ¶ 42-43. Defendant refused to reimburse Plaintiffs for the failed repairs or replacement. *Id.* at ¶ 43. The current Ice Maker's problems "continue to this day." *Id.* at ¶ 43.

The Castelos (California)[5]

In August 2016, "after the one-year warranty period expired," the Castelos' "ice maker began icing over and producing ice until the ice maker would freeze up." *Id.* at ¶ 46. The Castelos had repair work done three times on the refrigerator. The Castelos had to pay for two of the three repair visits (one visit there was no charge). *Id.* at ¶ 47. The Ice Maker had to be replaced earlier this year. *Id.* at ¶ 47.

The Mahoneys (New Jersey)

"In November, 2016 toward the end of the one-year limited warranty, the Mahoney's ice maker began to freeze up, ice over, and fail to work." *Id.* at ¶ 50. "During the first week of January, 2017, [apparently] after the refrigerator warranty had expired,[6] the ice maker once again froze up and failed to work." *Id.* at ¶ 51. After receiving and following instructions from Samsung to use a hairdryer to defrost the ice maker, the defect immediately recurred. *Id.* at ¶¶ 51-52. The Mahoneys had multiple calls with

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[5] Defendant states that the Castelos have not alleged further problems with their ice makers since they have been replaced. Yet this argument ignores the obvious: the replacement could indeed suffer from precisely the same defect as the original, which could manifest today or tomorrow. Surely, Plaintiffs' claims cannot be barred for a manifestly defective product that has already malfunctioned, even if Plaintiffs have not alleged that the replacement has not yet broken down.

[6] Despite having been delivered and installed on January 18, 2016, Samsung deemed the warranty period for the refrigerator to have ended on December 31, 2016. *Id.* at ¶ 53.

Samsung and had a technician make service calls on three separate occasions. *Id.* at ¶ 52. The Mahoneys' Ice Maker Defects have continued and the Mahoneys had to replace their Ice Maker on August 21, 2017.[7] *See* **Ex. A**, Aug. 21, 2017 Samsung Repair Invoice.

The Cecconis (Pennsylvania)[8]

In April 2017, after the expiration of the limited warranty, the Cecconis' Ice Maker "began making loud noises because it was hitting chunks of ice that had formed inside." *Id*. at ¶57. The Cecconis contacted Samsung and had a technician make service calls on three separate occasions. *Id*.

The Kauffman Plaintiffs (Pennsylvania)

In 2015, "while [their Refrigerator] was still under the manufacturer's one-year limited warranty," the Kauffman's "ice maker iced over, stopped working, and the water dispenser line froze up." *Id*. ¶60. The Kauffmans had the ice maker serviced. *Id*. Yet, in April 2017, after the Limited Warranty had expired, the "Ice Maker again iced up and was unusable." *Id*. ¶61. An additional service visit occurred during which a technician diagnosed the Kauffman's Ice Maker issues. *Id*. The Kauffmans scheduled a technician to replace their refrigerator's auger and Ice Maker on July 21, 2017. *Id*. "Since their Ice Maker failed, Ms. Kauffman and Mr. Rosengarten have been buying 10-pound bags of ice for home use approximately every two weeks." *Id*.

Plaintiffs' Allegations Regarding TSB 2014 and TSB 2015

Defendant attempts to categorize the technical service bulletins as "irrelevant," but as the FAC alleges, these bulletins identify the specific issues Plaintiffs were and are

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[7] Defendant argues that the Mahoneys have not complained about further problems with their ice maker, but the Defects have persisted since the filing of the FAC.

[8] Defendant again points out that the Cecconis made no further formal allegations in the FAC as to their Ice Marker since the Ice Maker was serviced. But like the Castelos and the Mahoneys, such a statement does not mean that the Cecconis have not or will not experience the same Defects post-service repairs.

experiencing with their Ice Makers. *Id*. at ¶¶ 2-6, 29 (Plaintiffs' Defects are the same as those in the TSBs), 42, 181, 274. They also demonstrate Defendant's knowledge of the Defects. *Id*. at ¶¶ 2-6, 29, 42, 66, 181, 274. Defendant's disagreement with the significance of allegations is irrelevant on a motion to dismiss.

ARGUMENT

I. PLAINTIFFS STATE A CLAIM FOR UNJUST ENRICHMENT (COUNT I)

Defendant asks for dismissal of Plaintiffs' unjust enrichment claims, applying the laws of each of the named Plaintiffs' home states. However, as a threshold matter, for the Court to dismiss Plaintiffs' claims, it must undertake a choice of law analysis. Such an analysis, given the factual inquiry that may be necessary, "can be inappropriate or impossible for a court to conduct [] at the motion to dismiss stage when little or no discovery has taken place." *In re Samsung DLP Television Class Action Litigation,* No. 07–2141, 2009 WL 3584352, at *3 (D.N.J. Oct.27, 2009). For that reason, courts in this District may defer choice of law analysis until the class certification stage. *See id.*; *see also Stewart v. Beam Glob. Spirits & Wine, Inc.*, 877 F. Supp. 2d 192, 196 (D.N.J. 2012) (recognizing that this is a proposed "class action, not yet certified, and that the claims of potential absent class members may be governed by laws of other states;" refusing to "engage in a choice of law analysis" where parties have not briefed the issue). Defendant's request that the Court undertake a choice of law analysis now is premature.

Furthermore, request for dismissal of the unjust enrichment claims fails because the existence of a limited warranty and continued use of the defective refrigerator does not defeat the claims; had Plaintiffs known the true facts about the defects they could reasonably have expected remuneration under New Jersey and Virginia law; Plaintiffs have a direct relationship with Defendant sufficient under New Jersey law; and the claim is appropriate under California law. *See* FAC ¶¶ 86-93.

A. The Existence of a Limited Warranty Does Not Defeat Plaintiffs' Unjust Enrichment Claim Under Any State Law

Defendant argues that Plaintiffs should not be allowed to pursue unjust enrichment claims because each refrigerator sale was accompanied by a written limited warranty. This argument fails for at least two reasons.

First, Defendant ignores that Plaintiffs may plead alternative, and even inconsistent claims. *See Dewey v. Volkswagen AG*, 558 F. Supp. 2d 505, 528–29 (D.N.J. 2008); *see also* Fed. R. Civ. Pro. 8(e)(2). It is in fact proper for Plaintiffs to assert an equitable claim, such as unjust enrichment, even if there *may* be an adequate remedy at law through an award of monetary damages, *e.g.*, for breach of a written warranty.

Glenn v. Hyundai Motor Am., No. SACV152052DOCKESX, 2016 WL 7507766 (C.D. Cal. Nov. 21, 2016), is instructive. The California Court explained that,

> "[w]hen a plaintiff alleges unjust enrichment, a court may 'construe the cause of action as a quasi-contract claim seeking restitution.'" *Id.* (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)). Furthermore, "restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason." (emphasis added) (quoting *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004)) (internal quotation marks omitted). Thus, "a claim for restitution is permitted even if the party inconsistently pleads a breach of contract claim that alleges the existence of an enforceable agreement." *Rutherford Holdings*, 223 Cal. App. 4th at 231.

Glenn, 2016 WL 7507766 at *5. The same is true under Florida, New Jersey, Pennsylvania, and Virginia law. *See e.g.*, *Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1220 (S.D. Fla. 2015) ("A party may plead in the alternative for relief under an express contract and for unjust enrichment...'where one of the parties asserts that the contract governing the dispute is invalid.'") (internal citations omitted); *Dewey*, 558 F. Supp. 2d at 529 (denying motion to dismiss unjust enrichment claim as premature stating that even though "recovery under quasi-contractual [] claims is precluded in the presence of a valid contract" which means "some of plaintiff's quasi-contractual or other equitable

claims may be dismissed as inconsistent at a later time [], it is far to[o] early to do so now.'") (internal citations omitted); *Slemmer v. McGlaughlin Spray Foam Insulation, Inc.*, 955 F. Supp. 2d 452, 460 (E.D. Pa. 2013) (denying motion to dismiss where defendant argued written contract barred unjust enrichment claim: "plaintiffs have not admitted that a valid contract existed between the parties. Given that plaintiffs are permitted to plead in the alternative, 'it is premature at this juncture to dismiss the unjust enrichment claim.'") (internal citations omitted); *Harrell v. Colonial Holdings, Inc.*, 923 F. Supp. 2d 813, 826–27 (E.D. Va. 2013) (a party "cannot simultaneously recover in contract and equity. But, this does not mean that they cannot plead in the alternative. Fed.R.Civ.P. 8(d)(2) specifically permits alternative theories of recovery, regardless of whether 'in a single count ... or in separate ones.' Although Defendant cannot recover for breach of contract and unjust enrichment, they are allowed to plead these inconsistent theories.") (citations omitted).

Here, Plaintiffs allege the contract is not valid. It was fraudulently procured because Defendant was "fully aware of the Defects" and "fraudulently concealed the Defects and prevented reasonable consumers from discovering them until such time as the Defects manifested to the individual owners." FAC ¶ 66. Moreover, Plaintiffs allege the limited warranty is unenforceable because it is unconscionable. *See e.g.*, *id*. at ¶¶ 98, 159, 160, 214, 229, 231, 233. Additionally, the limited warranty is unenforceable/ineffective because it fails its essential purpose. *Id*. at 230. Plaintiffs' unjust enrichment claims are therefore properly plead, even if inconsistent with Plaintiffs' breach of contract claims.

Second, Plaintiffs' injuries fall outside the scope of the limited warranty provided making their unjust enrichment claim appropriate.[9] Once again, *Glenn* is instructive:

[9] To the extent Defendant asks this Court to interpret the Limited Warranty at this stage, it would be inappropriate to do so on this motion to dismiss as "interpretation of contract provisions [i]s inappropriate [o]n a motion to dismiss." *Seaport Inlet Marina,* (footnote continues on next page)

> Plaintiffs argue that the unjust enrichment claim falls outside the scope of the warranty. Specifically, Plaintiffs argue that the claim arises principally from Hyundai's "pre-sale conduct," namely alleged fraudulent concealment of the defect and its attendant danger. *Id.* Indeed, "unjust enrichment is an action in quasi-contract[, which] cannot lie where a valid express contract covering the same subject matter exists between the parties." *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 856 (N.D. Cal. 2004). However, the legal theory here is that any fraudulent concealment before the contract is not within the scope of the warranty.
>
> Moreover, Plaintiffs have an additional theory. Although the warranty covers "defect[s] in material or factory workmanship," Plaintiffs allege, in part, a defect in design, which is not expressly covered by the warranty. The Court is persuaded that Plaintiffs' allegations can be read to "describe the theory underlying a claim that ... [D]efendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request." *Astiana*, 783 F.3d at 762 (internal quotation marks omitted); *see also Tait*, 2011 WL 1832941, at *6 ("the Court can imagine certain unjust enrichment claims that properly might be brought to recover for injuries not covered by an express warranty.").

Glenn, 2016 WL 7507766 at *6 (record citations omitted). Based on these theories, the court in *Glenn* denied Defendant's motion to dismiss. *Id*. The same holds true under Florida, New Jersey, Pennsylvania, and Virginia law. *See AutoNation, Inc. v. GAINSystems, Inc.*, 2009 WL 1941279, at *4–5 (S.D. Fla. July 7, 2009) (denying motion to dismiss unjust enrichment claims even though there was a contract because complaint alleged matters outside the scope of the contract); *Vantage Learning (USA), LLC v. Edgenuity, Inc.*, No. CV 16-4983, 2017 WL 1196683, at *2 & fn. 10 (E.D. Pa. Mar. 30, 2017) (unjust enrichment claim appropriate if "the contract at issue covers only a part of the relationship between the parties"); *Beacon Wireless Sols., Inc. v. Garmin Int'l, Inc.*, 894 F. Supp. 2d 727, 736 (W.D. Va. 2012) (denying summary judgement, despite existence of a contract, because contract did not govern ancillary services, as part of the contract was unenforceable, and those services fell "outside the purview of the [contract]"); *MK*

LLC v. Connell, No. CV171908FLWLHG, 2017 WL 3981128, at *6 (D.N.J. Sept. 11, 2017) (citation omitted).

Strategies, LLC v. Ann Taylor Stores Corp., 567 F. Supp. 2d 729, 735 (D.N.J. 2008) (denying motion to dismiss as to unjust enrichment because benefit conferred "was outside the scope of the main contract between" the parties.)

Here, even Defendant admits that Plaintiffs' complaints about "their Refrigerators' performance [were made] after the Limited Warranties expired" (*i.e.*, outside the scope of the limited warranty). Dfts. Memo at 10 (emphasis added). Additionally, Plaintiffs allege that Defendant fraudulently concealed their refrigerator Defects at times outside of any warranty period. *See e.g.*, FAC ¶¶ 66, 82-84, 118-24, 137, 139, 143, 162, 182, 187, 192, 212-14, 217, 228, 258, 264. For-example, Defendant's pre-purchase marketing, before Plaintiffs had received a defective refrigerator or any affiliated warranty, misrepresented how the Ice Makers would work and did not disclose the defective nature. *Id*. at ¶¶ 24, 70, 258, 260. Additionally, when Plaintiffs contacted Defendant about the defects as they were occurring after the expiration of the warranty, Defendant did not explain this was a common Defect, failed to pay for repairs or replacement, and even denied knowledge of the TSBs which outlined the Defects. *Id*. at ¶¶ 31, 42, 43, 47, 51, 52, 57, 122. Therefore, Plaintiffs' unjust enrichment claim should be allowed to proceed.

This Court should follow *Glenn* along with the related case law from other states and deny Defendant's motion to dismiss Plaintiffs' unjust enrichment claim.

B. Continued Use of the Defective Refrigerator Does Not Defeat Plaintiffs' Unjust Enrichment Claim Under Any Law Presented by Defendant

Defendant argues that Plaintiffs' continued use of their refrigerators prohibits them from pursuing remedies under a claim of unjust enrichment.[10] Dfts. Memo at 10-11 & fn. 11. This argument is meritless.

[10] Defendant suggests that its argument applies to each Plaintiff, but fails to cite cases from each class representative's state.

