IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE: DOLLAR GENERAL CORP. MOTOR OIL MARKETING AND SALES PRACTICES LITIGATION	)	**MDL NO. 2709**
	)	**Master Case No. 16-02709-MD-W-GAF**
ALL ACTIONS	)	

ORDER

Presently before the Court is Defendants Dollar General Corporation; Dolgencorp, LLC; DG Retail LLC; and Dollar General's (collectively "Dollar General" or "Defendants") Motion to Dismiss the Consolidated Amended Class-Action Complaint ("CAC") (Doc. # 84). Also before the Court is Defendants' Motion to Strike Class Allegations. (Doc. # 86). Plaintiffs Robert Oren, Nicholas Meyer, Janine Harvey, Chuck Hill, John Foppe, William Flinn, Bradford Barfoot, Leonard Karpeichik, Bruce Gooel, Matthew Wait, Miriam Fruhling, Scott Sheehy, Robin Preas, Loretta Johnson, Kevin Gadson, Roberto Vega, Allen Brown, John J. McCormick III, Gerardo Solis, James Taschner, Jason Wood, Roger Barrows, Brandon Raab, Seit Alla, and Howard Hogan (collectively "Plaintiffs") oppose both Motions. (Doc. ## 88, 89).

DISCUSSION

I. BACKGROUND

Defendants operate discount variety stores across the United States. (CAC, ¶ 36). These Dollar General stores are focused on low and fixed-income consumers, and are primarily located in small markets. (*Id.*). In addition to offering name-brand merchandise, Defendants manufacture and market their own lines of inexpensive products. (*Id.* at ¶ 38). One such line of products is DG Auto, which consists of three types of motor oil: DG SAE 10W-30, DG SAE 10W-40, and DG SAE 30 (collectively "DG Motor Oils"). (*Id.* at ¶ 42). Motor oils have evolved

in parallel with the automobiles they are meant to protect such that motor oils designed to protect older engines do not protect and can harm modern engines. (*Id.* at ¶¶ 40-41). DG SAE 10W-30 and DG SAE 10W-40 are motor oils not suitable for engines built after 1988. (*Id.* at ¶ 58). DG SAE 30 is not suitable for engines built after 1930. (*Id.*).

DG Motor Oils are placed next to national mainstream brands of motor oil, such as PEAK, Pennzoil, and Castrol. (*Id.* at ¶ 45, 51). The national mainstream brands are meant to be used in modern engines. (*Id.* at ¶ 45). Additionally, DG Motor Oils use the same oil descriptions (i.e. 10W-30, 10W-40, SAE 30) as the national mainstream oil brands that are suitable for use in modern engines. (*Id.* at 46).

The front labels of DG SAE 10W-30 and DG SAE 10W-40 say, "Lubricates and protects your engine." (*Id.* at 55). The back labels of DG SAE 10W-30 and DG SAE 10W-40 warn "This oil . . . is not suitable for use in most gasoline powered automotive engines built after 1988 It may not provide adequate protection against the build-up of engine sludge." (*Id.* at ¶ 58). However, this warning is beneath text stating the oil "is an all-season, multi-viscosity, heavy duty detergent motor oil recommended for gasoline engines in older model cars and trucks. This oil provides oxidation stability, antiwear performance, and protection against deposits, rust and corrosion." (*Id.* at ¶ 61). The back label of DG SAE 30 states, "This oil . . . is not suitable for use in most gasoline powered automotive engines built after 1930. Use in modern engines may cause unsatisfactory engine performance or equipment harm." (*Id.* at ¶ 68). This warning is beneath text stating the oil "is a non-detergent motor oil designed for use in older engines where consumption may be high and economical lubricants are preferred." (*Id.*).

Plaintiffs bring this action as individuals and as representatives of two nationwide classes and twenty-two state-specific subclasses.[1] (*Id.* at ¶ 4). Plaintiffs seek relief for Defendants' alleged unjust enrichment, breach of implied warranties of merchantability and fitness for a particular purpose, and violations of various state statutes. (*Id.* at ¶ 6). Each sub-class, class representative, and claim is listed below. The Court will refer to the claims as follows, throughout the litigation:

1) **Nationwide Unjust Enrichment Class**
2) **Nationwide Implied Warranty Class**
3) **Arkansas (Wait Class – No. 4:16-cv-00517-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Ark. Code Ann. § 4-2-314 *et seq.*
    c. Implied Warranty of Fitness – Ark. Code Ann. § 4-2-315 *et seq.*
    d. Deceptive Trade Practices Act – Ark. Code Ann. § 4-88-101 *et seq.*
4) **California (Vega Class – No. 4:16-cv-00518-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Cal. Com. Code § 2314 *et seq.*
    c. Implied Warranty of Fitness – Cal. Com. Code § 2315 *et seq.*
    d. Unfair Competition – Cal. Bus. & Prof. Code § 17200 *et seq.*
    e. False Advertising – Cal. Bus. & Prof. Code § 17500 *et seq.*
    f. Consumer Legal Remedies Act – Cal. Civ. Code § 1750
    g. Song-Beverly Consumer Warranty Act – Cal. Civ. Code §§ 1791 and 1792
5) **Colorado (Brown Class – No. 4:16-cv-00519-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Colo. Rev. Stat. § 4-2-314 *et seq.*
    c. Implied Warranty of Fitness – Colo. Rev. Stat. § 4-2-315 *et seq.*
    d. Uniform Deceptive Trade Practice Act – Colo. Rev. Stat. § 6-1-105 *et seq.*
6) **Florida (Barfoot/Karpeichik Class – No. 4:16-cv-00520-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Fla. Stat. § 672.314 *et seq.*
    c. Implied Warranty of Fitness – Fla. Stat. § 672.315 *et seq.*

[1] The CAC lists only eighteen state-specific sub-classes from sixteen states. Since the motions presently before the Court were filed, four other state-specific sub-classes have joined the MDL. (Wait Class – No. 4:16-cv-00517-GAF (Arkansas); Hill Class – No. 4:16-cv-00534-GAF (Vermont); Horgan Class – No. 4:17-cv-00584-GAF (Vermont); and Alla Class – No. 4:17-cv-00413-GAF (Wisconsin)). The Court addresses Defendants' Motion to Dismiss and Motion to Strike as the arguments within generally apply to the subsequently-joined classes. However, the Court will permit additional motions to dismiss regarding the above-listed subsequently-joined classes, to the extent Defendants wish to brief arguments that specifically address those four classes and that are not expressly considered herein.

d. Deceptive and Unfair Trade Practices Act – Fla. Stat. § 501.201 *et seq.*
e. Misleading Advertising Law – Fla. Stat. § 817.41

7) Illinois (Solis Class – No. 4:16-cv-00521-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – 810 Ill. Comp. Stat. 5/2-314 *et seq.*
c. Implied Warranty of Fitness – 810 Ill. Comp. Stat. 5/2-315 *et seq.*
d. Consumer Fraud and Deceptive Business Practices Act – 815 Ill. Comp. Stat. 510/1 *et seq.*

8) Kansas (Meyer Class – No. 4:16-cv-00522-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Kan. Stat. Ann. § 84-2-314 *et seq.*
c. Implied Warranty of Fitness – Kan. Stat. Ann. § 84-2-315 *et seq.*
d. Consumer Protection Act – Kan. Stat. Ann. § 50.623 *et seq.*

9) Kentucky (Foppe Class – No. 4:16-cv-00523-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Ky. Rev. Stat. Ann. § 355.2-314 *et seq.*
c. Implied Warranty of Fitness – Ky. Rev. Stat. Ann. § 355.2-315 *et seq.*
d. Consumer Protection Act – Ky. Rev. Stat. Ann. § 367.220 *et seq.*

10) Maryland (McCormick Class – No. 4:16-cv-00524-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Md. Code Ann., Com. Law § 4-2-314 *et seq.*
c. Implied Warranty of Fitness – Md. Code Ann., Com. Law § 4-2-315 *et seq.*
d. Consumer Protection Act – Md. Code Ann., Com. Law § 13-101 *et seq.*

11) Michigan (Gooel Class – No. 4:16-cv-00525-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Mich. Comp. Laws § 440.2314 *et seq.*
c. Implied Warranty of Fitness – Mich. Comp. Laws § 440.2315 *et seq.*
d. Consumer Protection Act – Mich. Comp. Laws § 445.901 *et seq.*

12) Minnesota (Sheehy Class – No. 4:16-cv-00526-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Minn. Stat. § 336.2-314 *et seq.*
c. Implied Warranty of Fitness – Minn. Stat. § 336.2-315 *et seq.*
d. Uniform Deceptive Trade Practices Act – Minn. Stat. § 325D.43 *et seq.*
e. Prevention of Consumer Fraud Act – Minn. Stat. § 325F.68 *et seq.*