The cases cited by Defendant do not address continued use. *See Alvarez v. Royal Caribbean Cruises, Ltd.*, 905 F. Supp. 2d 1334, 1341 (S.D. Fla. 2012); *Hughes v. Panasonic Cons. Elecs. Co.*, No. 10-846, 2011 U.S. Dist. LEXIS 79504, at *76 (D.N.J. July 21, 2011) (dismissing unjust enrichment claim because there was *no* allegation that plaintiff conferred benefit on defendant); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (Cal. App. 2010) (finding unjust enrichment claim failed because there was no "alleg[ation] [plaintiff] paid in excess of reasonable value for the services received or that the services were not worth [plaintiff] paid for them."); *Mitchell v. Moore*, 729 A.2d 1200, 1203 (Pa. Super. 1999) (finding services rendered were gratuitous and thus unjust enrichment cannot be proved). Defendant contends that continued use means that "Plaintiffs thus concede that they have 'derived a substantial benefit' from their Refrigerators."[11] Dfts. Memo at 10. But none of the Plaintiffs have conceded that point. In fact, throughout Plaintiffs' FAC, there are allegations that Plaintiffs "did not receive the benefit of their bargain." FAC ¶ 234; *see also id.* at ¶¶ 74, 86-90, 91 (Samsung took benefits from Plaintiffs who "paid a higher price for their Class Refrigerators than those refrigerators were worth"), 92-93, 98 ("Plaintiffs and Class Members were unable to derive a substantial benefit from their warranties."), 121 (Plaintiffs "would not have purchased their Class Refrigerators had they known" of the defects or "would not have paid as much as they did" and yet "Samsung benefited"), 205, 234.

There is no substantial benefit conferred simply by continuing to own a refrigerator that did not work correctly, needed to be serviced, was repaired without warranty coverage, and where the burden of time and expense was borne by Plaintiffs, especially given that Defendant knew all along about the refrigerator Defects and

[11] Whether a substantial benefit was conferred on Plaintiffs under the circumstances of this case is a question of fact and should not be decided on a motion to dismiss.

provided Plaintiffs with no notice of the Defects. *See e.g.*, *id.* at ¶¶ 6, 7, 67, 68, 74, 82, 91, 98, 205, 234. Plaintiffs did not obtain the benefit of the bargain.

C. **Had Plaintiffs Known About the Defects They Would Have Reasonably Expected Remuneration from Defendant which Sufficiently Supports Their Unjust Enrichment Claims Under New Jersey and Virginia law**

Defendant claims that New Jersey and Virginia law require an allegation of expected remuneration from Defendant to Plaintiffs in order for an unjust enrichment claim to proceed. However, Defendant's argument omits a key caveat. The rule, in full, in New Jersey actually states that:

> For an unjust enrichment claim to succeed, there must be a showing that "the plaintiff expected remuneration from the defendant, *or if the true facts were known to plaintiff*, he would have expected remuneration from defendant, at the time the benefit was conferred."

Stewart, 877 F. Supp. 2d at 196 (quoting *Callano v. Oakwood Park Homes Corp.*, 219 A.2d 332, 334-35 (N.J.1966) and citing *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (1994)) (emphasis added). The same is true under Virginia law. Therefore, unjust enrichment is a proper remedy for a plaintiff who did not actually expect remuneration at purchase, but *would have* if Defendant had provided the necessary information, as opposed to concealing it from plaintiff. When a defendant fails to disclose, withholds, or conceals information, that if known to plaintiff, would have caused plaintiff to expect some kind of remuneration from defendant at the time of sale, then unjust enrichment may be pursued. This is consistent with the cases cited by Defendant. *See* Dfts. Memo at 11.

Yingst v. Novartis AG, 63 F. Supp. 3d 412 (D.N.J. 2014), cited by Defendant, does state that expected remuneration is required, but the thrust of the court's discussion in granting the motion to dismiss for lack of a cognizable unjust enrichment claim was that the plaintiff in that case failed to "allege any misrepresentation or misinformation on [d]efendant's part" and plaintiff "received exactly what she paid for" (*i.e.*, a migraine medicine that relieved her migraine); thus, the court could not find "anything 'unjust'

about [the] particular transaction." *Id*. at 417-18. However, *Yingst* is distinguishable. Plaintiffs have, indeed, alleged wrongdoing, misrepresentation, and misinformation on the part of Defendant in that, at a minimum, Defendant failed to disclose the known Defects to Plaintiffs. *See* FAC ¶¶ 40, 45, 47, 66, 82, 84, 87, 117-24, 139, 143, 160, 162, 182, 191-92, 213, 215, 217, 259, 264. Additionally, Plaintiffs allege they did *not* get what they paid for; in fact, they got a product that was worth far less than what they paid for it given the Defects. *Id*. at ¶¶ 6, 38-39, 61, 74, 205, 233, 234. Unlike the allegations presented in *Yingst*, here, Plaintiffs provide the Court with numerous allegations which demonstrate that Defendant engaged in behavior that was unjust with respect to named Plaintiffs and that Defendant continues to engage in such unjust behavior with regard to other consumers and putative class members.

D. **Plaintiffs Have a Sufficiently Direct Relationship with Defendant to Pursue an Unjust Enrichment Claim Under New Jersey Law**

Defendant argues that a "direct nexus between [Plaintiffs] and [Defendant]" is "required" for an unjust enrichment claim under New Jersey law. Dfts. Memo at 12. Yet, Defendant misconstrues the direct relationship concept. This Court explained the context of that 'requirement' in detail in *Stewart*, 877 F. Supp. 2d at 196–202 and concluded that

> the "some direct relationship" element of an unjust enrichment claim does not standing alone preclude a consumer from ever bringing an unjust enrichment claim against a manufacturer simply because the consumer purchased the product at issue from a third-party retailer and not directly from the manufacturer. The Court rejects that such a bright light [sic] rule is supported by New Jersey law despite the [] defendants argument to the contrary.

Id. at 199.

In *Stewart*, the Court rejected the defendant's "contention that it is a 'well-settled' principle of New Jersey law that a plaintiff who purchases a product from a third-party retailer may not maintain an unjust enrichment claim against the product manufacturer…." *Id*. at 197. It did so by examining the direct relationship requirement

"in the context…of the specific fact pattern presented in *Callano* where the concept originated." *Id*. The Court explained that,

> In *Callano,* … Bruce Pendergast entered into a contract with the defendant, a housing developer, for the sale of a lot and a house to be constructed thereon. Subsequently, while the house was still under construction by the defendant developer, Pendergast entered into a separate contract with the plaintiffs, owners of a plant nursery, for the delivery and planting of shrubbery at the house.
>
> The plaintiffs performed on the contract they entered with Pendergast, planting the shrubbery at the house, but Pendergast never paid the plaintiffs. Shortly thereafter, Pendergast died. At that time, the defendant developer and Pendergast's estate cancelled the contract of sale for the lot and the house. The defendant developer then sold the Pendergast property, including the newly planted shrubbery thereon, to another couple. At the time, however, the defendant developer had no knowledge of Pendergast's failure to pay the plaintiffs on the shrubbery contract.

Id. at 197-98 (internal citations omitted). Thus, the New Jersey Supreme Court denied recovery under a theory of unjust enrichment in *Callano* because even though plaintiffs (the plant nursery) had entered into an express contract with Pendergast, recovery would be improper where they sought payment from a defendant (the housing developer) who "had no contract or course of dealings with the plaintiffs [who] was unaware of the contract between the plaintiffs and Pendergast and [who] did not engage in any fraud or conduct which otherwise justified recovery against it." *Id*. The plaintiffs simply "had no dealings with defendant." *Id*. "*Callano* suggests that the plaintiffs could not recovery [sic] from the defendant developer there on a claim for unjust enrichment without the existence of 'some direct relationship' because the defendant developer was essentially an innocent third-party." *Id*. But, according to the New Jersey Supreme Court, *Callano* is distinguishable from cases where "a fraud [is] perpetrated by the Defendant." *Callano,* 219 A.2d at 335. Where the defendant's actions are alleged to be fraudulent, recovery under a theory of unjust enrichment is permissible. *Stewart*, 877 F. Supp. 2d at 198. Thus, the "some direct relationship" requirement "is meant to protect innocent third-parties from liability where they did

not unjustly retain a benefit conferred upon them by the plaintiff…." *Id*. This purpose "was similarly recognized in *VRG Corp. v. GKN Realty Corp. In VRG Corp*….." *Id*. Indeed, the "some direct relationship" concept is meant "to prevent a finding of liability in cases where the defendant had absolutely no course of dealings with, and no other demonstrated connection to, the plaintiff." *Id*. at 200.

> Like *Stewart*, this case is "factually distinguishable from" *Callano* and *VRG Corp*.,
>
> because [those cases] involved Defendant who were innocent third parties … who did not unjustly retain a benefit, did not engage in allegedly fraudulent conduct, and had little to no dealings with the plaintiffs who sought relief against them. Moreover, in both cases, the plaintiffs had available a remedy against another party with whom the plaintiffs had independent contracts and whose conduct resulted in plaintiffs' losses.

Stewart, 877 F. Supp. 2d at 200. Here, Defendant is not alleged to be an innocent third party who had no contact with Plaintiffs. To the contrary, Plaintiffs allege that Defendant engaged in deceptive, unconscionable, and fraudulent conduct by failing to disclose the Defects of which it was fully aware. FAC ¶¶ 28 (explaining Samsung never notified the Bianchis of the Defects and had it done so at the time it published the TSB 2015, the Bianchis could have pursued the issue while their refrigerator was still under warranty), 66, 84, 85, 87, 98, 117-24, 139, 158-61, 163, 180, 191-92, 195, 214, 229, 260. Plaintiffs assert that Defendant received funds that it otherwise would not have and it would be unjust for Defendant to retain those funds as a result of their unconscionable conduct. *Id*. at ¶¶ 26, 66 ("Rather than disclose the Defects and repair them, or replace the Class Refrigerators, or recall the Class Refrigerators as Samsung should have, Samsung made a conscious decision to ignore the problem at the expense of its customers."), 86-93, 91, 121, 143, 158-60, 162, 182, 187, 192, 194-95, 214, 217, 234, 264. Plaintiffs allege that they and other class members would not have purchased the refrigerators if the true facts had been known. *Id*. at ¶¶ 26, 91, 121, 143, 162, 182, 192, 194, 217, 234, 264. Plaintiffs also allege that Defendant is not a mere third party with no association to the pertinent transaction. Rather, Defendant designed and manufactured

the refrigerators at issue, the refrigerators were sold under the Samsung brand name. *Id*. at ¶¶ 2, 69, 74, 99, 106, 110, 126. Moreover, Plaintiffs allege they had direct dealings and communication with Defendant. *Id*. at ¶¶ 31, 42, 43, 47, 51, 52, 57. As in *Stewart*, these allegations sufficiently set forth "a plausible claim for relief" under a theory of unjust enrichment. *Stewart*, 877 F. Supp. 2d at 201-02. And, just like in *Stewart*,

> it would be inequitable to suggest that the [] Defendant can insulate themselves from liability on an unjust enrichment claim simply by asserting that retail sales by [independent] stores cut off any relationship between the consumers and the manufacturer. This is particularly true in this case where Plaintiffs cannot seek a remedy directly from the [independent] stores based on misrepresentations [and wrongdoing] allegedly made by the [] Defendant themselves …. Accordingly, this Court finds that where a plaintiff alleges that a defendant manufacturer has made false claims or misrepresentations directed for the purpose of generating retail sales, and where those retails sales could have the effect of increasing the amount of wholesale sales to the manufacturer, it is plausible that a plaintiff can show evidence of a sufficiently direct relationship between the parties under New Jersey law.

Stewart, 877 F. Supp. 2d at 200. Thus, Plaintiffs' unjust enrichment claim should proceed.

E. Plaintiffs' Unjust Enrichment Claim Is Appropriate Under California Law, Regardless of Whether It Is a Separate Cause of Action in the State

Defendant contends that because unjust enrichment "is a theory of recovery, not an independent cause of action" in California, Plaintiffs' unjust enrichment claim should be dismissed. Dfts. Memo at 12. This logic is flawed.

While some California courts have said unjust enrichment is not an independent cause of action, others have recognized that it is. *See e.g.*, *Hirsch v. Bank of Am.*, 107 Cal. App. 4th 708, 721 (Cal. Ct. App. 2003); *Lectrodryer v. SeoulBank,* 77 Cal.App.4th 723, 726 (2000); *First Nationwide Sav. v. Perry,* 11 Cal.App.4th 1657, 1662–63 (1992).

Regardless of whether unjust enrichment is an independent cause of action, Plaintiffs' claim should not be dismissed. As explained in *Glenn*, the doctrine of unjust enrichment is recognized in California, and while there is not a stand-alone cause of

action under the doctrine, "[w]hen a plaintiff alleges unjust enrichment, a court may 'construe the cause of action as a quasi-contract claim seeking restitution.'" 2016 WL 7507766 at *5 (citing *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)). The solution is not to simply dismiss a plaintiff's claim seeking an equitable remedy. Indeed, dismissal would be drastic, unwarranted, and inequitable.

II. MAHONEYS HAVE PROPERLY ALLEGED NEW JERSEY EXPRESS WARRANTY CLAIMS (COURT XV)

A. Claiming that Samsung Denied a Warranty Claim Is Not Required for Mahoneys' Express Warranty Claim

Although the Mahoneys were unaware of the Defects in their Ice Maker on December 27, 2015 when they purchased their Refrigerator (FAC ¶ 48)—and contrary to the Defendant's advertising that included affirmations and descriptions of the Ice Maker's performance (*see e.g., id.* at ¶49)—Samsung was well aware of the Defects and had already issued two TSBs, one of which included the Mahoneys' brand-new Ice Maker. *Id* at ¶ 2, 4, 5, 6, 48. When it failed in November 2016, within one year of purchase, Defendant breached its warranty of the Ice Makers' performance. *Id* at ¶¶ 48, 50.

In *Kuzian v. Electrolux Home Prods.*, a nearly identical case with a nearly identically defective icemaker at issue, this District addressed the same issue:

> [P]laintiffs' claims, taken as true, that Electrolux knew that the ice makers in the refrigerators were defective when they advertised the ice makers' capabilities cannot be dismissed at this motion to dismiss stage. Plaintiffs are not contending that a known or unknown latent defect manifested after the express warranty period, but rather that Electrolux's express warranty warranted, for one year, its affirmation and description of the ice makers' performance. When the ice makers began to fail during that first year, plaintiffs contend that Electrolux breached its warranty that the ice makers would perform as promised. These claims may proceed.

937 F. Supp. 2d 599 at 612 (emphases added).

Contrary to Defendant's claim, when Plaintiffs acknowledge that Defendant included a written express limited warranty, they do not "concede that the Limited Warranty governs *any express warranty claim* that they might have." Dfts. Memo at 12 (emphasis added). "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise," N.J.S.A. 12A:2-313(1)(a), and "[a]ny description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description." N.J.S.A. 12A:2-313(1)(b). Like it did in *Kuzian,* this Court should deny Defendant's motion to dismiss the Mahoneys' New Jersey express warranty claim because Defendant warranted their Ice Maker would perform in accordance with Samsung's affirmation and description for at least one year and it did not.

B. **Pre-Suit Notice is Not Required for Plaintiffs' Express Warranty Claims**

As this Court recognized recently in *In re Volkswagen Timing Chain Product Liability Litigation*, New Jersey Plaintiffs are not required to give pre-suit notice to a remote manufacturer for their express warranty claims.