13) Missouri (Oren Class – No. 4:16-cv-00105-GAF) (Taschner Class – No. 4:16-cv-00606-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Mo. Rev. Stat. § 400.2.314 *et seq.*
c. Implied Warranty of Fitness – Mo. Rev. Stat. § 400.2.315 *et seq.*
d. Merchandising Practices Act – Mo. Rev. Stat. § 407.010 *et seq.*

14) **Nebraska (Harvey Class – No. 4:16-cv-00528-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Neb. Rev. Stat. U.C.C § 2-314 *et seq.*
    c. Implied Warranty of Fitness – Neb. Rev. Stat. U.C.C. § 2-315 *et seq.*
    d. Consumer Protection Act – Neb. Rev. Stat. § 59-1601 *et seq.*
    e. Uniform Deceptive Trade Practices Act – Neb. Rev. Stat. § 87-301 *et seq.*
15) **New Jersey (Flinn Class – No. 4:16-cv-00529-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – N.J. Stat. Ann. § 12a:2-314 *et seq.*
    c. Implied Warranty of Fitness – N.J. Stat. Ann. § 12a2-315 *et seq.*
    d. Consumer Fraud Act – N.J. Stat. Ann. § 56:8-1 *et seq.*
16) **New York (Gadson Class – No. 4:16-cv-00530-GAF) (Wood/Barrows Class – No. 4:16-cv-00607-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – N.Y. U.C.C. Law § 2-314 *et seq.*
    c. Implied Warranty of Fitness – N.Y. U.C.C. Law § 2-315 *et seq.*
    d. N.Y. Gen. Bus. Law § 349
    e. N.Y. Gen. Bus. Law § 350
17) **North Carolina (Raab Class – No. 4:16-cv-00868-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – N.C. Gen. Stat. § 25-2-314 *et seq.*
    c. Implied Warranty of Fitness – N.C. Gen. Stat. § 25-2-315 *et seq.*
    d. Consumer Protection Act – N.C. Gen. Stat. § 75-1.1 *et seq.*
18) **Ohio (Fruhling Class – No. 4:16-cv-00531-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Ohio Rev. Code § 1302.27 *et seq.*
    c. Implied Warranty of Fitness – Ohio Rev. Code § 1302.28 *et seq.*
    d. Consumer Sales Practices Act – Ohio Rev. Code § 1345.01 *et seq.*
19) **Texas (Preas/Johnson Class – No. 4:16-cv-00533-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Tex. Bus. & Com. Code Ann. § 2.314 *et seq.*
    c. Implied Warranty of Fitness – Tex. Bus. & Com. Code Ann. § 2.315 *et seq.*
    d. Deceptive Trade Practices Consumer Protection Act – Tex. Bus. & Com. Code § 17.41 *et seq.*
20) **Vermont (Hill Class – No. 4:16-cv-00534-GAF) (Horgan Class – No. 4:17-cv-00584-GAF)**
    a. Unjust Enrichment
    b. Implied Warranty of Merchantability – Vt. Stat. Ann. tit. 9A § 2-314 *et seq.*
    c. Implied Warranty of Fitness – Vt. Stat. Ann. tit. 9A § 2-315 *et seq.*
    d. Consumer Fraud Act – Vt. Stat. Ann. § 2451 *et seq.*

21) Wisconsin (Alla Class – No. 4:17-cv-00413-GAF)

a. Unjust Enrichment
b. Implied Warranty of Merchantability – Wis. Stat. § 402.314 *et seq.*
c. Implied Warranty of Fitness – Wis. Stat. § 402.315 *et seq.*
d. Deceptive Trade Practices Act – Wis. Stat. § 100.18 *et seq.*
e. Unfair Methods of Competition and Trade Practices – Wis. Stat. § 100.20 *et seq.*

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint that fails to state a claim upon which relief may be granted. When considering a Rule 12(b)(6) motion to dismiss, a court treats all well-pleaded facts as true and grants the non-moving party all reasonable inferences from those facts. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted). A Rule 12(b)(6) motion should be granted only if the non-moving party fails to plead facts sufficient to state a claim "that is plausible on its face" and would entitle the party to the relief requested. Twombly, 550 U.S. at 570. Federal district courts sitting in diversity apply federal pleading standards under Federal Rules 8 and 12(b)(6) to determine whether a party has sufficiently stated a claim under state substantive law. Karnatcheva v. JPMorgan Chase Bank, N.A., 704 F.3d 545, 548 (8th Cir. 2013).

B. Federal Rule of Civil Procedure 12(f)

Under Rule 12(f), the Court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Courts have acknowledged that Rule

12(f) may justify striking class allegations that facially fail to meet the requirements to certify a class under Rule 23. See Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 740 (S.D. Iowa 2007); Knowles v. Standard Fire Ins. Co., No. 4:11-CV-04044, 2013 WL 6497097, at *3-4 (W.D. Ark. Dec. 11, 2013). However, the Eighth Circuit has held that striking allegations is an "extreme measure" and is necessarily infrequently granted. Stanbury Law Firm v. Internal Revenue Serv., 221 F.3d 1059, 1063 (8th Cir. 2000).

III. ANALYSIS

Plaintiffs' claims can broadly be categorized into those brought on behalf of nationwide classes and those brought on behalf of state-specific sub-classes. Plaintiffs advance two nationwide classes: 1) nationwide unjust enrichment; and 2) nationwide breach of the implied warranty of merchantability under Tenn. Code Ann. § 47-2-314. The state-specific sub-classes can be categorized in the following groups: 1) unjust enrichment claims pursuant to each state's common law; 2) breach of implied warranties claims under each state's Uniform Commercial Code ("UCC"); and 3) statutory consumer protection actions brought under the laws of each state. Defendants move to dismiss or alternatively strike both the nationwide and state sub-classes on several grounds. The Court will address each of those grounds in turn.

As a preliminary matter, it is worth noting that several of Defendants' arguments are premature. It is true, that "sometimes [class certification] issues are plain enough from the pleadings" and can be ruled on prior to the class certification stage of the litigation. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982). Indeed, for the sake of judicial economy, the Court's initial Scheduling Order granted Defendants' leave to file a motion to strike allegations from the CAC. (*See* Doc. # 23, ¶ 2). However, at this time and in accordance with the demands of Rule 12, the Court focuses mainly on the plausibility of Plaintiff's claims. *See Iqbal*, 556 U.S. at 678.

Further, "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities . . ." *Gelboim v. Bank of Am. Corp.*, -- U.S. --, 135 S. Ct. 897, 904 (2015). However, when parties elect to file a "master complaint . . . which supersede[s] prior individual pleadings. . . . the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings." *Id.* at 905 n.3 (quoting *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590-92 (6th Cir. 2013)). In this circumstance, the Court instructed that "[t]he consolidated amended complaint supersedes and replaces all previously-filed class action allegations from the individual complaints." (Doc. # 23, ¶ 2). Therefore the Court only assesses the merits of the pending motions based on documents addressing the CAC.

A. Nationwide Unjust Enrichment Class

In the first claim for relief, Plaintiffs assert that they conferred substantial benefits on the Defendants, those benefits were obtained through use of deceptive and misleading conduct, and Defendants were unjustly enriched as a result of Defendants' actions. (CAC ¶¶ 120-134). However, Plaintiffs fail to identify any source of law that would serve as a basis for a national unjust enrichment class. (*See id.*). As a threshold matter, "there is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "The instances where [the Supreme Court has] created federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). "[A]bsent some congressional authorization . . . federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicted rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc., v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641 (1981). Plaintiffs fail to identify a plausible source of federal substantive law from

which an unjust enrichment claim would arise, nor does the equitable claim of unjust enrichment concern one of the aforementioned categories in which federal common law exists. (*See* CAC, ¶¶ 120-134; Doc. ## 88, 89); *Texas Indus, Inc.*, 451 U.S. at 641. Therefore, to the extent Plaintiffs advance a claim of unjust enrichment based on federal common law, the Court dismisses the cause of action for failure to state a claim upon which relief can be granted.

Instead, Plaintiffs' Oppositions to both Defendants' Motion to Dismiss and Motion to Strike indicate that Plaintiffs believe the laws of unjust enrichment in the many home states of the various plaintiffs are substantially similar so as to allow a nationwide class to proceed, despite any variance between those states' substantive laws. (*See* Doc. # 88, p. 26; Doc. # 89, p. 70 n.62). However, "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). Furthermore, courts adjudicating a lawsuit involving a nationwide class of plaintiffs "must apply an individualized choice of law analysis to *each plaintiff's claim*[] . . ." *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 627 (3rd Cir. 1996) (emphasis added) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985)).

Defendants cite a broad selection of decisions where courts have refused to allow multi-state or nationwide classes to advance, primarily on the basis of conflicts in substantive state laws. (*See, e.g.*, Doc. 92, pp. 10-12). However, among the cases cited by Defendants, the majority of the courts reached their conclusions at the class certification stage. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 611-12 (1997) (affirming Third Circuit's reversal of district court's certification in a class action); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 585 (9th Cir. 2012) (vacating district court's order certifying class); *Hopkins v. Kan. Teacher Cmty. Credit Union*, 265 F.R.D. 483, 489 (W.D. Mo. 2010) (denying certification of common law

conversion class at certification stage); *but see In re Sears, Roebuck & Co. Tools Mktg. and Sales Prac. Litig.*, Nos. 05 C 4742, 05 C 2623, 2006 WL 3754823, at *1 (N.D. Ill. December, 18, 2006) (dismissing unjust enrichment class action claims before certification stage).

Instead, Plaintiffs propose that the Court should delay ruling on whether the proposed class should be stricken or certified until Plaintiffs are allowed to fully brief a case-management strategy and provide an analysis of varying state laws. (Doc. # 88, p. 26). As discussed above, such a course follows the majority of guidance from the various circuit courts of appeal, which caution that plaintiffs seeking to certify a nationwide class "must credibly demonstrate, through an '*extensive analysis*' of state law variances, 'that class certification does not present insuperable obstacles.'" *Powers v. Lycoming Engines*, 328 F. App'x 121, 124 (3rd Cir. 2009) (emphasis added) (quoting *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3rd Cir. 1986)); *see also In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) (reversing nationwide class certification due to district court's underdeveloped conflicts of law analysis). District courts that opt to circumvent a thorough conflict of laws analysis are often reversed, despite the district court's often contrary intent of issuing certification in the name of pursuing an efficient outcome. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1019-21 (7th Cir. 2002) (reversing class certification).

In light of the relevant authority discussed above, the Court dismisses any claims brought by Plaintiffs based on federal common law, but otherwise denies Defendants' motion to dismiss and motion to strike the nationwide unjust enrichment class, with the understanding that, at the class certification stage, Plaintiffs must demonstrate how such a class can both plausibly be managed, as well as conform with the commands of Rule 23. Further, Plaintiffs must provide a cogent analysis of which source or sources of law govern their claims. At this point in the

litigation, however, Plaintiffs have sufficiently pled a plausible claim of unjust enrichment on behalf of a nationwide class.

B. Nationwide Breach of Implied Warranty of Merchantability Class

Plaintiffs next bring another claim on behalf of a nationwide class; unlike the previous claim, Plaintiffs identify a single state's substantive law as controlling authority. Plaintiffs claim Defendants breached the implied warrant of merchantability codified at Tennessee Code. § 47-2-314. (CAC, ¶¶ 135-151). Plaintiffs allege that Defendants sold self-branded motor oil to Plaintiffs, and implicitly warranted the motor oil was merchantable. (*Id.* at ¶ 139). Further, Plaintiffs argue the motor oil was not merchantable under Tennessee law, as the oil is not suitable for the vehicles driven by the vast majority of Defendants' customers. (*Id.* at ¶ 141). Plaintiffs pray for damages both stemming from the diminished value of the goods they received, as well as damages relating to the oil's effects on Plaintiffs' vehicles. (*Id.* at ¶ 143). Defendants respond with the arguments that (1) none of the transactions took place in Tennessee and therefore Tennessee's UCC cannot apply; and (2) the material differences between the transferor forum state substantive laws requires a choice of law analysis, and all relevant forms of such analysis would result in the Court applying the transferor forums' substantive law instead of Tennessee's. (Doc. # 85, pp. 46-51).

Here, Plaintiffs argue that a choice of law analysis is unnecessary, as they point out that every state has adopted the UCC and insist there is no material variance in the states' substantive laws. (Doc. # 89, pp. 57-63). Simply put, the Court does not accept such a blanket and unprobed assertion. *See Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) ("[Appellees] say no variations in state warranty laws relevant to this case exist. A court cannot accept such an assertion 'on faith.'"); *see also Cole v. Gen. Motors Corp.*, 484 F.3d 717, 726-730 (5th Cir. 2007)

(discussing state-by-state UCC variations in requirements for reliance, notice, contractual privity, damages, whether merchantability is presumed, and the types of products subject to warranty protections). Plaintiffs must explain how variations in these state laws do not conflict with the relevant requirements to litigate on behalf of a nationwide class.

However, again, Plaintiffs point out that a ruling to dismiss or strike this cause of action from the complaint is premature in the current procedural posture. (Doc. # 89, p. 57-61). Additionally, Plaintiffs insist the Court's current analysis must focus on the plausibility of the cause of action under Tennessee's UCC. (*Id.* at 63-65). "In Tennessee, '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." *AutoZone, Inc. v. Glidden Co.*, 737 F. Supp. 2d 936, 948-49 (W.D. Tenn. 2010) (quoting Tenn. Code Ann. § 47-2-314(1)). "A merchant includes a person who deals in goods of the kind . . . involved in the transaction. . . . [and] [g]oods are only merchantable when, among other things, they are fit for the ordinary purposes for which such goods are used." (*Id.*) (internal quotations omitted) (first ellipsis in original). Taking the factual allegations and all reasonable inferences Plaintiffs' favor, Plaintiff has stated a plausible claim for breach of the implied warranty of merchantability under Tennessee law. (*See* CAC ¶¶ 135-151). At this time, and as the Court ruled regarding the nationwide unjust enrichment class, the Court denies Defendants' requests to dismiss or strike the cause of action based on choice of law issues. However, as before, Plaintiffs will be tasked with providing a clear analysis of why Tennessee law controls the adjudication of claims for a nationwide class of persons at the class certification stage.

C. Unjust Enrichment State Sub-Classes

Defendants next advance several reasons the unjust enrichment claims in the various state sub-classes cannot proceed. Defendants' arguments fall into three general categories: (a) certain states do not recognize unjust enrichment as a cause of action; (2) several states to not allow plaintiffs to advance an unjust enrichment claim when the underlying transaction is governed by an express contract; and (3) several states do not allow an unjust enrichment claim to proceed when there is an alternative adequate remedy at law.

1. States Recognizing the Cause of Action

Defendants argue that four of the states in which sub-classes have been advanced — California, Illinois, New Jersey, and Texas — do not recognize unjust enrichment as a cause of action. (Doc. # 85, p. 43).

a. California

In California, "there is not a standalone cause of action for 'unjust enrichment,' which is synonymous with 'restitution.'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (quoting *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 699 (Cal. Ct. App. 2010); *Jogani v. Superior Court*, 81 Cal. Rptr. 3d 503, 511 (Cal. Ct. App. 2008)). "Rather, [unjust enrichment and restitution] describe the theory underlying a claim that a defendant has been unjustly conferred a benefit through mistake, fraud, coercion, or request." *Astiana*, 783 F.3d at 762 (quotation omitted). "When 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*, 166 Cal. Rptr. 3d 864, 872 (Cal. Ct. App. 2014). The Court follows the holding in *Astiana*, and finds that Plaintiffs have sufficiently stated a quasi-contractual claim for restitution under California law.

b. Illinois

The Seventh Circuit recently opined on whether Illinois recognizes unjust enrichment as an independent cause of action. *See Cleary v. Philip Morris, Inc.*, 656 F.3d 511, 516-520 (7th Cir. 2011). Noting the discrepancy between recent rulings from the Illinois Supreme Court[2] and the Illinois Appellate Court,[3] the Seventh Circuit synthesized the rulings and stated the following:

> [u]njust enrichment [in Illinois] is a common-law theory of recovery or restitution that arises when the defendant is retaining a benefit to the plaintiff's detriment, and this retention is unjust. What makes the retention of the benefit unjust is often due to some improper conduct by the defendant. And usually this improper conduct will form the basis of another claim against the defendant in tort, contract, or statute. So, if an unjust enrichment claim rests on the same improper conduct alleged in another claim, then the unjust enrichment claim will be tied to this related claim—and, of course, unjust enrichment will stand or fall with the related claim.

Cleary, 656 F.3d at 517 (citing *Ass'n Benefit Serv. v. Caremark Rx, Inc.*, 493 F.3d 841, 855 (7th Cir. 2007)). As Plaintiffs also advance related causes of action, such as the consumer protection claims, and the unjust enrichment claim shares the same underlying facts as those related claims, Plaintiffs have sufficiently stated a cause of action. However, going forward, the Court notes that Plaintiffs' claims for unjust enrichment in the state of Illinois are predicated on the viability of the other related claims.

c. New Jersey

New Jersey recognizes "[t]he doctrine of unjust enrichment [as an] equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Virzi v. Air Cargo Global Corp.*, No. C-0072-12, 2014 WL 2533807, at *2 (June 6, 2014) (quotation

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[2] *Raintree Homes, Inc. v. Vill. of Long Grove*, 807 N.E. 2d 439 (Ill. 2004); *HPI Health Care Serv. v. Mount Vernon Hosp., Inc.*, 545 N.E.2d 672 (Ill. 1989); *Indep. Voters v. Ill. Commerce Comm'n*, 51 N.E.2d 850 (Ill. 1987).