> Pre-suit notice is not required when the action is brought against a remote manufacturer and/or seller. *See Strzakowlski v. Gen. Motors Corp.*, 2005 U.S. Dist. LEXIS 18111, 2005 WL 2001912, *3 (D.N.J. Aug. 16, 2005). There, the Court explained that it "has previously predicted that the New Jersey Supreme Court would not require notice under section 2-607(3)(a) in a case against a remote manufacturer who was not the immediate seller of a defective product." *Strzakowlski*, 2005 U.S. Dist. LEXIS 18111, [WL] at *3 (emphasis added). The Court further held that even if notice was required, notice would be satisfied merely by filing the Complaint. 2005 U.S. Dist. LEXIS 18111 at *3. . . . Accordingly, the Court concludes that Plaintiffs, in certain circumstances [including those in New Jersey], were not required to provide Defendant with any pre-suit notice, and, in cases where pre-suit notice was required, Plaintiffs satisfied said requirement by simply filing their Complaint.

No.: 16-2765, 2017 U.S. Dist. LEXIS 70299, at *41-43 (D. N.J. May 8, 2017). Thus, dismissal of the Mahoneys' New Jersey express warranty claims on this ground is unwarranted.

C. Plaintiffs May Represent Both Owners and Renters of Defective Samsung Refrigerators

There is no material difference between those who purchase and those who rent/lease Defendant's defective refrigerators. Defendant's argument to the contrary fails for the same reasons discussed with regard to implied warranties. *See infra* at Section III.F.

D. Plaintiffs Properly Alleged Samsung's One-Year Limited Warranty Is Unconscionable

Plaintiffs properly alleged that Defendant's one-year limited warranty, the duration of which is only a fraction of the expected useful life of the refrigerator, is both substantively and procedurally unconscionable. *See e.g.* FAC ¶232. Faced with a similar argument at the motion to dismiss stage in *In re Volkswagen Timing Chain Product Liability Litigation*, this Court noted:

> This Court is also satisfied that Plaintiffs have pled both substantive and procedural unconscionability. Substantive unconscionability occurs when "the term is 'excessively disproportionate,' involving an exchange of obligations so one-sided as to shock the court's conscience." *Skeen*, 2014 U.S. Dist. LEXIS 9256, [WL] at 12. "[P]rocedural unconscionability focuses on the circumstances of the negotiation that produced the contested term," and typically is present when a party has "no meaningful choice" in negotiating the term due to "a gross disparity in bargaining power." *Id.* (quoting *Henderson v. Volvo Cars of North America, LLC*, 2010 U.S. Dist. LEXIS 73624, 2010 WL 2925913, *9 n.6 (D.N.J. Jul. 21, 2010)).

No.: 16-2765, 2017 U.S. Dist. LEXIS 70299, at *37 (D. N.J. May 8, 2017).

Like the plaintiffs in *In re Volkswagen Timing Chain Prod. Liab. Litig.*, Plaintiffs have alleged that the "time limits contained in Samsung's warranty period were and are also unconscionable," FAC ¶ 65, since the "life expectancy of a refrigerator is 13 years" yet the Ice Makers generally fail within or right after the first year of use. *See, e.g.* No.:

16-2765, 2017 U.S. Dist. LEXIS 70299, at *37; FAC ¶ 50. Further, Plaintiffs and Class Members had "no meaningful choice in determining these time limitations." FAC at ¶ 232. Similar to the situation in *In re Volkswagen Timing Chain Prod. Liab. Litig.*, the Plaintiffs clearly allege that Defendant was aware of the Defects, based in part on its issuance of two TSBs prior to selling the Ice Makers, yet "made a conscious decision to ignore the problem" *see, e.g.* FAC ¶ 66, such that Samsung's warranty limitations shock the conscience. Finally, Plaintiffs allege "there was a gross disparity in bargaining power in favor of Defendant, the terms of the [limited warranty] unreasonably favored Defendant, and Defendant was aware of the defect at the time of sale." No.: 16-2765, 2017 U.S. Dist. LEXIS 70299, at *37. These allegations sufficiently support the claim that the Limited Warranty is both procedurally and substantively unconscionable. And since unconscionability is a fact sensitive inquiry, dismissal on the pleadings is premature and inappropriate.

III. PLAINTIFFS SUFFICIENTLY PLED THEIR IMPLIED WARRANTY CLAIMS (COUNTS II, VII, X, XII, XVI AND XVII)

A. Plaintiffs Have Properly Alleged Their Claims Are Not Proscribed by One-Year Limitation in Samsung's Warranty (VA, FL, CA, PA)

Defendant inaccurately argues that Plaintiffs' implied warranty claims must be dismissed because the time to bring such a claim has expired. In support of this argument, Defendant states that the limited warranty agreement "conspicuously" limits any implied warranty of merchantability claims to one year under the language of the warranty. Simply put, this is incorrect.

"In order for a manufacturer's disclaimer 'to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous.'" *Rue v. Kohler Corp.*, No. A-4610-04T1, 2006 N.J. Super. Unpub. LEXIS 1988, at *8 (N.J. Super. Ct. App. Div. July 25, 2006). "The critical requirement is that the language be 'conspicuous.'" *Zabriskie*

Chevrolet v. Smith, 99 N.J. Super. 441, 447 (N.J. Super. Ct. Law Div. Feb. 29, 1968). "Conspicuous means so written, *displayed*, or presented that a reasonable person against whom it is to operate *ought to have noticed it*." *Hoffman v. Daimler Trucks N. Am., LLC*, 940 F.Supp.2d 347, 355-356 (W.D. Va. Apr. 12, 2013) (emphasis added).

Defendant repeatedly asserts that its warranty was conspicuously provided to consumers by pointing to the bold-face, all-capitalized font as apparent proof. Dfts. Memo at 4, 17-18. However, Defendant conveniently neglects to mention anything about ***where*** the limited warranty could be found or ***when*** it was provided to consumers. Manufacturers' limited warranties typically come in a shrink-wrapped package along with the owner's manual and installation instructions *upon delivery of the product*, an event after purchase. "After a contract to sell has been entered into or, at any event, where title has passed to the buyer, a disclaimer of warranties … is ineffectual." *Zabriskie*, 99 N.J. Super. at 448 (citations omitted). If the consumer is not able to read and review the limited warranty *before* he or she enters into the contract, the disclaimer within the limited warranty is unconscionable and invalid. This factual issue prevents dismissal.

In addition, Samsung's warranty disclaimers are not textually "conspicuous." The lack of conspicuousness of the disclaimer can best be demonstrated by comparing Samsung's applicable U.S. Warranties to its Canadian Warranties. *Compare, e.g.*, ECF 29-5, at 3 (USA) *to* at 4 (Canada); *see also,* ECFs 29-6, 29-7, 29-8, 29-9, 29-10. The limitations in the US Warranty are buried in a sea of similarly sized and often-capitalized text, all of which is written in legalese (unlike the plain language of its Canadian Warranty). "This is not an 'eye-catching location' that commands 'the attention of the non-drafting party.'" *Hartford Fire Ins. Co. v. Roadtec, Inc*., 2010 U.S. Dist. LEXIS 125443, *18.

B. **That Some Refrigerators May Have Functioned for a Period of Time Before Manifesting Defects Is Not Fatal to Plaintiffs' Claims (VA, FL, CA, NJ, PA)**

Plaintiffs have alleged that the refrigerators all suffered from the Defects at the time they were manufactured and thus were defective at the point of sale. *E.g.,* FAC ¶¶ 66, 96. As such, Plaintiffs have all properly pled their implied warranty claims.

Like the Plaintiffs in *Kuzian*, the Plaintiffs here pled that they purchased their refrigerators for their ice making capabilities (*see e.g.* FAC ¶24, 49, 59), and that the Ice Makers never lived up to Samsung's claims (*id.*) and failed to make ice altogether (*id.* at ¶¶38, 50, 60). These allegations state a claim for breach of the implied warranties of merchantability and fitness for a particular purpose. *Kuzian*, 937 F. Supp. 2d at 613. "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." 13 Pa. Cons. Stat. § 2314(a). Merchantable goods "are fit for the ordinary purpose for which such goods are used." *Id*. § 2314(b)(3). Although the Plaintiffs' states' laws (VA, FL, CA, NJ, and PA) require a showing that the product was defective to recover for the breach of the implied warranty of merchantability, Plaintiffs' allegations are sufficient to show that the Ice Makers failed to perform the function of making ice. *See, e.g.,* 937 F. Supp. 2d at 612-13; *In re Takata Airbag Prods. Liab. Litig.*, 2017 U.S. Dist. LEXIS 85412, *171 (S.D. Florida May 31, 2917).

Defendant, citing a single unpublished opinion (*Moulton*, 2012 U.S. Dist. LEXIS 117931) that includes only a passing mention of implied warranty claims, seems to contend that the only question is whether "Plaintiffs' Refrigerators did not make ice at the time of delivery." Dfts. Memo at 20. This "operation on the first day" measure for implied warranty claims is unsupported (and unsupportable) by the laws of any state at issue. Defendant's motion to dismiss the implied warranty claims should be denied.

C. **The California Plaintiffs Have Properly Alleged Their Claims Under the Song-Beverly Act (CA)**

Defendant argues that the Castelos' Song-Beverly Consumer Warranty Act ("Song-Beverly") claim fails based upon the "fitness for use" and duration, but ignores all recent case law to the contrary. *Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, 2016 U.S. Dist. LEXIS 123455 (N.D. Calif. Sept. 12, 2016) addresses both of these issues:

> In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." *Id.* at 291 ("[A]lthough a defect may not be discovered for months or years after a sale, merchantability is evaluated as if the defect were known."). Requiring individuals to assert an implied warranty claim within the one year duration period would, according to the *Mexia* court, contravene the California legislature's intent to provide consumers protection from latent defects.
>
> * * *
>
> Further, as in *Mexia*, that Plaintiff's Ultra Slim wall mount worked for years before failing does not mean that the defect did not exist at the time of sale. *Mexia*, 95 Cal. Rptr. 3d at 293 ("[T]he fact that the alleged defect resulted in destructive corrosion two years after the sale of the boat does not necessarily mean that the defect did not exist at the time of sale."). Thus, the Court rejects Defendant's arguments as to both the duration provision and the fitness of Plaintiff's Ultra Slim wall mount for its ordinary use, and DENIES Defendant's motion to dismiss Plaintiff's claim under the Song-Beverly Act.

2016 U.S. Dist. LEXIS 123455, *44-47.

As explained herein, although the Castelos' Ice Maker functioned for a period of time, its Defects were present (and known to the Defendant) at the time of purchase. Neither the delayed discovery of the Defect, nor that fact that the Ice Maker worked for a period of time defeats the Castelos' Song-Beverly claim.

D. **Pre-Suit Notice is Not Required for Plaintiffs' Implied Warranty Claims**

Samsung argues that this Court should dismiss Plaintiffs Castelos [CA], Cecconi [PA], Kauffman [PA] and Mahoney [NJ]'s implied warranty claims for lack of pre-suit notice. While it may be true that California and New Jersey do not accept civil lawsuits

as pre-suit notice, the Castelos [CA] and the Mahoneys [NJ] did give Samsung pre-suit notice. FAC ¶ 47 ("In January of 2017, Marie Castelo contacted Samsung about the over-icing problem."); *id.* at ¶ 51 (stating that in January 2017, "Mr. Mahoney contacted Samsung and a representative told him to use a hair dryer to defrost the ice maker . . .").

While true that implied warranty claims in Pennsylvania require notice, the courts of that state have held that civil lawsuits themselves suffice for that notice. *Yates v. Clifford Motors, Inc.*, 423 A.2d 1262, 1270 (Pa. Super. Ct. 1980) (concluding that a civil complaint was "adequate notice" of rejecting a good under 13 Pa.C.S. § 2607). In addition, Ms. Kauffman [PA] notified her immediate seller of the defect, s*ee* FAC ¶¶61, 62 (stating that Ms. Kaufman notified Best Buy of the defect and Best Buy's Geek Squad serviced the unit multiple times), while the Cecconi Plantiffs [PA] notified Samsung directly of the defect. FAC ¶57 (stating that in April 2017 Mr. Cecconi contacted Samsung about the defect).

Finally, similar to their argument for pre-suit notice requirements for express warranty claims, all Plaintiffs have properly alleged their implied warranty claims as pre-suit notice is not required. As this Court explained in *Volkswagen*:

> Summarily, the Court disposes of arguments . . . regarding the pre-suit notice [for implied warranty.] This is because the argument[] advanced in support of . . . the pre-suit notice requirements [is] identical to those advanced by Defendant in support of dismissal of the express warranty claims. Accordingly, the above analysis, *supra* at 26-30, is applicable to th[is] argument[]. Hence, th[is] argument[] [is] not persuasive and no further analysis is necessary herein.

In re Volkswagen Timing Chain, 2017 U.S. Dist. LEXIS 70299, at *45-46 (internal citations omitted). Thus, the Court should deny Samsung's request to dismiss these implied warranty claims on the basis of pre-suit notice.

E. **Privity Does Not Bar Plaintiffs' Implied Warranty Claims (CA, PA, FL)**

Defendant argues that Castelos [CA], Marino [FL] Cecconis [PA], and Kauffman [PA] Plaintiffs' "implied warranty claims fail because they do not allege privity with

[Samsung]." Dfts. Memo at 22. However as explained in *In re Volkswagen Timing Chain,* it is not necessary for Plaintiffs to alleged privity to support their implied warranty claims.

> . . . Defendant argues that Plaintiffs from California, . . . [and] Florida, . . . cannot maintain an implied warranty claim because they are not in "vertical privity" with Defendant. Indeed, those states require the parties to be in vertical privity with each other in order for a breach of implied warranty claim to lie. . . .
>
> However, each of these states provides various exceptions to the vertical privity requirement; the so-called third-party beneficiary exception. California, . . . [and] Florida . . . have exceptions to the vertical privity requirement when, as is the case here, the consumer, rather than the dealer, is the ultimate user. *See In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 983-85 (N.D. Cal. 2014)(acknowledging the third-party beneficiary exception under California and North Carolina law); . . . *Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1233-34 (S.D. Fla. 2014)(acknowledging the third-party beneficiary exception under Florida law).

2017 U.S. Dist. LEXIS 70299, at *48-49.

F. Plaintiffs May Represent Both Owners and Renters of Defective Samsung Refrigerators

There is no logical or legal basis to differentiate claims for those who lease defective refrigerators from those such as the Plaintiffs who purchase defective refrigerators. Therefore, there is no reason to dismiss any of Plaintiffs' warranty claims based on such an arbitrary distinction. Courts regularly recognize that one type of plaintiff can properly represent both owners and lessors of defective products.