[3] *Martis v. Grinnell Mut. Reinsurance Co.*, 905 N.E.2d 920 (Ill. Ct. App. 2009).

omitted) (second alteration added). However, the state does not recognize a standalone claim for unjust enrichment when the claim is based in tort. *McGuire v. BMW of N. Am., LLC*, No. 13-7356, 2014 WL 2566132, at *3 (D.N.J. June 6, 2014). In New Jersey, unjust enrichment, is generally "the basis for a claim of quasi-contractual liability," and sometimes "a claim of unjust enrichment may arise outside the usual quasi-contractual setting." *Goldsmith v. Camden Cty. Surrogate's Office*, 975 A.2d 459, 463 (N.J. Super Ct. App. Div. 2009) (citations omitted); *Maniscalco v. Brother Intern. Corp. (USA)*, 627 F. Supp. 2d 494, 505 (D.N.J. 2004) (stating "[a]n unjust enrichment claim may be sustained independently as an alternative theory of recovery"). "To establish unjust enrichment as a basis for quasi-contractual liability, 'a plaintiff must show both that defendant received a benefit and that retention of the benefit would be unjust.'" *Castro v. NYT Television*, 851 A.2d 88, 98 (N.J. Super. Ct. App. Div. 2004) (quoting *VRG Corp. v. GKN Realty Corp.*, 641 A.2d 519, 526 (N.J. 1994). However, "[s]uch liability will be imposed only if plaintiff expected remuneration from the defendant, or if the true facts were known to plaintiff, he would have expected remuneration from the defendant, at the time the benefit was conferred." *Id.* (quotation omitted). Plaintiffs' pleadings advance the requisite elements to state a claim for unjust enrichment under New Jersey law.

d. Texas

In Texas, "the elements are clear. . . . [u]just enrichment is an implied-contract basis for requiring restitution when it would be unjust to retain benefits received." *Perales v. Bank of Am., N.A.*, No. H-14-1791, 2014 WL 3907793, at *3 (S.D. Tex. Aug. 11, 2014). Plaintiffs have sufficiently stated a claim for unjust enrichment under Texas law.

2. Preclusion by Existence of a Contract and Adequate Remedies at Law

Defendants argue that twelve states in which a sub-class has been advanced — Florida, Illinois, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, and Texas — preclude unjust enrichment claims when the subject-transaction is governed by an underlying express contract. (Doc. # 85, p. 43-44). Defendants also contend that equitable causes of action are precluded when plaintiffs have an adequate remedy at law in those same twelve states. (*Id.* at 44-45). The two arguments are related, as the remedy for a breach of contract necessarily involves an adequate remedy at law. However, for the sake of thoroughness, the Court analyzes the two arguments separately.

a. Existence of a Contract

As a preliminary matter, an express contract is generally and simply defined as "[a] contract whose terms the parties have explicitly set out." Black's Law Dictionary (10th ed. 2014). Throughout the complaint, Plaintiffs allege Defendants concealed material facts relating to their motor oil, and deceived customers into purchasing the product. (*See, e.g.*, CAC, ¶¶ 49; 52). The Court therefore infers that Plaintiffs are arguing their purchases were not governed by express contracts. (*See also* Doc. # 89, pp. 71-72). Such allegations must be taken as true at this preliminary stage, and this alone is cause to deny Defendants' motion to dismiss. *See Twombly*, 550 U.S. at 555-56.

Even if the parties' interaction was governed by an express contract, the contents of which must be eventually proved, the Court denies dismissing the claims on related grounds. First, decisions from several of these states acknowledge that granting a motion to dismiss on Defendants' theory is premature, and instead allow plaintiffs to plead alternative theories until later stages of the litigation prove or disprove the relevant underlying facts. *See, e.g.*, *Samana*

Inc. v. Lucena, 156 F. Supp. 3d 1373, 1374 (S.D. Fla. 2016) (stating, in Florida, "until an express contract is proven, a motion to dismiss a claim for unjust enrichment on these grounds is premature" (alteration omitted)); *Prudential Ins. Co. of Am. v. Clark Consulting, Inc.*, 548 F. Supp. 2d 619, 623-24 (N.D. Ill. 2008) (Illinois); *Keywell & Rosenfeld v. Bithell*, 657 N.W.2d 759, 776 (Mich. Ct. App. 2002) (Michigan); *Vielbig v. USA Janitorial, Inc.*, No. C8-00-1255, 2001 WL 50890, at *3 (Minn. Ct. App. 2001) (Minnesota); *Howard v. Turnbull*, 258 S.W.3d 73, 76 (Mo. Ct. App. 2008) (Missouri); *Prof'l Recruiters, Inc. v. Oliver*, 456 N.W.2d 103, 107 (Neb. 1990) (Nebraska); *Caputo v. Nice-Pak Prod., Inc.*, 693 A.2d 494, 504-05 (N.J. Super. Ct. App. Div. 1997) (New Jersey); *FMW/MJH at 2604 Hillsborough LLC v. WSA Constr., LLC*, No. 3:13-CV-703-GCM, 2014 WL 6476187, at *2 (W.D.N.C. Nov. 19, 2014) (North Carolina); *Teknol, Inc. v. Buechel*, No. C-3-98-416, 1999 WL 33117391, at *3 (S.D. Ohio Aug. 9, 1999) (Ohio); *Meadow v. Nibco, Inc.* NO. 3-15-1124, 2016 WL 2986350, at *7 (M.D. Tenn. May 25, 2016) (Tennessee).

New York and Texas generally provide that a party can only plead simultaneous legal and equitable claims arising from a contractual or quasi-contractual circumstance when the party disputes the existence or validity of the contract purportedly governing the dispute. *Agerbrink v. Model Service LLC*, 155 F. Supp. 3d 448, 459 (S.D.N.Y. 2016) (New York); *Johnson v. Wells Fargo Bank, NA*, 999 F. Supp. 2d 919, 929-30 (N.D. Tex. 2014) (Texas). Plaintiffs sufficiently do so here.

Maryland recognizes relevant exceptions that allow a claim for unjust enrichment to proceed despite the existence of an express contract. *See Janusz v. Gilliam*, 947 A.2d 560, 567-68 (Md. 2008) ("we have recognized exceptions when there is evidence of fraud or bad faith, there has been a breach of contract or a mutual rescission of the contract, when rescission is

warranted, or when the express contract does not fully address a subject matter" (quotation omitted)). Accordingly, Plaintiffs' claim is not barred in Maryland.

Finally, while the above-cited courts have allowed alternative pleadings to survive a motion to dismiss, all of the same courts recognize that their respective precedents forbid awarding damages to parties that advance claims arising simultaneously out of equity and contract. That being said, Plaintiffs are not required to elect which theory they will proceed under at this time and therefore the Court does not dismiss any unjust enrichment claims for preclusion by express contract.[4]

b. Existence of an Adequate Remedy at Law

Defendants argue that the same twelve states preclude unjust enrichment claims because the states provide an alternative adequate remedy at law. (Doc. # 85, p. 44-45). However, some of these states provide otherwise. *See Williams v. Bear Stearns & Co.*, 725 So.2d 397, 400 (Fla. Dist. Ct. App. 1998) (the notion that adequate legal remedies preclude equitable relief does not apply to unjust enrichment claims) (Florida); *Scott v. GlaxoSmithKline Consumer Heathcare, L.P.*, No. 05 C 3004, 2006 WL 952032, at *4 (N.D. Ill. April 12, 2006) (noting unjust enrichment can be an action at law) (Illinois); *Stanley v. Cent. Garden & Pet Corp.*, 891 F. Supp. 2d 757, 766 (D. Md. 2012) (stating "the Maryland Court of Appeals, however, has recognized that unjust enrichment claims seeking money damages may be treated as claims at law") (Maryland); *Prudential Ins. Co. v. Eslick*, 586 F. Supp. 763, 768 (S.D. Ohio 1984) (quotation omitted) (denying summary judgment motion when unjust enrichment claim was broader than other legal

[4] Defendants additionally appear to argue that when unjust enrichment and fraud claims share a common fact pattern, the success of one is contingent upon the success of the other. (*See* Doc. # 85, p. 46). The argument is wholly laid out in one paragraph and two footnotes, and cites cases from six of the relevant jurisdictions. (*See id.*). However, the Court finds that the analysis of alternative pleadings contained in this section adequately address Defendants' legal arguments.

claims) (Ohio); *Carter v. Jackson-Madison Cnty. Hosp. Dist.*, No. 1:10-CV-01155-JDB-egb, 2011 WL 1256625, at *8-9 (W.D. Tenn. Mar. 31, 2011) (Tennessee); *Norhill Energy LLC v. McDaniel*, 517 S.W.3d 910, 919 (Tex. App. 2017) (Texas) (stating bar on equitable claims due to availability of alternative legal remedies is not an absolute rule).