> Rule 23(a)(3) requires that the representative parties' claims be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality "assure[s] that the interest of the named representative aligns with the interests of the class." Under this "permissive" rule, "representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."

> The typicality requirement is met. The Settlement Class Representatives' claims are based on the same pattern of wrongdoing as those brought on behalf of Class Members. The Settlement Class Representatives, as well as Class Members, *purchased or leased* an Eligible Vehicle equipped with a defeat device. Their claims are typical because they were subject to the same conduct as other Class Members, and as a result of that conduct, the Settlement Class Representatives and Class Members suffered the same injury. As such, the Court finds Rule 23(a)(3) is satisfied.

All Consumer & Reseller Actions (*In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*), MDL No. 2672, 2016 U.S. Dist. LEXIS 99071, at *630-31 (C.D. Cal. July 26, 2016) (emphasis added) (internal citations omitted); *Baxter v. Kawasaki Motors Corp., U.S.A.*, 259 F.R.D. 336, 344 (E.D. Ill. 2009) (certifying a class where a single named plaintiff represented "All persons and entities who/which purchased or leased a new Kawasaki Vulcan Nomad 1600 or Vulcan Classic 1600 motorcycle") (emphasis added). Claims made by Plaintiffs, whether as purchasers or lessees, are indistinguishable as both are subject to the same unconscionable conduct by the Defendant.

IV. PLAINTIFFS STATE VALID STRICT LIABILITY CLAIMS FOR FLORIDA, CALIFORNIA, NEW JERSEY, AND PENNSYLVANIA (COUNTS IV AND VI)[12]

Defendant asserts that Plaintiffs' claims for strict liability fail because they only allege economic loss; fail to plead a design defect; and otherwise fail under each state's strict liability law. However, Defendant's arguments ignore Plaintiffs' allegations and otherwise misstate strict liability laws of various states.

A. Plaintiffs Sufficiently Alleged Damage to Other Property, and Are Not Barred by the Economic Loss Doctrine

Defendant initially attacks Plaintiffs' strict liability claims by incorrectly asserting that Plaintiffs have only alleged damages related to repairs of the Ice Makers, and thus, their damages are solely economic in nature. *See* Dfts. Memo at 24. Plaintiffs acknowledge that the strict liability laws of each state require Plaintiffs to allege

[12] Plaintiffs hereby withdraw the strict liability claim asserted on behalf of Ronald and Debra Bianchi (Virginia).

damage to property other than the product, or personal injury. *See Marsulex Envtl. Techs. v. Selip S.P.A.*, 247 F. Supp. 3d 504 (M.D. Pa. 2017) (quoting *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002)); *Jimenez v. Superior Court*, 58 P.3d 450, 456 (2002); *Alloway v. Gen. Marine Indus., L.P.*, 695 A.2d 264, 275–76 (N.J. 1997); *Aprigliano v. Am. Honda Motor Co.*, 979 F. Supp. 2d 1331, 1336–37 (S.D. Fla. 2013).

However, Defendant is incorrect in its assertion that Plaintiffs have not sufficiently alleged damage to other property. In fact, Plaintiffs' FAC is replete with allegations that the Ice Makers have caused damage to Plaintiffs' property, other than their Class Refrigerators, and also to putative class members. Specifically, Plaintiffs allege that beyond repair damages, the Ice Makers have caused "water leakage," necessary "water cleanup" following leaks, and production of "leaking water rather than producing ice." FAC ¶¶ 2, 34, 42. Plaintiffs further allege that Defendant was aware or should have been aware "that the Defects would cause… damage to other property," and that "Plaintiffs and Class Members have suffered property damage and other incidental and consequential damages as a direct and proximate result of the Defects." *Id.* at ¶¶ 115-116; *see also id.* at ¶ 78 ("ice makers… were defective and caused property damage and other losses to consumers…"). Accordingly, Plaintiffs have sufficiently alleged damages to "other property," and therefore, Defendant's Motion with regard to this argument should be denied.

B. **Plaintiffs Sufficiently Pled a Design Defect**

Defendant asks the Court to dismiss Plaintiffs' claims on the basis that Plaintiffs have not defined *any* defect in the Ice Makers. Dfts. Memo at 25. In fact, Defendant goes so far as to disingenuously argue that its own TSBs, only identify "symptoms" and methods to "improve inspections." *Id.* at 26. Neither argument is accurate.

While plaintiffs are required to provide sufficient allegations about the defects alleged and the general mechanism of failure, they need not provide expert level detail in the complaint that is necessary in later *proving* the defect. *Brown v. Sketchers, U.S.A.*,

Inc., 2009 WL 3157677 *2 (M.D. Fl., September 28, 2009)(citing *Cunningham v. Gen. Motors Corp.*, 561 So. 2d 656 (Fla. Dist. Ct. App. 1990), in support of denying defendant's motion to dismiss where plaintiff alleged a portion of a skate failed and how, leaving more technical detail about the defect for discovery); *see Mountain Club Owner's Ass'n v. Graybar Elec. Co.*, No. CIV. 2:13-1835 WBS K, 2014 WL 130767, at *1 (E.D. Cal. Jan. 14, 2014)(to *assert* a strict liability design defect claim, plaintiff must simply "*describe how* the [product] failed to meet the minimum safety expectations of an ordinary consumer…and then '*explain how* the particular design of the [product] caused [plaintiff] harm)"); *Lauder v. Teaneck Volunteer Ambulance Corps*, 845 A.2d 1271, 1277 (N.J. App. Div. 2004) (to *prove* "the existence of a defect, a plaintiff may rely on the testimony of an expert who has examined the product or offers an opinion on the product's design.") (citing *Scanlon v. General Motors Corp.*, 326 *A*.2d 673 (N.J. 1974)); *McCracken v. Ford Motor Co.*, 392 F.App'x 1, 3 (3d Cir. 2010)(holding certain design defect cases require expert testimony); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 159 (3d Cir. 2000) (expert testimony generally required in products liability cases).

Here, Plaintiffs sufficiently alleged the component claimed to be defective (the French Door External Dispenser built-in-door Ice Makers of Samsung refrigerators); as well as the mechanism of failure. Specifically, Plaintiffs specified that the Ice Makers experience water buildup in the exit chute of the door due to air gaps in the ice cavity, causing the ice makers to ice up and cease to function. FAC ¶¶ 6, 42, 46, 50. Plaintiffs also provided Defendant's own TSBs further describing the Defects, including, *inter alia*, "Root Cause #1," defined as "[T]he water hose to the ice room fill tube is inserted too far into the fitting which causes water to splash out during the ice maker fill cycle;" "Root Cause #2," defined as "a gap between the liner and the floor of the ice room." *Id.* at Exs. 1 and 2. Accordingly, Plaintiffs have more than sufficiently alleged which components are failing, the mechanism of failure, and have gone so far as to include

Defendant's own description of the design defects. Any additional details are properly left for discovery, and later expert opinion during the course of litigation.

C. **Plaintiffs' Strict Liability Claims Are Not Fatally Deficient**

1. Plaintiffs Do Not Have to Use the Words "Unreasonably Dangerous"

While Defendant properly asserts that under Florida and Pennsylvania law, Plaintiffs are required to prove the product is unreasonably dangerous, this does not entail specifically reciting the words "unreasonably dangerous." As the Supreme Court of Pennsylvania articulated,

> It is well settled a dangerous product can be considered "defective" for strict liability purposes if it is distributed without sufficient warnings to notify the ultimate user of the dangers inherent in the product. *Sherk v. Daisy-Heddon, Etc.*, 498 Pa. 594, 450 A.2d 615 (1982); *Azzarello v. Black Bros. Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp., 337 A.2d 893 (Penn.1975) supra; Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974); *Webb v. Zern,* 422 Pa. 424, 220 A.2d 853 (1966); *see also,* Restatement (Second) of Torts § 402A comment h. Such warnings must be directed to the understanding of the intended user. *See Sherk, supra; Berkebile, supra; Incollingo v. Ewing,* 444 Pa. 263, 282 A.2d 206 (1971); *see also, Brown v. Caterpillar Tractor Co.*, 741 F.2d 656 (3rd Cir.1984); *Jackson v. Coast Paint and Lacquer Co.*, 499 F.2d 809 (9th Cir.1974).

Mackowick v. Westinghouse Elec. Corp., 525 Pa. 52, 56, 575 A.2d 100, 102 (1990)

Plaintiffs sufficiently alleged that Defendant failed to provide adequate warnings to notify the ultimate user of the dangers inherent to the product, including *inter alia*, that they "failed to provide Plaintiffs and Class Members, either directly or indirectly, with adequate and sufficient warnings regarding the known and foreseeable failure risks inherent in and related to the ice makers." FAC ¶ 114. Additionally, Plaintiffs alleged that these products are inherently dangerous by virtue of "water leakage." *Id.* at ¶¶ 2, 34, 42. As the FAC specifies, one consumer complaint indicated that the Defect caused the homeowner to pull "…very hard on [Deli/Crisper drawer] and that brought the entire sheet of ice out and onto the kitchen floor, creating one big dangerous mess!" *Id.* at ¶ 72. While Plaintiffs did not expressly use the words "unreasonably dangerous,"

they sufficiently alleged that the Class Refrigerators are unreasonably dangerous by alleging the components subject to fail, a failure to warn, and a cognizable claim for strict liability.

2. Plaintiffs Are Not Required to Use the Words "Alternative Design"

Similar to "unreasonably dangerous," Plaintiffs are not required to use the words "alternative design" in order to move forward on strict liability claims in New Jersey and Pennsylvania. In fact, Plaintiffs are not even required to allege or prove an alternative design in order to move forward with and prevail on their strict liability claim. *See Lance v. Wyeth*, 85 A.3d 434, 459, n.36 (Pa. 2014) (the "assertion[] that this Court has required proof of an alternative safer design as an absolute prerequisite to the advancement of a design-defect claim is in error"); *Truchan v. Nissan Motor Corp. in U.S.A.*, 720 A.2d 981, 985–86 (N.J. App. Div. 1998)("even though no alternative design existed which would have made a product safer, [it is possible] the product is so dangerous and of such little use that under the risk-utility analysis [the] manufacturer [should] bear the cost of liability to others'"). Accordingly, Defendant's assertion that Plaintiffs are required to allege alternative design fails, as their motion to dismiss should.

3. The Mahoneys Are Not Barred by NJPLA

Defendant's assertions that the Mahoneys' strict liability claims in New Jersey should be dismissed are predicated on the same erroneous assertions as the economic loss rule, and should therefore be denied.

N.J. Stat. Ann. § 2A:58C-1 (West), provides:

> (2) "Harm" means (a) physical damage to property, other than to the product itself; (b) personal physical illness, injury or death; (c) pain and suffering, mental anguish or emotional harm; and (d) any loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

Plaintiffs have asserted harm, other than to the product itself. FAC ¶¶ 2, 34, 42, 48-54, 78, 115-116. Accordingly, the Court should not dismiss the Mahoneys' claims.

D. **The Castelos Properly Pled Strict Liability Under California Law**

Defendant asks this Court to dismiss the Castelos' California strict liability claim for failure to use magic language, while ignoring the substantive allegations of the cause of action. As the *Johnson* court explained, with regard to California strict liability law,

> '[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts.' Three general types of defects have been discerned: manufacturing defects, warning defects, and design defects. … A warning defect occurs when a manufacturer does not adequately warn the consumer of "a particular risk that was known or knowable in light of the generally recognized and prevailing scientific and medical knowledge available at the time of manufacture and distribution." In California, a product is defective in design if "the product fails to meet ordinary consumer expectations as to safety" or "the design is not as safe as it should be."

Johnson v. United States Steel Corp., 192 Cal. Rptr. 3d 158, 165 (Calif. 2015), *reh'g denied* (Sept. 22, 2015), *review denied* (Dec. 9, 2015) (internal citations omitted). Here, Plaintiffs sufficiently alleged a "warning defect," for Defendant's failure to warn the consumers who purchase the Class Refrigerators with the known risk of water leakage, ice over, and resulting dangers of such condition. FAC ¶¶2, 34, 42, 72, 114. Defendant's argument for dismissal fails and the Castelos' strict liability claim should proceed.

V. PLAINTIFFS ADEQUATELY PLED THEIR STATUTORY CONSUMER PROTECTION CLAIMS (COUNTS VII, IX, XIV AND XVII)

Despite filing a ninety-one page FAC filled with specific statements and omissions made by Defendant in various forms of media about the characteristics and benefits of the Class Refrigerators, Defendant asserts that Plaintiffs do not state claims for violations of any of the consumer protection laws cited in the FAC. However, an examination of the FAC reveals that Plaintiffs have provided Defendant with more than

sufficient notice of the precise misconduct and fraudulent behavior about which they are complaining.

Defendant has misconstrued the relevant authorities and misstated the facts upon which Plaintiffs rely in an attempt to sway this Court toward dismissing Plaintiffs' fraud claims. Plaintiffs allege that Samsung knew or should have known that various refrigerator models advertised, marketed, and sold to the public were defective. Specifically, Defendant knew that the refrigerators' ice-making capability would cease to function properly. Despite Defendant's knowledge, it continued to advertise that the refrigerators had master ice-making capabilities. Plaintiffs have stated claims for violations of their respective consumer fraud statutes as well as common law fraudulent concealment. Therefore, Defendant's motion must be denied.

A. Plaintiffs Satisfy the Pleading Standards for their Statutory Fraud Claims

Samsung attempts to group all of Plaintiffs' statutory consumer law claims into a single bowl by arguing that all Plaintiffs' consumer fraud claims must meet "Rule 9(b)'s heightened pleading standards." Dfts. Memo at 32. As described below, that is not so.

Nevertheless, although Rule 9(b) may not apply to all of Plaintiffs' consumer fraud claims, all Plaintiffs' claims have satisfied the Rule here. Fed. R. Civ. P. 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The purpose of the rule is to "place the defendant[ ] on notice of the precise misconduct with which [it] is charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). "[I]n applying [Rule 9(b)], focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'" *Christidis v. First Penn. Mortg. Trust*, 717 F.2d 96, 100 (3d Cir. 1983).

The most basic consideration in judging the sufficiency of a pleading is whether it provides enough notice to an adverse party so as to enable it to prepare a responsive pleading. *See* 5A Charles A. Wright and Arthur R. Miller, § 1298, at 648 (1990). "It is certainly true that allegations of 'date, place or time' fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Seville Indus. Mach. Corp*. 742 F.2d at 791.

Plaintiffs' FAC need only inject sufficient precision to put Defendant on notice of the "precise misconduct with which [it is] charged." *Frederico v. Home Depot*, 507 F.3d 188, 200 (3d Cir. 2007). This standard can be satisfied by alleging "the 'who, what, when, where and how' of the events at issue," *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276-77 (3d Cir. 2006), or by "otherwise inject[ing] precision or some measure of substantiation" in the allegations. *See Frederico*, 507 F.3d at 200. Plaintiffs have done this.

B. The Bianchi Plaintiffs Sufficiently Pled a Claim Under the Virginia Consumer Protection Act

The Virginia Consumer Protection Act of 1977 (VCPA), Va. Code Ann. § 59.1–196 *et seq.*, makes it unlawful for a supplier[13] to misrepresent its "goods or services as those of another," *id.* at § 59.1–200(1), or to misrepresent "the affiliation, connection, or association" of itself or of its goods or services, *id.* at § 59.1–200(3), or to use "any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction," *id.* at § 59.1–200(14). To state a cause of action under the VCPA, Plaintiff must allege (1) fraud, (2) by a supplier, (3) in a consumer transaction. *Id.* at § 59.1–200(A).

[13] The Virginia Code defines "supplier" as: "a seller, lessor or licensor who advertises, solicits or engages in consumer transactions, or a manufacturer, distributor or licensor who advertises and sells, leases or licenses goods or services to be resold, leased or sublicensed by other persons in consumer transactions." Va. Code § 59.1–198(C).

The Supreme Court of Virginia, analyzing the General Assembly's stated purpose for passing the VCPA, held that the VCPA should be "construe[d] liberally, in favor of the injured party." . That court also drew a distinction between the VCPA and fraud at common law, holding that "a plaintiff must prove a violation of the VCPA by a preponderance of the evidence rather than by clear and convincing evidence." *Id*. at 370. In misrepresentation cases, the VCPA requires proof of the elements of (1) reliance and (2) damages. *Id*. However, "[t]he VCPA clearly does not require the consumer to prove in every case that misrepresentations were made knowingly or with the intent to deceive." *Id*.

The Bianchi Plaintiffs have pleaded their VCPA claim with the requisite specificity. In *Scott v. GMAC Mortgage, LLC*, 3:10CV00024, 2010 WL 3340518 (W.D. Va. Aug. 25, 2010), the court, relying on the decision in *Nahigian v. Juno Loudoun, LLC*, 684 F.Supp.2d 731 (E.D. Va. 2010), found that the plaintiffs had pleaded their case with sufficient particularity to satisfy Rule 9(b) and to allow the defendant to raise a defense. *Scott*, 2010 WL 3340518, at *3. The court held that it was not necessary to name the specific representative of the defendant that made the misrepresentations, nor the precise location, date, and hour at which defendant allegedly made the misrepresentations. *Id*. Instead, it was sufficient to merely identify the defendant corporate entity and provide general allegations of when and where the misrepresentations were made. As in *Scott* and *Nahigian*, Plaintiffs here have identified the defendant entity (Samsung), the general time when the material misrepresentations and/or omissions[14] took place (just prior to purchasing in September 2014, FAC ¶¶ 22,

[14] The FAC adequately alleges that Defendant fraudulently concealed the defect from the Bianchis and Virginia class members in violation of the VCFA. FAC ¶¶ 66, 82, 137, 139. Also, Plaintiffs allege that they would have taken different actions had they known about the defect Samsung concealed through its omission (FAC ¶ 143). This is enough to plead an omission-based VCPA claim.

24), the contents of the misrepresentations (that the ice maker would actually make ice and certain quantities of it (*id*. at ¶¶ 24, 49)), and the general location (the Internet, and at Home Depot in Suffolk, Virginia (*id*. at ¶¶ 22, 24, 25, 26)).

Plaintiffs also adequately allege that they relied on Samsung's misrepresentations, (*id.* at ¶¶ 71, 84), and also that they have suffered "ascertainable loss and actual damages as a direct and proximate result of Samsung's misrepresentations and their concealment of and failure to disclose material information." *Id.* at ¶ 143. Specifically, Plaintiffs sustained actual damages, including out-of-pocket costs for technician calls, replacement parts, and labor. *Id*. at ¶¶ 30, 34, 35, 37. Plaintiffs have therefore adequately alleged damages. Because Plaintiffs have sufficiently pled the required elements to sustain their VCPA claim, the court must deny Defendant's motion to dismiss. *See In re Lumber Liquidators Chinese-Manufactured Flooring Durability Mktg. & Sales Practice Litig.*, No. 1:16MD2743 (AJT/TRJ), 2017 WL 2911681, at *12–13 (E.D. Va. July 7, 2017) (denying motion to dismiss VCPA claim where plaintiffs alleged that they relied on defendant's misrepresentations and suffered damages in the amount they paid for the defective product and the amount they paid to repair the defective product).

C. The Marino Plaintiffs Sufficiently Pled a Claim under the Florida Deceptive and Unfair Business Practices Act

In order to plead a *prima facie* case under the Florida Deceptive and Unfair Business Practices Act ("FDUTPA"), Fl. Stat. Ann. § 501.201 *et seq.*, a plaintiff must allege: (1) a deceptive act or unfair practice by the defendant[15]; (2) causation; and (3) actual damages.[16] *Rollins, Inc. v. Butland*, 951 So. 2d. 860, 869 (Fla. 2d DCA 2006)

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[15] An unfair practice is "one that 'offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 499 (Fla. 4th DCA 2001).

[16] "[T]he measure of actual damages is the difference in the market value of the product

(footnote continues on next page)

(citations omitted). Florida courts define a "deceptive act" within the FDUTPA" as 'a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.'" *Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cnty., Inc.*, 169 So. 3d 164, 169 (Fla. Dist. Ct. App. 2015) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)). An "unfair practice" is defined as "'one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.'" *Id.* (quoting *PNR*, 842 So. 2d at 777).

Courts have consistently held that "FDUTPA claims premised on a manufacturer's failure to disclose a known, latent defect" are sufficient to survive a motion to dismiss. *Chiarelli v. Nissan N. Am., Inc.*, No. 14-CV-4327 NGG VVP, 2015 WL 5686507, at *17 (E.D.N.Y. Sept. 25, 2015); *see also Velasco v. Chrysler Grp. LLC*, No. CV 13-08080 DDP VBKX, 2014 WL 4187796, at *1 (C.D. Cal. Aug. 22, 2014) (failure to disclose defect with vehicles' electrical systems sufficient to state FDUTPA claim); *In re Porsche Cars N. Am., Inc.*, 880 F. Supp. 2d 801, 813 (S.D. Ohio 2012) (failure to disclose defect with plastic coolant tubes constituted a valid FDUTPA claim); *Matthews v. Am. Honda Motor Co.*, No. 12-60630-CIV, 2012 WL 2520675, at *1 (S.D. Fla. June 6, 2012) (failure to disclose paint discoloration was actionable under FDUTPA). *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 548 (D. Md. 2011) (FDUTPA claim was meritorious where Ford failed to disclose torque converter defect).

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or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." *Rollins, Inc. v. Heller*, 454 So.2d 580, 585 (Fla. 3d DCA 1984). The FAC clearly alleges that the Marino Plaintiffs and Florida class members suffered actual damages as a direct and proximate result of Samsung's misrepresentations and their concealment of and failure to disclose material information. FAC ¶¶ 161-165.

Although Samsung argues that Rule 9(b)'s heightened pleading standard applies to Plaintiffs' FDUTPA claims, the prevailing rule is that it does not apply. *See, e.g., Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1239 (S.D. Fla. 2014) ("While the Court acknowledges that courts within this district have reached various conclusions about the application of Rule 9(b) to FDUTPA claims, this Court is persuaded that *Rule 9(b) does not apply to FDUTPA claims*.") (emphasis added).

Here, the Marino Plaintiffs allege that Samsung knew of the defect in its Ice Makers through a combination of records of consumer complaints, warranty claims, and TSBs. FAC ¶¶ 3, 6-7, 41, 161. Courts have held that a manufacturer's knowledge of a latent defect may be inferred when such complaints and records exist. *See Catalano v. BMW of N. Am., LLC*, 167 F. Supp. 3d 540, 559 (S.D.N.Y. 2016) (finding knowledge of defect had been properly alleged based on complaints, repair records, warranty claims, and TSBs); *Velasco*, 2014 WL 4187796, at *1 (allowing FDUTPA claim to survive motion to dismiss due to allegation that defendant knew of defect through recent complaints). The Marino Plaintiffs also allege that Samsung's deceptive acts and practices caused damage. FAC ¶¶ 160, 164. Indeed, despite Samsung's significant and exclusive knowledge of the Defects, it fraudulently concealed the Defects and prevented reasonable consumers from discovering them until such time as the Defects manifested to the individual owners. *Id*. at ¶ 66. Because of Samsung's deceptive acts and practices, Plaintiffs decided to purchase their Class Refrigerator, and in fact, would not have purchased the refrigerator at all or, alternatively, would have paid less for it if they knew the truth about the quality of the refrigerator. *Id*. at ¶ 162. This is more than enough to adequately allege causation under the FDUTPA. *See Gavron v. Weather Shield Mfg., Inc.*, 819 F. Supp. 2d 1297, 1301 (S.D. Fla. 2011) (finding plaintiff adequately pled causation under FDUTPA by alleging defendant made misleading representations that would deceive an objectively reasonable person).

Accordingly, Plaintiffs have sufficiently pled a *prima facie* case under the FDUTPA and have injected adequate precision and some measure of substantiation into their allegations of Samsung's deceptive acts and practices. Dismissal would be improper.

D. The Mahoney Plaintiffs Sufficiently Pled a Claim under the New Jersey Consumer Fraud Act

The New Jersey Consumer Fraud Act ("NJCFA")—lauded as "one of the strongest consumer protection laws in the nation," *Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741, 748 (N.J. 2009)—provides relief to consumers who suffer "fraudulent practices in the market place." *Lee v. Carter–Reed Co.*, 4 A.3d 561, 576 (N.J. 2010); *Furst v. Einstein Moomjy, Inc.*, 860 A.2d 435 (N.J. 2004). The Act was intended to "root out consumer fraud" and "protect consumers" by eliminating "sharp practices and dealings in the marketing of merchandise" in which a consumer could be "lured into a purchase through fraudulent, deceptive or other similar kind of selling or advertising practices." *Id.* (citing *Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 696 A.2d 546, 551 (N.J. 1997)). In light of its legislative history, courts have consistently noted that the NJCFA should be "construed liberally to accomplish its broad purpose of safeguarding the public." *Lee*, 4 A.3d at 577 (citing *Furst*, 860 A.2d at 440).

To establish a *prima facie* case under the NJCFA, N.J.S.A. 56:8-1 *et seq.*, a plaintiff must allege: (1) unlawful conduct by the defendant; (2) an ascertainable loss by plaintiff; and (3) a causal connection between the defendant's unlawful practice and the plaintiff's ascertainable loss. *Payan v. Greenpoint Mortg. Funding*, 681 F.Supp.2d 564, 572 (D.N.J. 2010) (citing *Bosland*, at 557). Unlawful practices fall into one of three general categories: affirmative acts, knowing omissions, and regulatory violations. *Frederico*, 507 F.3d at 202 (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 17 (1994)).

Here, the Mahoneys have pleaded their claims under the NJCFA with sufficient particularity to provide Samsung with notice. Yet, despite pleading all of the elements

under the NJCFA with the requisite specificity, Defendant contends that the Mahoneys' NJCFA claim should fail because they "allege no facts showing either ascertainable loss or an unlawful practice by SEA." Defendant's protestations are meritless.

Plaintiffs alleged unlawful conduct and practices by Defendant, stating that Defendant knew of the defect for years and continued to market, advertise and sell the defective refrigerators to the public. Indeed, as alleged in the FAC, Defendant has known about the defect, not only by virtue of the Samsung TSBs, FAC ¶¶ 3-6, but also by virtue of numerous consumer complaints. *Id*. at ¶¶ 7, 213.[17] Yet, Samsung has taken no action to repair, replace, or recall the defective Ice Makers or the Class Refrigerators. *Id*. As such, Plaintiffs have pleaded with the requisite specificity unlawful practices by Samsung.

In addition, the FAC sufficiently pleads that Samsung engaged in unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment of material facts with the intent that others rely upon in violation of the NJCFA. FAC ¶ 214. NJCFA claims for unconscionable commercial practice need not allege an affirmative fraudulent statement, representation, or omission by the defendant. *Dewey v. Volkswagen AG,* 558 F.Supp.2d 505, 525 (D.N.J. 2008); *see also Cox v. Sears Roebuck & Co.,* 647 A.2d 454, 462 (N.J. 1994) (noting that NJCFA "specifies the conduct that will amount to an unlawful practice in the disjunctive" in determining that the question of "whether an unconscionable commercial practice occurred . . . does not adequately address a consumer-fraud claim."). Unconscionable commercial practice claims are distinct from

[17] These allegations are more than enough to satisfy a claim under the NJCFA because, at the pleading stage, "knowledge, intent, or 'other conditions of a person's mind'" may be pled generally. *Rossi v. Whirlpool Corp.*, No. 2:12-CV-00125, 2013 WL 5781673, at *9 (E.D. Cal. Oct. 25, 2013) (quoting *Kowalsky v. Hewlett–Packard Co.*, No. 10–CV–02176–LHK, 2011 WL 3501715, at *3 (N.D.Cal. Aug. 10, 2011) (quoting Fed.R.Civ.P. 9(b))); *Dzielak v. Whirlpool Corp.*, 26 F. Supp. 3d 304, 337–38 (D.N.J. 2014).

NJCFA claims sounding in fraud, and so the heightened pleading standard of Rule 9(b) does not apply. *See Dewey*, 558 F.Supp.2d at 525–27 (applying Rule 9(b) standard to common law fraud claims and NJCFA claims sounding in fraud, but not unconscionable commercial practice claim).

Because unconscionable commercial practices are categorized as "affirmative acts," as opposed to knowing omissions, NJCFA claims alleging unconscionable commercial practice as the unlawful activity do not require a showing of "intent to deceive" or "knowledge of the falsity of the representation." *Busse v. Homebank LLC*, No. 07–3495, 2009 WL 424278, at *9 (D.N.J. Feb.18, 2009) (quoting *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 365 (N.J. 1997)); *see also Leon v. Rite Aid Corp.*, 774 A.2d 674, 677 (N.J.App.Div.2001) ("When the alleged violation is an affirmative act, plaintiff need not prove defendant's intent nor even necessarily actual deceit or fraud. Any unconscionable commercial practice is prohibited.") (citations omitted).