Other courts applying relevant state laws have simply allowed alternative pleadings under Federal Rule 8, or recognize that a defense asserting preclusion based on other adequate remedies at law is not properly taken up ruling on a motion to dismiss. *See Power Process Eng'g Co., Inc. v. ValvTechnologies, Inc.*, No. 16-CV-11524, 2016 WL 7100504, at *4 (E.D. Mich. Dec. 6, 2016) (Michigan) (contemplating alternative pleadings are acceptable if Plaintiffs challenge the validity of a contract); *Roth v. Life Time Fitness, Inc.*, No. 16—2467 (JRT/HB), 2017 WL 1628877 (D. Minn. May 1, 2016) (Minnesota) (caselaw does not state that a plaintiff must establish the lack of an adequate remedy at law at the pleading stage."); *Thornton v. Pinnacle Foods Grp. LLC*, No. 4:16-CV-00158 JAR, 2016 WL 4073713, at *4 (E.D. Mo. Aug. 1, 2016) (Missouri) (allowing alternate pleadings); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 544 (D.N.J. 2004) (New Jersey) (allowing alternative pleadings); *Embree Const. Grp., Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 919-23 (N.C. 1992) (North Carolina) (holding plaintiffs sufficiently stated a claim for unjust enrichment despite the availability of other potential remedies at law).

In Nebraska, "'[w]here a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and the statutory remedy must be exhausted before equity may be resorted to.'" *Sw. Trinity Constructors, Inc. v. St. Paul Fire & Marine Ins. Co.*, 497 N.W.2d 366, 368 (Neb. 1993) (citing *Koperski v. Husker Dodge, Inc.*, 302 N.W.2d 655, 660 (Neb. 1981)). "An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Vaccaro v.*

City of Omaha, 579 N.W.2d 535, 539 (Neb. 1998). Defendants make no specific argument regarding these factors. Further, the Court notes inconsistent precedent from the jurisdiction on whether state courts entertain alternative pleadings. *See I.P. Homeowners, Inc. v. Morrow*, 668 N.W.2d 515, 524 (Neb. Ct. App. 2003) (stating "we understand the rule to be that a plaintiff cannot plead alternative theories of recover, one in equity and one in law"); *but see Hornig v. Martel Lift Sys., Inc.*, 606 N.W.2d 764, 771 (Neb. 2000) (explaining that "[w]hether a case is one of equitable cognizance depends upon the peculiar facts *disclosed by the record*") (emphasis added). In any case, whether Plaintiffs' claim for unjust enrichment will survive a 12(b)(6) motion is analyzed under federal pleading standards, which permit alternative pleadings. Fed. R. Civ. P. 8(a)(3).

New York law provides that a claim for unjust enrichment "is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1185 (N.Y. 2012). "[A]n unjust enrichment claim 'is not available where it simply duplicates, or replaces, a conventional contract or *tort* claim.'" *Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 296-97 (S.D.N.Y. 2015) (emphasis in original) (citing *Corsello*, 967 N.E.2d at 1186)). However, unjust enrichment has been found to not be precluded by other adequate remedies at law in cases involving fraud. *Pramer S.C.A. v. Abaplus Intern. Corp.*, 907 N.Y.S.2d 154, 161-62 (N.Y. App. Div. 2010). Taking into consideration Plaintiffs' allegations, the circumstances from which those allegations arose, and the commands of Rule 8(a)(3), Plaintiffs' claim for unjust enrichment in New York is not dismissed for preclusion by an alternative adequate remedy at law.

D. Breach of Implied Warranty State Sub-Classes

Plaintiffs also advance claims for the breach of the implied warranty of merchantability on behalf of each state sub-class. (CAC ¶¶ 152-169). Plaintiffs incorporate by reference the same allegations contained in the claim that advanced a nationwide breach of the implied warranty of merchantability class, above. Defendants argue the claims should be dismissed or struck for several reasons, including (a) insufficient pleading; (b) failure to inspect the motor oil prior to purchase; and (c) preclusion by express warranties.

1. Sufficiency of Pleadings

Defendants argue that the majority of the Plaintiffs did not plead sufficient facts to plausibly demonstrate that Dollar General breached the implied warranty of merchantability. (Doc. # 85, pp. 55-59).

The implied warranty is found in § 2-314 of the UCC[5] and provides the following:

> (1) Unless excluded or modified (Section 2-316), 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 . . . .
>
> (2) Goods to be merchantable must be least such as
>
> (a) pass without objection in the trade under the contract description; and

[5] Each state in which Plaintiff advances a sub-class has adopted the implied warranty of merchantability, found at U.C.C. § 2-314. The specific codifications are found at the following locations: Ark. Code Ann. § 4-2-314 (Arkansas); Cal. Com. Code § 2314 (California); Colo. Rev. Stat. § 4-2-314 (Colorado); Fla. Stat. § 672.314 (Florida); 810 Ill. Comp. Stat. § 5/2-314 (Illinois); Kan. Stat. Ann. § 84-2-314 (Kansas); Ky. Rev. Stat. Ann. § 355.2-314 (Kentucky); Md. Code Ann., Com. Law § 2-314 (Maryland); Mich. Comp. Laws § 440.2314 (Michigan); Minn. Stat. § 336.2-314 (Minnesota); Mo. Rev. Stat. § 400.2-314 (Missouri); Neb. Rev. Stat. U.C.C. § 2-314 (Nebraska); N.J. Stat. Ann. § 12A:2-314 (New Jersey); N.Y. U.C.C. Law § 2-314 (New York); N.C. Gen. Stat. § 25-2-314 (North Carolina); O.R.C. § 1302.27 (Ohio); Tex. Bus. & Com. Code Ann. § 2.314 (Texas); 9A Vt. Stat. Ann. § 2-314 (Vermont); Wis. Stat. § 402.314 (Wisconsin).

> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.

Defendants argue that Plaintiffs failed to assert the necessary allegations to establish breach, their valid use of the motor oil, and pre-suit notice. (Doc. # 85, pp. 55-59). All arguments relate to the sufficiency of the pleadings.

Although the current actions' forum states have largely codified identical forms of the implied warranty of merchantability,[6] the elements to maintain a cause of action under the warranty vary across those same jurisdictions. *See, e.g.*, *Polk v. KV Pharm. Co.*, No. 4:09-CV-0058 SNLJ, 2011 WL 6257466, at *7 (E.D. Mo. Dec. 15, 2011) (discussing differing elements in Texas and Missouri). Most states involved in this action require parties seeking relief for a defendant's breach of the implied warranty of merchantability to establish three elements. *See, e.g.*, *Driscoll v. Standard Hardware, Inc.*, 785 N.W.2d 805, 816 (Minn. Ct. App. 2010) (three elements under Minnesota law); *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 611 (D. Kan. 2014) (three elements under Kansas law); *Tillman v. Taro Pharm. Indus. Inc.*, No. 10-cv-0202, 2011 WL 3704762, at *8 (N.D. Ill. August 17, 2011) (three elements under Illinois law). However, other states require plaintiffs to establish as many as five or six elements. *Hope v. Nissan North Am., Inc.*, 353 S.W.3d 68, 90 (Mo. Ct. App. 2011) (five elements under Missouri

[6] The only divergence among the states' codes involves Maryland's, in which the state clarifies the definition of "seller" and explicitly abolishes any requirement of privity between buyer and seller in an action brought by the buyer. *See* Md. Code Ann. § 4-2-314(1)(a)-(b).

law); *Tamayo v. CGS Tired US, Inc.*, No. 8:11CV61, 2012 WL 2129353, at *7 (D. Neb. June 12, 2012) (six elements under Nebraska law).