Here, the FAC adequately alleges facts establishing unlawful conduct by Samsung in the form of unconscionable commercial practice in violation of the NJCFA. Indeed, Samsung was made aware by endless complaints from consumers that the refrigerator almost immediately failed to produce ice. FAC ¶ 7, 213. Defendant had an affirmative obligation to disclose the knowledge of this defect to its customers, but failed to do so. *Id*. at ¶¶ 84, 119, 218. Had customers been made aware of the failure rate of the ice-making function, they would have been able to make a fully informed choice whether to buy one of the Class Refrigerators. Plaintiffs were deprived of full disclosure and, thus, were unable to make an informed decision. These allegations are sufficient for Plaintiffs NJCFA claim based on Samsung's unconscionable commercial practices. *See, e.g., Dewey*, at 525 (denying defendant's motion to dismiss on "unconscionability" grounds when the defendant sold defective automobiles and was allegedly aware of the defects); *Real v. Radir Wheels, Inc.*, 969 A.2d 1069 (N.J. 2009) (concluding defendant

"intentionally had engaged in unconscionable commercial practices in connection with the advertisement and sale of merchandise" by falsely representing condition of car).

Plaintiffs have also adequately alleged ascertainable loss under the NJCFA. Plaintiffs and Class Members all have ascertainable loss in that, at a minimum, they spent thousands of dollars on refrigerators that do not work. They should be fully reimbursed for the money spent on the defective refrigerators. But for Defendant's marketing, advertising, and selling the defective refrigerators, Plaintiffs would never have purchased the refrigerator and would not have lost thousands of dollars in purchasing a product that had far less value than it advertised; *i.e.*, it was alleged to have ice-making capability but it failed to produce ice. These ascertainable losses are the same measurable losses that this Court has deemed sufficient at the pleading stage. For their money, Plaintiffs "received something less than, and different from, what they reasonably expected in view of defendant's presentations. That is all that is required to establish 'ascertainable loss'. . . " *Miller v. Am. Family Publishers,* 663 A.2d 643, 655 (Ch.Div.1995); *see also*, *Talalai v. Cooper Tire & Rubber Co.,* 823 A.2d 888, 898 (Law Div. 2001) (the precise amount of loss need not be known; it need only be measurable.); *Torres–Hernandez v. CVT Prepaid Solutions, Inc.*, 3:08–CV–1057–FLW, 2008 WL 5381227, at *7 n. 3 (D.N.J. Dec. 17, 2008) ("Although there is no specific dollar amount alleged in Plaintiffs Complaint, that level of specificity is not required by the case law and Rule 9(b).").

Defendant's reliance on *Hughes v. Panasonic Consumer Elecs. Co.*, No. CIV.A. 10-846 SDW, 2011 WL 2976839 (D.N.J. July 21, 2011) is misplaced. First, the *Hughes* decision is marked "NOT FOR PUBLICATION." Furthermore, the court in that case held that plaintiffs did not sufficiently plead either an out-of-pocket loss or a showing of loss in value. Unlike *Hughes*, the Mahoneys have pled that they suffered out-of-pocket loss in

the amount of $327.50 to service the Ice Maker when it stopped making ice. FAC ¶ 50, 51, 52.[18] In addition, Plaintiffs allege that they suffered ascertainable loss of the diminished value of their refrigerators as well as lost or diminished use. *Id*. at ¶ 217. Accordingly, *Hughes* is not applicable to the facts of this case.

In fact, Plaintiffs here allege *more than* what is required under New Jersey law to plead ascertainable loss. Plaintiffs purchased their Class Refrigerator at a purchase price of $3,422.92. *Id.* at ¶ 48. As a result of multiple failures of the Ice Maker, Plaintiff suffered ascertainable out-of-pocket loss in the amount of at least $327.50 to service his ice maker. *Id*. at ¶¶ 50, 51, 52. In addition, Plaintiffs and the New Jersey Class suffered ascertainable loss of the diminished value of their refrigerators as well as lost or diminished use. *Id*. at ¶ 217. "A plaintiff may show ascertainable loss by 'either out-of-pocket loss or a demonstration of loss in value.'" *Green v. Green Mtn. Coffee Roasters, Inc.*, 279 F.R.D. 275, 281 (D. N.J. 2011) (quoting *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 792 (N.J. 2005)). Therefore, Plaintiffs have adequately pleaded ascertainable loss under the NJCFA.

Accordingly, Plaintiffs have sufficiently pled a prima facie case under NJCFA and have injected adequate precision and some measure of substantiation into their allegations of consumer fraud committed by Samsung. Dismissal would be improper.

E. The Cecconis and Kauffman Plaintiffs Sufficiently Pled Claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law

To assert a private right of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("PUTPCPL"), 73 Pa. Cons. Stat. § 201-1 *et seq.*, plaintiff must meet three criteria: (1) that defendant's business constitutes a "trade" or "commerce" within the Act; (2) that the Act grants her a private cause of action for injuries sustained; and (3) that actions of which she complains are either unfair or

[18] Since the filing of the FAC, the Mahoneys have had to have their ice maker replaced. *See* **Ex. A**.

deceptive and fall within one of the 21 specific acts enumerated by statute.[19] *In re Cruz*, 441 B.R. 23 (Bankr. E.D.Pa. 2004). Also, a plaintiff must allege that (s)he suffered an ascertainable loss as a result of the defendant's prohibited action. *Weinberg v. Sun Co., Inc.*, 777 Pa. 612, 618 (2001). A plaintiff needs to establish a causal connection between the defendant's allegedly deceptive conduct and the harm plaintiff suffered. *Weiler v. SmithKline Beecham Corp.*, 2001 WL 1807382, 53 Pa. D. & C.4th 449, 452 55 (Pa.Com.Pl. 2001).

A cause of action under the PUTPCPL "is to be liberally construed in order to effectuate its purpose." *Keller v. Volkswagen of America, Inc.*, 733 A.2d 642 (Pa.Super. 1999); *In re Rodriguez*, 218 B.R. 764 (Bkrtcy. E.D. Pa. 1998); *see also Com. v. Percudani*, 825 A.2d 743, 746 (Pa. Commw. Ct. 2003); *Commonwealth v. Parisi*, 873 A.2d 3, 9 (Pa. Cmwlth. 2005). The purpose of the PUTPCPL is to protect the public from fraud and unfair or deceptive business practices, and the statute is the principal means for doing so. *Feeney v. Disston Manor Personal Care Home, Inc.*, 849 A.2d 590, 597 (Pa. Super. 2004, *reargument denied*, *appeal denied*, 581 Pa. 691, 864 A.2d 529; *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022 (Pa. Super. 2005).

Defendant contends that Plaintiffs' PUTPCPL claims are barred under the economic loss doctrine. Dfts. Memo at 41. Defendant principally relies on *Werwinski v. Ford Motor Co.* 286 F.3d 661, (3d Cir. 2002) for the proposition that the economic loss doctrine applies to PUTPCPL claims. However, *Werwinski* no longer has any vitality in cases like Plaintiffs.' When *Werwinski* was decided, there was no guidance from Pennsylvania courts, which forced the Third Circuit to predict how Pennsylvania's highest court would rule on the issue of whether the economic loss doctrine applies to PUTPCPL claims. *Werwinski,* 286 F.3d at 675. The Pennsylvania courts, the highest

[19] An act or a practice is deceptive or unfair if it has the capacity or tendency to deceive. *Chiles v. Ameriquest Mortg. Co.*, 551 F.Supp.2d 393 (E.D. Pa. 2008).

court, and the intermediate appellate courts, had not yet addressed this issue. But since *Werwinski*'s issue, many Pennsylvania courts have held that the economic loss doctrine does not apply to PUTPCPL claims. *Knight v. Springfield Hyundai*, 81 A.3d 940 (Pa. Super. 2013); *Kantor v. Hiko Energy, LLC*, 100 F. Supp. 3d 421, 427 (E.D. Pa. 2015); *Roberts v. NVR, Inc.*, No. 15-489, 2015 WL 3745178, at *5 (W.D. Pa. June 15, 2015); *Horne v. Progressive Advanced Ins. Co.*, No. 15-1029, 2015 WL 1875970, at *1 n.1 (E.D. Pa. April 24, 2015). Thus, Plaintiffs' PUTPCPL claims are not barred under the economic loss doctrine.

Defendant also contends that Plaintiffs have not pled justifiable reliance, Dfts. Memo at 42, and that Plaintiffs fail to allege deceptive conduct under the PUTPCPL. *Id.* at 43. Each of these arguments is easily dismissed.

Here, Plaintiffs have sufficiently and specifically asserted deceptive conduct by Samsung sufficient to satisfy the PUTPCPL. The Cecconi Plaintiffs allege that they saw and reviewed marketing materials and/or pamphlets attributable to Defendant prior to and in conjunction with their purchase of their Class Refrigerator in August 2012. FAC ¶ 56. Also, the Kauffman Plaintiffs allege that they saw and reviewed marketing materials and/or pamphlets attributable to Defendant prior to and in conjunction with their purchase of their Class Refrigerator in August 2014. *Id.* at ¶ 59. Both the Cecconi and Kauffman Plaintiffs affirmed that the advertisements they saw and on which they relied included the specific statements identified in paragraphs 70, 71, and 84 of the FAC. *Id.* at ¶ 254. Moreover, Plaintiffs allege that these statements constitute fraudulent or deceptive practices by Defendant upon which Plaintiffs *relied* when purchasing their Class Refrigerators, thus establishing the causal connection. *Id.* at ¶¶ 71, 84, 258, 259, 260, 261, 264. Because of Defendant's deceptive practices, Plaintiffs decided to purchase their Class Refrigerators, and in fact, would not have purchased the refrigerators at all or, alternatively, would have paid less for them if they knew the truth about the quality of the refrigerators. *Id.* at ¶ 264. Plaintiffs suffered further ascertainable loss from their

reliance on Defendant's misrepresentations in that their purchased refrigerators came with defective Ice Makers that do not work and requires replacement and remediation. *Id*. at ¶¶ 6, 52.

Accordingly, Plaintiffs have injected sufficient precision and some measure of substantiation into their allegations of consumer fraud to satisfy Rule 9(b)'s heightened pleading standard, and therefore, Defendant's Motion should be denied.

F. The Castelos Sufficiently Pled Claims under California's Consumer Fraud Statutes

Defendant contends that the Castelos fail to state claims under the California Legal Remedies Act ("CLRA") or California's Unfair Competition Law ("UCL"), and that claims under both of these statutes should be dismissed. To the contrary, Plaintiffs have sufficiently pled their claims under both California's consumer fraud statutes.

1. The Castelos Adequately Plead their CLRA Claim

The CLRA prohibits "'unfair methods of competition and unfair or deceptive acts or practices' in transactions for the sale or lease of goods to consumers." *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 833–34, 51 Cal. Rptr. 3d 118, 125 (2006), *as modified* (Nov. 8, 2006) (citing Cal. Civ. Code § 1770(a)). Under the CLRA, sellers can be liable for "making affirmative misrepresentations as well as for failing to disclose defects in a product." *Baba v. Hewlett–Packard Co.*, No. 09–05946, 2010 WL 2486353, *3 (N.D. Cal. June 16, 2010). The standard for the CLRA is the "reasonable consumer" test, which requires a plaintiff to show that members of the public are likely to be deceived by the business practice or advertising at issue. *See Williams v. Gerber Prod. Co.*, 552 F.3d 934, 938 (9th Cir. 2008); *see also Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 1360, 8 Cal.Rptr.3d 22 (2003) ("[U]nless [an] advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.") (internal quotation marks and citation omitted); *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 680, 38 Cal. Rptr. 3d 36 (2006) (quoting

Nagel v. Twin Laboratories, Inc., 109 Cal. App. 4th 39, 54, 134 Cal. Rptr.2d 420 (2003)) ("Conduct that is 'likely to mislead a reasonable consumer' . . . violates the CLRA.").

Defendant's arguments that the Castelos fail to allege an actionable misrepresentation or omission and that they fail to allege reliance (Dfts. Memo at 44-45) is wholly baseless.

This case is like *Clark v. LG Elecs. U.S.A., Inc.*, No. 13-CV-485 JM JMA, 2013 WL 5816410 (S.D. Cal. Oct. 29, 2013). In *Clark*, plaintiff filed a class action complaint against defendant LG alleging that the LG Refrigerator's Ice System would repeatedly clog and become non-operational. 2013 WL 5816410 at *1. The plaintiff also alleged that LG was aware of these problems as evidenced by the numerous customer complaints found on the Internet and LG's refusal or inability to repair the reported problems with the refrigerator. *Clark*, at *2. In her complaint, plaintiff asserted various claims against LG, including violations of the CLRA and UCL. *Id*. at *2. In its motion to dismiss the complaint, LG alleged that the plaintiff's CLRA and UCL claims should be dismissed for failure to meet Rule 9(b)'s heightened pleading requirements. *Id*. at *4.

The court denied defendant's motion to dismiss the CLRA and UCL claims. First, the court reasoned that the plaintiff sufficiently pleaded LG's knowledge, "When considering the totality of Plaintiff's factual allegations, the [complaint] suggests LG would have knowledge of problems with its products through its ordinary process of tracking and receiving information from its customer service line, warranty service providers, and complaints posted on its own website."[20] *Id*., at *5. Furthermore, the

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20 The *LG* court also noted,

> In LG's motion to dismiss, LG argues Plaintiff's UCL "unfair" claim also fails because Plaintiff has not sufficiently pled knowledge as required to bring fraudulent omission claims under the UCL and FAL. Insomuch as the court concludes Plaintiff has sufficiently pled knowledge for her UCL and FAL claims, LG's argument regarding Plaintiff's UCL "unfair" claim is moot.

(footnote continues on next page)

court rejected LG's argument that the plaintiff had not established reliance because the complaint did not allege plaintiff saw any advertisement by LG prior to her purchase that could possibly have contained the supposedly omitted information. *Id*. at *6.

According to the Court,

> LG's reliance argument defies common sense and real-world business practice. No refrigerator manufacturer would ever advertise its product to, in essence, consistently fail due to repeated clogging of the ice system, frequent problems with the cooling system necessitating control board rebooting, and periods of nonoperation. Such advertising would be tantamount to an automobile manufacturer advertising its vehicle routinely stalls in freeway traffic, or a wireless telephone provider advertising a high rate of dropped calls. Such disclosures do not exist in the real world because they represent product or service failure. Product advertising is meant to identify and buttress product features and value, not denigrate and diminish those qualities. Under the unusual circumstances pled in this case, reliance may be established by LG's alleged failure to disclose at the point of purchase the alleged defects which, if true, would seem to negate the inherent purpose of the product.

Id. at *6.

In *Clark*, the plaintiff's contentions that she would not have purchased the refrigerator had she known that she would have to continually unplug and replug it to keep it operational and empty the ice tray on a daily basis in order for the Ice System to function properly were sufficient to support her CLRA and UCL claims. *Id*., at *6; *see also Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, at 327–28, 120 Cal.Rptr.3d 741, 246 P.3d 877 (2011).

Here, Samsung (like LG) contends that "the Castelos allege no exposure to *any* pre-purchase representation by SEA" which "prevents the Castelos from pleading reliance." Dfts. Memo at 44. Samsung's reliance argument defies common sense and real-world business practice. Indeed, the Castelos allege that shortly after purchase their Ice Maker began icing over and producing ice until the Ice Maker would freeze up. FAC

Id. at *14. Therefore, the Castelos' UCL claim must survive, just like their CLRA claim.

¶ 46. Like the frustrated plaintiff in *Clark*, the Castelos tried unplugging and defrosting their Refrigerator for 48 hours and re-setting the Ice Maker. Neither of those efforts worked, and the Castelos were left emptying the Ice Maker every evening and turning it off regularly. Simply put, their Ice Maker did not work.

But Samsung never told Plaintiffs about the Defects at the point of sale or otherwise. Instead, Defendant promoted the Ice Makers as a selling point in the Refrigerators. FAC ¶¶ 181, 45. Plaintiffs suffered ascertainable loss and actual damages as a direct and proximate result of Samsung's misrepresentations and its concealment of and failure to disclose material information, and had they known of that information, the Castelos would not have purchased their refrigerator or would have paid significantly less for it. *Id*. at ¶ 182.[21]

Defendant also contends that even if the Castelos had alleged facts showing misrepresentation or omission and reliance, the Court should dispose of Plaintiffs' CLRA claim for damages because they did not provide the required notice. Dfts. Memo at 45-46. That is not so. For some time, federal courts in this district dismissed CLRA claims when the plaintiff did not provide the required notice before filing the complaint. *See Cattie v. Wal–Mart Stores, Inc.*, 504 F.Supp.2d 939, 949–50 (S.D.Cal.2007); *Janda v. T-Mobile, USA, Inc.*, No. C 05-03729 JSW, 2008 WL 4847116, at *7

[21] Defendant cites *Myers v. BMW of N. Am., LLC*, No. 16-CV-00412-WHO, 2016 WL 5897740, at *6 (N.D. Cal. Oct. 11, 2016). The case is inapplicable here. In *Myers*, the plaintiff did not view or rely on the misrepresentations like the Castelos did in this case, as discussed above. *Herremans v. BMW of N. Am., LLC*, No. CV 14-02363 MMM PJWX, 2014 WL 5017843, at *7 (C.D. Cal. Oct. 3, 2014) is also inapposite. In that case, the court dismissed plaintiff's CLRA claim because it was time-barred. The court ruled that plaintiff did "not adequately allege facts showing that she can invoke the delayed discovery rule or the doctrine of fraudulent concealment, her CLRA and fraud claims, as pled, are time-barred. The court therefore grants BMW's motion to dismiss the claims on this ground." *Id.* at *7. *Herremans* actually supports Plaintiffs' case because the court held plaintiff had met rule 9(b)'s heightened pleading standard and consequently, denied BMW's motion to dismiss the CLRA and UCL claims for failure to satisfy Rule 9(b)'s heightened pleading standard. *Id*. at *11.

(N.D. Cal. Nov. 7, 2008) (same).[22] But, in 2009, the California Court of Appeal criticized these decisions for failing to properly take into account the purpose of the notice requirement, which "exists in order to allow a defendant to avoid liability for damages if the defendant corrects the alleged wrongs within 30 days after notice, or indicates within that 30–day period that it will correct those wrongs within a reasonable time." *Morgan v. AT & T Wireless Servs., Inc.*, 177 Cal.App.4th 1235, 1261 (2009). Thus, this Court is obligated to follow the state-court appellate decision in *Morgan*. *See Kanfer v. Pharmacare US, Inc.*, 142 F. Supp. 3d 1091, 1106–07 (S.D. Cal. 2015) (citing *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001)) ("Under *Morgan,* dismissal . . . would not be appropriate."). So Plaintiffs' CLRA cannot be dismissed for lack of notice.

2. The Castelos Adequately Plead their UCL Claim

Defendant bears a heavy burden in moving to dismiss the UCL claims, for Plaintiffs need only allege one "unlawful, unfair, or fraudulent business act or practice" to survive a motion to dismiss. *Lipitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1043 (9th Cir. 2003). It is "the rare situation in which granting a motion to dismiss [a UCL claim] is appropriate." *Williams*, 552 F.3d at 939. This is in part because intent to injure is not an element. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163,181 (Cal. 2000). Further, to the extent that the claim is not solely grounded in fraud it is not subject to Rule 9(b). *Morgan,* 177 Cal. App. 4th at 1256. Whether Defendant's conduct is "unfair is generally a question of fact which requires consideration and weighing of evidence from both sides." *Paduano v. American Honda Motor Co., Inc.*, 169 Cal. App. 4th 1453, 1469 (Cal. Ct. App. 2009). Thus, dismissal is inappropriate at the pleading stage.

[22] These are the two pre-*Morgan* cases cited by Defendant that no longer represent the current view in California on the CLRA notice issue.

California's UCL provides a cause of action for business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Cal. Bus. & Prof. Code § 17200. Each of these three "prongs" constitutes a separate and independent cause of action. *See Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). The standard for the UCL[23] is the "reasonable consumer" test, which requires a plaintiff to show that members of the public are likely to be deceived by the business practice or advertising at issue. *See Williams*, 552 F.3d at 938; *see also Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal.App.4th 1351, 1360, 8 Cal.Rptr.3d 22 (2003) ("[U]nless [an] advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer.") (internal quotation marks and citation omitted).

Here, the Castelos adequately pled that Samsung has violated all three prongs of the UCL. First, Samsung's acts and practices constitute fraudulent practices in that they are likely to deceive a reasonable consumer. FAC ¶ 192. Specifically, Samsung knowingly concealed that the Ice Makers are designed and manufactured and will fail well before their anticipated useful life, and Samsung continues to fail to disclose the Defects at the point of sale or otherwise. *Id*. Indeed, Samsung knew of the defect for years and continued to market, advertise, and sell the defective refrigerators to the public. As alleged in the FAC, Defendant has known about the defect, not only by virtue of the Samsung TSBs, *id*. at ¶¶ 3-6, but also by virtue of numerous consumer complaints. *Id*. at ¶ 7. Yet, Samsung has taken no action to repair, replace, or recall the defective Ice Makers or the Class Refrigerators. *Id*. Had Samsung disclosed this information, Plaintiffs and the California Class Members would not have purchased the Class Refrigerators or would have paid significantly less for them. *Id*. at ¶ 192.

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[23] The UCL's coverage has been described as "sweeping," and its standard for wrongful business conduct is "intentionally broad." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 995 (9th Cir. 2006) (citing *Cel–Tech Commc'ns., Inc.*, 20 Cal.4th at 83).

These allegations are enough to satisfy the fraudulent prong of the UCL because, in order to state a cause of action under that prong, "a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question." *Schnall v. Hertz Corp.*, 78 Cal.App.4th 1144, 1167 (2000); *see also In re Tobacco II Cases*, 46 Cal.4th 298, 312 (Cal.2009) (the UCL fraudulent practice prong "has been understood to be distinct from common law fraud . . . 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief' under the UCL."); *In re Sony Grand Wega KDF–E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F.Supp.2d 1077, 1092 (S.D.Cal.2010) ("Unlike common law fraud, a party can show a violation of the UCL's 'fraudulent practices' prong without allegations of actual deception.").

Furthermore, the Castelos adequately pled that Samsung's acts and practices are unfair under the UCL. "Under the unfairness prong of the UCL, 'a practice may be deemed unfair even if not specifically proscribed by some other law.'" *In re Carrier IQ, Inc.*, 78 F. Supp. 3d 1051, 1115 (N.D. Cal. 2015) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (Cal. 2003)). The California Court of Appeal, in *Drum v. San Fernando Valley Bar Association*, 182 Cal. App. 4th 247 (2010), "articulated three possible tests defining 'unfair.'" *See In re Carrier IQ*, 78 F. Supp. 3d at 1115. Specifically, the "balancing test" "asks whether the alleged business practice is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.'" *Id.*

As alleged in the FAC, Samsung's acts and practices flunk the balancing test. Samsung's conduct constitutes an unfair business practice because the gravity of potential harm to Plaintiffs and the California Class Members as a result of Samsung's acts and practices far outweighs any legitimate utility of Samsung's conduct; Samsung's

conduct is immoral, unethical, oppressive, unscrupulous, or potentially injurious to Plaintiffs and the California Class; and Samsung's conduct undermines or violates stated policies underlying the UCL—to protect consumers against unfair and sharp business practices and to promote a basic level of honesty and reliability in the marketplace. FAC ¶ 193.

Plaintiffs have alleged immoral, unethical, oppressive, and unscrupulous conduct by Samsung, stating that Samsung knew of the Defects for years and continued to market, advertise, and sell the defective Class Refrigerators. Indeed, as alleged in the FAC, Defendant has known about the Defects, not only by virtue of the Samsung TSBs, *id*. at ¶¶ 3-6, but also by virtue of consumer complaints. *Id*. at ¶ 7. Yet, Samsung has taken no action to repair, replace, or recall the defective Ice Makers or the Class Refrigerators. *Id*. As a direct and proximate result of Samsung's conduct, Plaintiffs suffered injury-in-fact and lost money or property because they purchased or paid for refrigerators that, had they known of the Defects, they would not have purchased or, in the alternative, they only would have purchased for a lower amount. *Id*. at ¶ 194. At this stage of the proceedings, Plaintiffs' allegations that Defendant's conduct substantially "injured consumers by inducing them to buy products they would not otherwise have purchased is sufficient to meet the 'unfair' prong . . ." of the UCL. *Rael v. New York & Co., Inc.*, No. 16-CV-369-BAS(JMA), 2017 WL 3021019, at *5 (S.D. Cal. July 17, 2017); *see also Clark*, at *7 (holding plaintiff sufficiently alleged knowledge and reliance to bring CLRA and UCL claims).

Finally, Plaintiffs adequately allege that Samsung's conduct is unlawful under the UCL. The UCL's "unlawful" prong is essentially an incorporate-by-reference provision. *See Cel-Tech*, 20 Cal. 4th at 180 ("By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes independently actionable."). "Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair competition]

claim." *Plaxcencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (citing *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994)). "When a statutory claim fails, a derivative UCL claim also fails." *Aleksick v. 7-Eleven*, 205 Cal. App. 4th 1176, 1185 (2012). As described above, Plaintiff adequately alleges a violation of the CLRA, and therefore, Plaintiff also adequately alleges a violation of the UCL "unlawful" prong. *Rael*, at *4–5. In addition, the FAC pleads in detail that the acts and practices of Samsung are unlawful under the Song-Beverly Act. The UCL permits consumers to "borrow" violations of these other laws and treat them as unfair competition that is independently actionable. *In re iPhone Application Litigation*, 844 F. Supp. 2d 1040, 1072 (N.D. Cal. 2012). For these reasons, Samsung's conduct is unlawful under the UCL.

Accordingly, Plaintiffs UCL claim should survive, and Defendant's motion to dismiss Plaintiffs' UCL claim should be denied.

VI. PLAINTIFFS' FRAUDULENT CONCEALMENT IS PROPERLY PLED (COUNT V)

Plaintiffs have set forth factual allegations that satisfy the pleading standard for fraudulent concealment. To state a claim for fraudulent concealment, a plaintiff must allege: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) a reasonable reliance thereon by the other person; and (5) resulting damages." *Arcand v. Brother Int'l Corp.*, 673 F. Supp. 2d 282, 305 (D.N.J 2009). The "[d]eliberate suppression of a material fact that should be disclosed" is "equivalent to a material or affirmative misrepresentation, which will support a common law fraud action." *Id.*

This case is like *Kuzian*, discussed above. In that case, plaintiffs filed a class action complaint against defendant Electrolux claiming that the ice makers in their refrigerators, manufactured by Electrolux, were defective. *Kuzian*, 937 F. Supp. 2d at 604-05. Plaintiffs contended that even though Electrolux knew of the defect for years,

Electrolux continued to manufacture and sell refrigerators with the defect. *Id*. As such, plaintiffs alleged, *inter alia*, fraudulent concealment by the defendant. *Id*.

In its motion to dismiss, Electrolux argued that the plaintiffs did not meet the heightened pleading standard required for fraudulent concealment. *Id*. at 615. Electrolux contended that the plaintiffs' recitation of complaints posted by consumers on the Internet, and Electrolux's responses to those complaints, did not properly evidence Electrolux's knowledge of the alleged defects. Electrolux also argued that its advertising constituted "puffery," and not material misrepresentations. *Id*.

The court rejected Electrolux's arguments (which mirror the arguments of Samsung here), and held that plaintiffs had met their burden under Rule 9(b) by contending that (1) Electrolux represented that, at a minimum, their refrigerators contained operational ice makers, (2) Electrolux knew their ice makers would fail, (3) Electrolux intended for consumers to rely upon their representations regarding the capabilities of their ice makers, (4) plaintiffs relied upon those representations, and (5) have been damaged as a result. *Id*. As such, plaintiffs' allegations were adequate to proceed past the motion to dismiss stage. *Id*.

As stated above when addressing the facts pleaded to satisfy the pleading standard for the consumer protection counts, Plaintiffs have pleaded sufficient factual allegations that support a finding of fraudulent concealment. Here, Defendant (1) misrepresented the ice-making function of the refrigerator and omitted that there was a known Defect that caused the ice-making function to fail prematurely. FAC ¶ 66, 70, 90. Defendant also (2) knew the representations about the ice-making function were false, and knew about the Defects in the Ice Makers, leaving Plaintiffs with a Refrigerator that does not work as advertised. *Id*. at ¶¶ 7, 66, 67, 68, 72, 73, 118, 122. Defendant (3) made these representations with the intention of inducing the Plaintiffs to purchase the refrigerator. *Id*. at ¶¶ 84, 121. Plaintiffs (4) reasonably relied on the representation that the refrigerator they were purchasing would produce ice. *Id*. at ¶¶ 71, 84. Instead,

Plaintiffs (5) purchased refrigerators for thousands of dollars that failed prematurely, and left Plaintiffs with a product that does not function. Thus, like the plaintiffs in *Kuzian*, Plaintiffs here have pleaded all five (5) elements necessary for fraudulent concealment. *Kuzian* at 615.[24]

In addition, contrary to Defendant's protestations, both the Restatement and Courts of New Jersey provide that manufacturers are liable for failing to disclose known defects to consumers – "New Jersey has recognized 'the growing trend to impose a duty to disclose in many circumstances in which silence historically sufficed,' and has adopted the reasoning of the Second Restatement of the Law of Torts." . . . "The Restatement requires a party to disclose to another party 'facts basic to the transaction, if he knows that the other is about to enter into it under a mistake . . . and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.'" *Id*.; citing Restatement (Second) of Torts § 551(2) (1977). "New Jersey law imposes a duty of

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[24] Defendant cites *Oliver v. Funai Corp.*, No. 14-CV-04532, 2015 WL 3938633, at *2 (D.N.J. June 25, 2015) in support of its misguided arguments. First, *Oliver* is an unpublished decision. Further, the case is inapposite. The misrepresentations in that case were made by defendant in its user manual that was contained inside of the allegedly defective tv's packaging. The court held that plaintiffs failed to state they even reviewed the user manual at all. *Id*. at *8. As such, the court dismissed plaintiffs' fraudulent concealment claims on that basis. Here, as discussed fully above, all plaintiffs adequately allege that they read and relied Samsung's misrepresentations either shortly before purchasing their refrigerator or at the time of purchase.