a. Damages

Defendants challenge that Plaintiffs did not adequately plead damages in thirteen sub-classes,[7] as Plaintiffs failed to identify an automobile damaged by the motor oil. (Doc. # 85, pp. 55-56). This argument focuses on paragraphs 82-99 of the CAC, in which Plaintiffs list each class representative, the type of motor oil the class representative purchased, and the location where the class representative made the purchase. (CAC ¶¶ 82-99). While several of the recitations include vehicles for which Plaintiffs purchased Dollar General's motor oil, Plaintiffs do not include vehicles for several other class members. (*See id.*). However, this omission is not fatal to Plaintiffs' claims. As Defendants point out in other areas of their motions, the Court is required to use its experience and common sense in making its plausibility determination. *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015). The necessary recitations are found co-mingled with other claims and arguments in the CAC. *See Bailey v. Janssen Pharmaceutica, Inc.*, 288 F. App'x 597, 609 (11th Cir. 2008) (stating it was "an abuse of discretion for the district court to dismiss the count for being commingled with another claim . . ."). The CAC includes the allegation that "members of the Sub-Classes sustained damages including . . . the receipt of goods they would not have otherwise purchased which are likely to cause damage to their automobiles" and that "Plaintiffs and Class Members have also suffered property damage." (CAC ¶ 160). This allegation is accompanied by extensive factual pleadings elsewhere in the CAC, and is advanced on behalf of all sub-classes. Even if Plaintiffs did not include the

[7] Specifically Plaintiffs Brown (Colorado), Barfoot (Florida), Solis (Illinois), Meyer (Kansas), Foppe (Kentucky), Sheehy (Minnesota), Oren (Missouri), Taschner (Missouri), Harvey (Nebraska), Raab (North Carolina), Fruhling (Ohio), Preas (Texas), and Johnson (Texas).

allegation of property damage in paragraph 160 of the CAC, a cursory survey of the laws in play reveals that damage to or diminished value of the product, taken alone, is sufficient to establish a breach of the implied warranty of merchantability in several of the relevant jurisdictions. *See Hodges v. Johnson*, 199 P.3d 1251, 1261-62 (Kan. 2009) (stating measure of damages is the difference of the value of the goods as accepted and the goods' actual value) (Kansas); *ZeniMax Media, Inc.*, No. 12-cv-00411, 2013 WL 5420933, at *10 (D. Colo. Sept. 27, 2013) (damage to *Oblivion* video game, itself, sufficient) (Colorado); *Belcher v. Hamilton*, 475 S.W.2d 483, 485 (Ky. Ct. App. 1971) (Kentucky) (stating measure of damages is the difference between the value of the goods accepted and the value if goods were as warranted). Accordingly, the Court finds Plaintiffs have sufficiently alleged damages under all codifications of the implied warranty of merchantability.

b. Misuse

Defendants next argue that Plaintiffs improperly pleaded a cause of action for the breach of the implied warranty of merchantability, as Plaintiffs' pleadings allege misuse of the motor oil instead of valid use of the motor oil in seven sub-classes[8]. (Doc. # 85, p. 56). However, Defendants' argument reflects a too-narrow reading of the warranty. While the requirement that goods be merchantable under UCC § 2-314(c) includes the precondition that the goods "are fit for the ordinary purposes for which such goods are used . . .," the warrant imposes additional, broader protections. It also requires that goods shall be "adequately contained, packaged, and labeled as the agreement may require," and "conform to the promises or affirmations of fact made on the container or label. . . ." *See* U.C.C. § 2-314(2)(e)-(f). Therefore, while a plaintiff's misuse might pose a defense to whether he plausibly stated the goods are not merchantable under

[8] Specifically Plaintiffs Vega (California), McCormick III (Maryland), Gooel (Michigan), Flinn (New Jersey), Gadson (New York), Wood (New York), and Barrows (New York).

UCC § 2-314(2)(c), courts recognize that the other requisites of merchantability involve separate lines of inquiry. *See, e.g., Plas-Tex, Inc., v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 n.4 (Tex. 1989) (contemplating possible tests of merchantability); *Grantham v. Wal-Mart Stores, Inc.*, No. 08-3466-CV-S-GAF, 2012 WL 12898186, at *3 (W.D. Mo. Feb 28, 2012) (recognizing multiple tests of merchantability). Accordingly, the Court notes that Plaintiffs' pleadings allege and touch on violations of all three of the above-described protections. (CAC ¶¶ 154, 157, 161, 162).

Further, the effect of a misuse defense is varied. *See Sales: Implied Warranty of Merchantability*, 26 Am. Jur. Proof of Facts 2d 1 § 25. Depending on the jurisdiction, a plaintiff's misuse of a product impliedly warranted as merchantable for ordinary use either completely bars the action, allocates fault between the parties, or does not serve as a defense at all. *See id.* (stating "[b]ecause the courts historically have wavered on the question whether breach of warranty sounds in contract or in tort, there is considerable disagreement from one jurisdiction to the next"). Plaintiffs' misuse of the motor oil will later bar them from recovery under UCC § 2-314(2)(c) in jurisdictions that recognize misuse as a total defense, but the pleadings leave open the possibility of liability under other methods of establishing breach of the implied warranty of merchantability.

c. Notice

Defendants next argue that the majority of Plaintiffs failed to plead facts alleging they notified Defendants prior to filing suit.[9] (Doc. #85, pp. 57-59). Under UCC § 2-607(3), "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ." The UCC's notice

[9] Plaintiffs Wait (Arkansas); Vega (California); Brown (Colorado); Barfoot (Florida); Illinois (Solis); Meyer (Kansas); Gooel (Michigan); Sheehy (Minnesota); Oren (Missouri); Harvey (Nebraska); Flinn (New Jersey); Gadson, and Wood/Barrows (New York); Fruhling (Ohio); Preas/Johnson (Texas); Hill (Vermont); and Alla (Wisconsin).

requirement "(1) . . . provides the seller an opportunity to correct any defect; (2) . . . affords the seller an opportunity to prepare for negotiation and litigation; and (3) . . . provides the seller an opportunity to investigate the claims independently while the products remain in a relatively pristine state." *See Drobnak v. Anderson Corp.*, 561 F.3d 778, 784-85 (8th Cir. 2009) (applying Minnesota law).

Notice requirements vary from state to state. Generally, no specific form of notice is required to commence an action under the UCC for a breach of warranty. *See, e.g., Jarrett v. Panasonic Corp. of N. Am.*, 8 F. Supp. 3d 1074, 1083 (E.D. Ark. 2013) (Arkansas). In some states, filing suit may provide sufficient notice. *Wallman v. Kelley*, 976 P.2d 330, 332 (Colo. App. 1998) (Colorado); *Cipollone v. Liggett Grp., Inc.*, 683 F. Supp. 1487, 1498 (D.N.J. 1988) (New Jersey); *Graham ex rel. Graham v. Wyeth Lab., a Div. of Am. Home Prod. Corp.*, 666 F. Supp. 1483, 1500 (D. Kan. 1987) (Kansas). In others, the notice requirement is waived when the seller has actual knowledge of their breach. *Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710, 715 (7th Cir. 1992) (Illinois). In some circumstances, states impose loosened notice requirements when the party complaining of a breach of warranty is a consumer. *Golden v. Den-Mat Corp.*, 276 P.3d 773, 787-88 (Kan. Ct. App. 2012) (Kansas). However, the majority of states require courts to evaluate the sufficiency of pre-suit notice under the particular facts and circumstances of each case. *See, e.g., Wallman*, 976 P.2d at 332 (Colorado); *Envtl. Elements Corp. v. Mayer Pollock Steel Corp.*, 497 F. Supp. 58, 61 (D. Md. 1980) (Maryland); *Lincoln Elec. Co. v. Technitrol, Inc.*, 718 F. Supp. 2d 876, 881 (N.D. Ohio 2010) (Ohio).

Defendants make clear that they are not challenging the sufficiency of any pre-suit notice where given. (Doc. # 85, p. 80). Rather, Defendants' charge that the majority of Plaintiffs failed to even allege they gave notice. (*Id.*). However, the CAC states that "[e]ach Plaintiff and all

Sub-Class Members provided notice of Defendants' breach of the implied warranty of merchantability at least as of the date (s)he filed this allegation."[10] (CAC, ¶ 168). This general pleading, taken in light of the Court's survey of relevant elements across the many jurisdictions involved in this action, suffices for the majority of the classes at this stage of the litigation.

However, the CAC also advances four specific instances of sub-class representatives giving notice — Plaintiffs Barfoot (Florida), McCormick III (Maryland), Raab (North Carolina), and Preas (Texas). (CAC, ¶¶ 164-167). Defendants challenge the notice given by Plaintiff Barfoot and Plaintiff Preas. According to the CAC, Plaintiff Barfoot provided notice to Defendants on December 18, 2015. (*Id.* at ¶ 164). This date is prior to the filing of the CAC, but the same date Barfoot filed his underlying action. (*See* No. 4:16-cv-00520-GAF, Docket Sheet). However, courts applying Florida law have allowed contemporaneous notice and filing to overcome a motion to dismiss when some notice is at least alleged. *PB Prop. Mgmt, Inc. v. Goodman Mfg. Co., L.P.*, No. 3:12-cv-1366-J-20JBT, 2013 WL 1272912, at *3 (M.D. Fla. Aug. 28, 2013) (citing *Royal Typewriter Co., a Div. of Litton Bus. Sys., Inc. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1102 (11th Cir. 2013)). Accordingly, Plaintiff Barfoot's claim is not barred for failure to plead notice.

Defendants similarly challenge Plaintiffs Preas's pleadings. (Doc. # 85, p. 81). The CAC alleges that Preas provided notice of breach to Defendants on August 29, 2016, and makes no mention of Johnson giving notice. (CAC, ¶ 167). However, Dollar General argues that they did not receive notice until August 30, 2016, and have attached a correspondence from Preas titled "Notice of Breach of Warranties relating to DG™ Motor Oils" to the Motion to Dismiss.

[10] Again, the Court is unable to incorporate the discrete, underlying pleadings to supplement any hypothetical deficiencies in the CAC. *See Gelboim*, 135 S. Ct. at 905 n.3 (quotation omitted).

(Doc. # 85, Ex. M). The Court takes notice of the attachment, as a court ruling on a motion to dismiss can consider matters outside the complaint when the matter is incorporated by reference or integral to the claim. *Dittmer Prop., L.P. v. F.D.I.C.*, 708 F.3d 1011, 1021 (8th Cir. 2013) (quotation omitted). The correspondence is dated August 29, 2016, but is stamped as having been received by Defendants on August 30, 2016. (*Id.*). This is one day after Plaintiffs filed the CAC, which is the initial source of Preas and Johnson's complaint. (*See* Docket Sheet). Plaintiffs do not address Defendants' contention that Defendants received notice after Preas filed the suit. Moreover, commencement of litigation does not satisfy the notice requirement to demonstrate a breach of the implied warranty of merchantability under Texas Law. *McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 706 (5th Cir. 2014).

Plaintiffs also argue that Defendants had notice as of the first class action complaint as of December 17, 2015. However, in a breach of warranty action under Texas law, "[t]he manufacturer must be made aware of a problem with a particular product purchased by a *particular buyer*." *U.S. Tire-Tech, Inc. v. Borean, B.V.*, 110 S.W.3d 194, 202 (Tex. App. 2003) (emphasis added); *see also Verde v. Stoneridge, Inc.*, 2016 WL 9022449, at *13 (E.D. Tex. Nov. 7, 2016) (stating individualized notice requirements for each class member informs the court whether the class members gave timely notice of breach). Generalized notice is not sufficient. *See id.*

In another section of Plaintiffs' brief in opposition, Plaintiffs argue that Preas and Johnson merely stepped into the shoes of the previously dismissed lead plaintiff. (*See* Doc. # 89, p. 17 n.6). The Eighth Circuit has previously applied Federal Rule of Civil Procedure 15(c) to allow the substitution of a class representative plaintiff. *See Plubell v. Merck & Co., Inc.*, 434 F.3d 1070, 1074 (8th Cir. 2006). However, though Preas and Johnson may be substituted for the

previous plaintiff, they do not assume the facts particular to and underlying his notice pleading. *See U.S. Tire-Tech*, 110 S.W.3d at 202.

"We assess plausibility considering only the materials that are necessarily embraced by the pleadings and exhibits attached to the complaint, and drawing on our own judicial experience and common sense." *Wong v. Minn. Dep't of Human Serv.*, 820 F.3d 922, 927 (8th Cir. 2016) (quotation and alterations omitted). Viewing the correspondence purporting to give notice to Defendants, and considering that Plaintiffs did not contest the date Defendants claimed to have received the document, it is clear that Preas did not give notice prior to filing the suit. Further, Preas fails to demonstrate pre-suit notice through alternative means. Accordingly, Plaintiff Preas's claim for breach of the implied warranty of merchantability is dismissed without prejudice. Defendants' motion to dismiss for failure to give notice is denied as to the remainder of Plaintiffs' claims.

2. Particular Use versus Ordinary Use

Defendants also argue that the Court should dismiss Plaintiffs' warranty of merchantability claim because Plaintiffs attempt to bring an implied warrant of merchantability claim based on their particular purpose and use of the motor oil instead of an ordinary purpose and use. (Doc. # 85, pp. 61-65). This argument involves a challenge to the sufficiency of Plaintiffs' allegations, as well as a legal challenge based on how the implied warranty of merchantability interacts with the implied warranty of fitness for a particular purpose and whether Plaintiffs can simultaneously advance claims for the breach of both.

Defendants' argument narrowly applies to Plaintiffs' theory of liability under UCC § 2-314(2)(c). As discussed throughout this Order, this provision provides that "[g]oods to be merchantable must at least [be] fit for the ordinary purposes for which such goods are used. . . ."

UCC § 2-314(2). The implied warranty of fitness for a particular purpose instead arises when the seller has knowledge, actual or constructive, of an individual buyer's intended, specific, and peculiar use of a product and reliance on the seller's skill and judgment. UCC § 2-315, cmt. 1. More thoroughly,

> [a] "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

UCC § 2-315, cmt. 2. The two theories of recovery are not mutually exclusive in all cases, and have been found to overlap or merge in some circumstances. *See, e.g., Cartillar v. Turbine Conversions, Ltd.*, 187 F.3d 858, 861 n.5 (8th Cir. 1999) (citing *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 785 S.W.2d 13, 17 (Ark. 1990)); *but see Coghlan v. Aquasport Marine Corp.*, 73 F. Supp. 2d 769, 774 (S.D. Tex. 1999) (stating "under Texas law, an implied warranty of fitness for a particular purpose does not arise unless the particular purpose differs from the usual and ordinary use of the goods"); *Duffee By and Through Thornton v. Murray Ohio Mfg. Co.*, 866 F. Supp. 1321, 1323 (D. Kan. 1994) (explaining that the implied warranty of fitness for a particular purpose is narrower than the implied warranty of merchantability).

Plaintiffs claim the motor oil is ordinarily used in modern-day engines, and thus they are buyers making such ordinary use. (CAC, ¶ 35, 69, 177). In response, Defendants argue that Plaintiffs' alleged ordinary use is too-narrowly defined. (*See* Doc. # 85, p. 62). However, determining the ordinary purpose and use of any product requires a court to assess the expectations of a "normal buyer making ordinary use of the product." *Peterson v. Bendix Home Sys., Inc.*, 318 N.W. 2d 50, 53 (Minn. 1982). Plaintiffs bear the burden of demonstrating they

are, in fact, normal buyers making ordinary use of Defendants' motor oil throughout the litigation, but this is a question of fact, and the Court must accept Plaintiffs' factual allegations as true. *See Twombly*, 550 U.S. at 555-556 ("stating [f]actual allegations must be enough to raise a right to relief . . . , on the assumption that all the allegations in the complaint are true"). Plaintiffs' allegation, that the ordinary use of Defendants' motor oils is for modern-day engines, is plausible and thus withstands a motion to dismiss.

Defendants also contend that Plaintiffs did not adequately plead the necessary elements to establish a breach of the implied warranty of fitness for a particular purpose. Defendants focus their challenge on whether Plaintiffs properly alleged the knowledge requirement associated with the warranty and argue that Plaintiffs only advance conclusory recitations of the cause of action's elements. The Court disagrees. Plaintiffs allege the following that relate to and establish the necessary elements to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "Dollar General is a discount retailer focused on low and fixed-income consumers in small markets." (CAC, ¶ 36). "Dollar General offers basic every day and household goods, along with a variety of general merchandise at low prices. . . ." (*Id.* at ¶ 37). "Defendants engage in the . . . practice of marketing, selling, and causing to be manufactured, obsolete motor oil. . . ." (*Id.* at ¶ 43). "Defendants place their DG Auto motor oil adjacent to the other brands of motor oil that they sell . . . these other brands are non-obsolete motor oils that . . . are meant to be used in modern automotive engines." "The average consumer does not know what obsolete motor oil [is]." (*Id.* at ¶ 71). "A reasonable consumer would believe and expect that these products are suitable for use in automotive engines in cars actually in use on the date of sale and that these products will lubricate and protect such engines." (*Id.* at ¶ 57). "There was in each sale of DG Auto motor oil an implied warranty that those goods were fit for the particular

purpose of lubricating and protecting engines in automobiles currently in use at the time the product was sold." (*Id.* at ¶ 175). "At the time of the sale of the product, Defendants had reason to know that Plaintiffs and Class members would use . . . [the] motor oil in their modern day motor vehicles. . . . (*Id.* at ¶ 176). "At the time of sale, Defendants had reason to know the particular purpose for which the goods were being purchased, and that Plaintiffs and Class Members were relying on Defendants' skill and judgment to select and furnish suitable goods. . . . (*Id.*). Such allegations are sufficient to plead a breach of the implied warranty of fitness for a particular purpose.