Defendant cites yet another unpublished opinion, *Stevenson v. Mazda Motor of Am., Inc.*, No. 14-5250 FLW DEA, 2015 WL 3487756 (D.N.J. June 2, 2015). In that case, the court took issue with the fact that the plaintiff did not allege when he was exposed to allegedly false statements made by the defendant. Accordingly, the court held that plaintiff could not claim that he relied on such statements in purchasing his vehicle and therefore could not maintain a claim for fraud. Here, as discussed fully above, all plaintiffs adequately allege that they were exposed to Samsung's misrepresentations either shortly before purchasing their refrigerator or at the time of purchase. As such, the "not for publication" opinion of *Stevens* carries little weight here.

disclosure when necessary to make a previous statement true . . ." *Viking Yacht Co. v. Composites One LLC*, 496 F.Supp.2d 462, 472 (D.N.J. 2007) on reconsideration in part, CIV.A. 05-538 (CBI), 2007 WL 2746713 (D.N.J. Sept. 18, 2007) and *affd sub nom*. 385 F. App'x 195 (3d Cir. 2010). It is well settled that a manufacturer has a duty to inform consumers of any and all defects known to be present at the time the product is sold. *Monogram Credit Card Bank of Georgia v. Tennesen*, 390 N.J. Super. 123, 133, 914 A.2d 847, 853 (App. Div. 2007) (An omission or failure to disclose a material fact, if accompanied by knowledge and intent, is sufficient to violate the CFA). "Unconscionable commercial practices, including 'deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact' with the intent that others rely on the concealed fact, are unlawful." *Mango v. Pierce-Coombs*, 851 A.2d 62, 69 (App. Div. 2004); citing N.J.S.A. 56:8-2, *Skeer v. EMK Motors, Inc.*, 455 A.2d 508 (App. Div. 1982).

As set forth above, Defendant was made aware by countless complaints from consumers that the Ice Maker failed to produce ice within a short time after purchase. Defendant had an affirmative obligation to disclose the knowledge of this Defect to its customers, but failed to do so. FAC ¶¶ 84, 119. Had customers, including Plaintiffs, been made aware of the failure rate of the ice-making function, they would have been able to make a fully informed choice whether to buy one of the Class Refrigerators. Plaintiffs were deprived of full disclosure and, thus, were unable to make an informed decision. Accordingly, the Court should not dismiss Plaintiffs' fraudulent concealment claim.

VII. PLAINTIFFS' CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF IS PROPER (COUNT III)

Defendant seeks dismissal of Plaintiffs' declaratory and injunctive relief claim. As an initial matter, "[t]he motion to dismiss the count is premature, as it is best addressed upon a motion to certify the class after the completion of discovery." *Francis*

E. Parker Mem'l Home, Inc. v. Georgia-Pac. LLC, 945 F. Supp. 2d 543, 566 (D.N.J. 2013). Despite being premature, Defendant's arguments for dismissal fail for the following reasons.

A. Plaintiffs' Requests for Declaratory Relief Fall Within the Scope of the Declaratory Judgement Act

Defendant contends that the particular requests "for a declaration that 'these Class Refrigerators have a common defect(s) in their design/manufacture,' and that 'this common defect poses a serious risk to consumers and the public'" (Dfts. Memo at 55 (quoting FAC ¶¶104-05)) should be dismissed because such a declaration would not declare the "rights, duties, and status or other legal relations between the parties." *Nationwide Mut. Fire Ins. Co. v. Creation's Own Corp.*, No. 6:11-CV-1054-ORL-28, 2011 WL 6752561, at *6 (M.D. Fla. Nov. 16, 2011). The argument is vague and without merit.

This Court has "note[d] that it has wide discretion to provide declaratory relief…." *Francis E. Parker Mem'l Home, Inc.*, 945 F. Supp. 2d at 566. Moreover, a declaration of a product defect and the danger associated with that defect is commonly requested and provided under the Declaratory Judgment Act. *See e.g.*, *id.* (requesting *inter alia* "declaratory relief as to the Class…[that] the [product] has a defect which results in premature failure"); *Ajose v. Interline Brands*, Inc., 187 F. Supp. 3d 899, 909 (M.D. Tenn. 2016) ("In the context of products liability class action cases, injunctive relief classes under Rule 23(b)(2) typically seek a declaration that a product is defective so that relief can be easily pursued once the defect manifests itself or causes damages."); *In re Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 22 F. Supp. 3d 1322, 1331–32 (N.D. Ga. 2014). Because Plaintiffs' requests for declaration are typical of that requested and granted in products liability class action cases, it stands to reason that such a declaration does indeed declare the "rights, duties, and status or other legal relations between the parties." *Nationwide Mut. Fire Ins. Co.*, 2011 WL 6752561 at *6. Defendant's request to dismiss should be denied.

B. **Plaintiffs Adequately Allege Future Injury**

Defendant claims that dismissal of Plaintiffs' declaratory relief claim is warranted because Plaintiffs failed to allege any future injury, focusing solely on named Plaintiffs.

As discussed above, plaintiffs in products liability class actions typically seek a declaration that the product at issue is defective. *Ajose*, 187 F. Supp. 3d at 909. Such a declaration is sought "so that relief can be easily pursued once the defect manifests itself or causes damages" for class members *who have yet to be impacted by the defect*. *Id*. A declaration of defect means that "Rule 23(b)(3) class members are entitled to damages because the defect already manifested itself…, while Rule 23(b)(2) class members are guaranteed damages if the defect ever manifests and causes harm…." *Gonzalez v. Corning*, 317 F.R.D. 443, 526 (W.D.Pa. Mar. 31, 2016). Thus, "[t]he inclusion of an equitable relief class seeking declaratory relief accounts for the fact that not all individuals who own [the product at issue] have already experienced damage." *Ajose*, 187 F. Supp. 3d at 909. "Equitable relief is the most fitting remedy available to individuals who own but have not yet experienced damage due to the [product at issue]." *Id*.

Just like in most products liability class actions, here, Plaintiffs' claims are brought with putative class members in mind. *See e.g.*, FAC ¶¶ 9, 74. There are, undoubtedly, consumers who currently own a Class Refrigerator, but have yet to experience the Defects. There are also consumers who will purchase a Class Refrigerator and then experience the Defects. *See e.g.*, *id*. at ¶ 83 ("concealment is ongoing"), ¶ 84. These are all imminent future injuries which are appropriately pled and adequately address the types of injury required for declaratory relief. Moreover, even named Plaintiffs may experience additional future harm. *See* FAC ¶ 35 (Bianchis' replacement Ice Maker – same model as original – has same problems as the original, "which continue to this day"); ¶ 43 (Marino and Bishop's refrigerator problems

"continue to this day"); ¶ 71 ("the Class Refrigerators' Ice Makers will require repairs more than occasionally and on an ongoing basis within the reasonable expected lifetime for a refrigerator, or the Ice Makers are not repairable at all"); *see also* **Ex. A** (Mahoneys experiencing post-FAC repairs). Not only has declaratory relief been properly pled, it would provide a measure of justice and "promote judicial economy by facilitating the[] [putative class members'] damages claims, should they arise, rather than leaving them to wait for [the defect to occur] and then bring suit individually or petition to intervene in this action." *Id*. Plaintiffs' claim should be allowed to proceed.

C. Plaintiffs' Requested Declaratory Relief is Not Duplicative or Redundant

Defendant contends that declaratory relief is not an independent cause of action and therefore the relief requested is duplicative of that which is being sought under Plaintiffs' other claims. Dfts. Memo at 56. This is inaccurate.

As discussed above, "there will be potential class members whose [refrigerators] have not yet [manifested the defects described in the FAC]…these potential class members will not have ripe claims for breach of express and implied warranties" or the other claims named Plaintiffs bring. *In re Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 22 F. Supp. 3d at 1331. "[T]here is no redundancy" of claims "because these [putative] class members—at the time of litigation—will only qualify for declaratory relief." *Id*. "This is a permissible purpose for seeking declaratory relief." *Id*. Contrary to Defendant's contention, Plaintiffs' request for declaratory relief does not misconstrue the purpose of the Act, *see* Dfts. Memo at 55, but rather, seeks to fulfill its very purpose. *See In re Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 22 F. Supp. 3d at 1331-32; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950) (Act "allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked."); *Hardware Mut. Cas. Co. v. Schantz*, 178 F.2d 779, 780 (5th

Cir.1949) (Act's purpose "is to settle 'actual controversies' before they ripen into violations of law or a breach of some contractual duty").

D. **Plaintiffs' Request for Declaratory and Injunctive Relief Is Proper Whether or Not They Qualify as a Separate Cause of Action**

While declaratory and injunctive relief are not recognized as independent causes of action, it is undisputed that Plaintiffs may nevertheless seek such relief. "The [c]ourt is not required to dismiss [plaintiffs'] claim" simply because it is not a separate cause of action. *Sands v. Wynn Las Vegas, LLC*, No. 210-CV-00297-RLH-PAL, 2010 WL 2348633, at *2 (D. Nev. June 9, 2010). A court may, instead,

> exercise[] its discretion and den[y] [defendant's] motion to dismiss…even though injunctive relief is a remedy because [plainitff's] claims are still before the [c]ourt. [And] if [plaintiff] succeeds on these claims he may very well be entitled to the injunctive and declaratory relief he seeks. Given this fact, the [c]ourt sees no reason why it should dismiss [plaintiff's] claims for injunctive and declaratory relief only to have him re-file an amended complaint containing the same basic request for relief.

Id. at *2. In exercising discretion and denying a motion to dismiss on this ground, "the [c]ourt [] interpret[s] [plaintiff's] claim for injunctive and declaratory relief as a request for a remedy rather than a separate cause of action." *Id*.; *see also Nissan of Slidell, L.L.C. v. Nissan N. Am., Inc.*, No. 08–1206, 2008 WL 4809438, at *1 n. 1 (E.D.La. Nov. 3, 2008) ("An injunction is a form of relief and not a cause of action, and the Court interprets plaintiff's pleadings as requesting injunctive relief as an additional form of recovery under its other causes of action."). Denial on this basis elevates form over substance, a touchstone in the U.S. legal system. *See e.g. Lambley v. Kameny*, 682 N.E.2d 907, 910 (1997) ("The label attached to a pleading or motion is far less important than its substance.") (citing SMITH & ZOBEL, RULES PRACTICE Sec. 7.11 (1974); and 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE Sec. 1196 (2d ed. 1990)); *Honer v. Wisniewski*, 48 Mass.App.Ct. 291, 294 (1999) ("Courts may determine whether and under what section relief might be granted; the label attached to the motion is not dispositive."). Rather than submit to a "tyranny of labels," *South County*

Sand & Gravel Co. v. South Kingstown, 160 F.3d 834, 836 (1st Cir.1998), substance as opposed to a heading is determinative. *See Hennessey v.* Sarkis, 54 Mass.App.Ct. 152, 154-156 (2002). Thus, regardless of the title, Plaintiffs may pursue the declaratory and injunctive relief set forth in the FAC.

E. Plaintiffs Sufficiently Pled Facts to Support their Injunctive Relief Claim

Defendant misapplies the Supreme Court's language in *eBay Inc. v. MercExchnage, L.L.C.*, 547 U.S. 388 (2006) to argue what a plaintiff must plead in order to survive a motion to dismiss with regard to injunctive relief claims.

> According to *well-established principles of equity*, a plaintiff seeking a permanent injunction *must satisfy a four-factor test before a court may grant such relief*. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.

Id. at 391. *eBay does not* discuss pleading requirements, nor does it address dismissal of a claim for injunctive relief. In fact, Defendant provides no case law supporting its proposition that Plaintiffs' claim for injunctive relief should be dismissed for failure to plead facts associated with the four-factor test outlined in *eBay*. Nonetheless, Plaintiff did sufficiently allege facts to support its request for injunctive relief. *See e.g.*, FAC ¶¶ 67, 69, 80, 84, 101-108. Plaintiffs' claim for injunctive relief is properly pled.

CONCLUSION

For at least the above reasons, Plaintiffs respectfully request that the Court deny Defendant's motion to dismiss.

Dated: April 26, 2018

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 26, 2018, the foregoing was filed using the Court's CM/ECF system and will be served via the Court's CM/ECF filing system, on all attorneys of record.

/s/ Mitchell M. Breit

EXHIBIT A

SAMSUNG

Repair Invoice

NISI

Customer Info

Ticket #	4144387686	Customer Name	John Mahoney	Posting Date	8/17/2017
Home Phone	973-919-2302	Cell Phone		Work Phone	973-998-1954
Address	194 schoolhouse rd			Oak Ridge NJ	07438
E-mail	accessmechanical@gmail.com				

Model Info

Model #	RF23HSESBSR/AA	Serial #	06QE43BGA00023B N/A 0007	Purchase Date	
WRTY Status	Records indicate this unit is Out of Warranty.				
WRTY Exception				WRTY Term	Labor: 12/31/2016Part : 12/31/2016
Status	Confirmed	Schedule Date	Monday, August 21, 2017 Any	Technician	BFSC521 Seungwoo Lee
Symptom	Ice/Water/Sparkling	Ice/water dispensing		Ice type is not selected correctly:crushed, cubed	

Service Description: (Flat Service Fee Applied) ☐ In Warranty ☐ Out of Warranty ☐ Ext. Warranty(Capacitors, DLP)

Ice maker replaced

Trip and Diagnose $_____ Labor $_____ Part Price $_____ Tax $_____ Total $_____

Method: ☐ C/C Auth #_____ ☐ Check #_____ ☐ Cash _____

- The returned check fee is $25.00 per item. Your balance includes the total service fee and the returned check fee. The final payment must be in the form of cash, cashier's check, or money order.
- Your total service fee is due at the date of the service. No exceptions.
- Make the check payable to NISI
- Samsung and Service Center Bench Warranty is for 90 days ONLY on the same problem caused by same part. Non- Refundable.

Technician's Signature _____ Date 8/21/17

NISI-NJ, INC Samsung Authorized Service Center. 200 Gates Rd. Unit # L Little Ferry NJ 07643
Television Department 201-370-0213 Home Appliance Department 201-370-0213 Or call 1-800-Samsung