Finally, Defendants' arguments necessarily implicate the question of whether a party can simultaneously allege a breach of both implied warranties, as well as rely on a same underlying purpose as an element to prove a breach of both. As touched on above, jurisdictions differ on whether the warranties overlap, merge, or exclude each other. In states in which they overlap and merge, the Court understands the causes of action to be simultaneously alleged. In the states they are respectively exclusive, the Court interprets the causes of action as alternative pleadings under Federal Rule of Civil Procedure 8(a)(3). Accordingly, Defendants' motion to dismiss based on insufficient pleadings as they relate to particular or ordinary use must be denied.

3. Inspection

Defendants next argue that, prior to purchase, Plaintiffs either inspected the motor oil, or refused to inspect the motor oil. (Doc. # 85, pp. 51-55). Again, important to note, here, is the current stage of the litigation. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. A complaint fails when "the allegations . . . however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558.

Here, Defendants advance a six-step fact pattern that purports to describe a typical customer's behavior within the store, and argue that the fact pattern would preclude Plaintiffs from establishing liability in all jurisdictions. (Doc. # 85, p. 53). Defendants argue that at some point in the process, Plaintiffs would have inspected the motor oil and such an inspection would have revealed any relevant defects to a reasonable consumer. (*Id.*). Defendants also claim that if, alternatively, Plaintiffs refused to inspect the motor oil prior to purchase, Plaintiffs would still be at fault for any breach. (*Id.*). However, adopting Defendants' argument would require the Court to assume facts outside the CAC. Defendants' argument imposes a specific line of consumer behavior atop Plaintiffs' allegations. Further, Defendants' inspection argument assumes both the adequacy of the labeling[11] and the ordinary purposes for which the oil is used. These assumptions contradict the relevant allegations from the CAC on a factual basis, and cannot be considered by the Court at this stage of the litigation. *See Iqbal*, 556 U.S. at 678 (stating the Court must accept, as true, factual allegations to judge the complaint's sufficiency).

Defendants also argue that transactions involving self-service stores are fundamentally different than and therefore legally distinguishable from other transactions contemplated by the UCC. (Doc. # 85, p. 53). Defendants claim that, during the transaction, "Plaintiffs were invited by Dollar General by custom and common practice — to inspect the Motor Oil Product that had been selected from the shelf." (*Id.*) (alterations and quotations omitted). Indeed, UCC § 2-316(3)(b) provides the following:

> when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstance to have revealed to him. . . .

[11] Defendants invite the Court to determine the adequacy of the labeling as a matter of law, elsewhere in their Motion to Dismiss. (Doc. # 85, p. 13-16). This is discussed below. *See, infra*, section (D)(4).

Application of § 2-316, under Defendants' reading, would appear to place a heightened burden to plead matters relating to inspection whenever a plaintiff wanted to bring an action for the breach of an implied warranty. However, Plaintiffs supply § 2-316(3)(b)'s context:

> In order to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

UCC § 2-316, cmt. 8. Plaintiffs claim Defendants made no such demand. Moreover, the cases Defendants cite to support the self-service store argument do not relate to implied warranties.[12] Defendants also cite authority from jurisdictions where district courts have dismissed specious claims involving labeling issues.[13] *See Twombly*, 550 U.S. at 556 (commenting that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."). However, at this time, the Court must accept Plaintiffs' well-pleaded allegations. Plaintiffs' claim for the breach of implied warranty of merchantability is sufficiently pleaded, and Defendants' motion to dismiss is denied.

[12] See *Fleming v. Wal-Mart, Inc.*, 595 S.W.2d 241 (Ark. 1980) (premises liability) (Arkansas); *Bridgman v. Safeway Stores, Inc.*, 348 P.2d 696 (Cal. 1960) (premises liability) (California); Lee v. State, 474 A.2d 537 (Md. Ct. App. 1984) (criminal law) (Maryland); *O'Shea v. K Mart Corp.*, 701 A. 2d 475 (N.J. 1997) (premises liability) (New Jersey); *Holguin v. Sally Beauty Supply Inc.*, 264 P.3d 732 (N.M. Ct. App. 2011) (claims arising from defendant-store detaining shopper) (New Mexico).

[13] *See Gedalia v. Whole Foods Mkt. Serv., Inc.*, 53 F. Supp. 3d 943 (S.D. Tex. 2014); *Simpson v. Cal. Pizza Kitchen, Inc.*, 989 F. Supp. 2d 1015 (S.D. Cal. 2013); *McGee v. Diamond Foods, Inc.*, No. 14CV2446 JAH (DHB), 2016 WL 816003 (S.D. Cal. 2016).

4. Preclusion by Express Warranties

Defendants next contend that any implied warranties covering the motor oil were voided by specific express warranties elsewhere on the product. (Doc. # 85, pp. 59-61). As discussed, above, every contract for the sale of goods includes a warranty that those goods are merchantable, so long as the seller is a merchant with respect to goods of those kinds and the warranty has not been excluded or modified. UCC § 2-314(1). To be merchantable, goods must, among other things, be fit for the ordinary purposes for which such goods are used. UCC § 2-314(2)(c). Plaintiffs allege the ordinary purpose that consumers use Defendants' motor oil is for their modern-day automotive engines. (CAC, ¶¶ 124, 126, 194, 196). However, Plaintiffs admit the back of the packages include statements, in small print, that read "not suitable for use in most . . . engines built after 1988," and not suitable for use in most . . . engines built after 1930," depending on the product. Defendants argue the labeling on the back of the packaging provided an express warranty,[14] which superseded or voided any implied warranty associated with the motor oil.

[14] Section 2-313 governs the creation of express warranties, and provides:

> (1) Express warranties by the seller are created as follows:
>
> > (a) 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.
> >
> > (b) Any 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.
> >
> > (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Defendants cite to UCC § 2-317 to support their position. The section provides, in part, the following:

> Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:
>
> (a) Exact or technical specifications displace an inconsistent sample or model or general language of description.
>
> (b) A sample from an existing bulk displaces inconsistent general language of description.
>
> (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

UCC § 2-317. Defendants argue that application of § 2-317 to the facts, as pleaded, bars all claims arising out of implied warranties. However, this argument assumes the language on the back label is a warranty. Plaintiffs instead cite § 2-316, which provides specific guidance to merchants seeking to *modify* implied warranties. Section 2-316(2), in relevant part, provides that "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, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." However, most states treat whether the seller created an express warranty as a matter of fact.[15] So although Plaintiffs admit the statement was conveyed, they contest whether the statement stands as a

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[15] *See, e.g.*, *McDonnell Douglas Corp. v. Thiokol Corp.*, 124 F.3d 1173, 1176 (9th Cir. 1997) (California); *Giles v. Inflatable Store, Inc.*, Civil Action No. 07-cv-00401-PAB-KLM, 2009 WL 961469, at *3 n.4 (D. Colo. April 6, 2009) (Colorado law); *In re Horizon Organic Milk Plus DHA Omega-3 Mkt. and Sale Practice Litig.*, 955 F. Supp. 2d 1311, 1341 (S.D. Fla. 2013) (Florida law); *Golden*, 276 P.3d at 795 (Kansas); *Minn. Forest Prod., Inc. v. Ligna Mach., Inc.*, 17 F. Supp. 2d 892, 917 (D. Minn. 1998) (Minnesota); *Gillette Dairy, Inc. v. Hydrotex Indus., Inc.*, 440 F.2d 969, 974 (D. Neb. 1971) (Nebraska); *Smith v. Merial Ltd.*, Civ. No. 10-439, 2011 WL 2119100, at *5 (D.N.J. May 26, 2011) (New Jersey); *Ebin v. Kangadis Food Inc.*, No. 13 Civ. 2311(JSR), 2013 WL 6504547, at *3 (S.D.N.Y. Dec. 11, 2013) (New York); *Warren v. Joseph Harris Co., Inc.*, 313 S.E.2d 901, 904 (N.C. Ct. App. 1984) (North Carolina); *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241, 1252 (M.D. Tenn. 1986) (Tennessee).

promise itself, or a mere modification to the implied warranty of merchantability already imposed by law. Assuming the back labeling is not a warranty and simply a modification, to be effective, the statement would have to specifically mention merchantability. UCC § 2-316(2). Further, any written statements must be conspicuous. *Id.* The text does not mention merchantability, and the Court makes no determination whether the statement is conspicuous as a matter of law. The parties disagree about factual matters, but the Court must accept the truthfulness of Plaintiffs' allegations as pleaded at this point in the litigation. According, Defendants' Motion to Dismiss on the basis of superseding express warranties is denied.

E. Consumer Protection Claims

Defendants also argue that Plaintiffs' consumer protection actions based on the various state laws should be dismissed. (Doc. # 85, pp. 11-42). Specifically, those arguments include (1) the sufficiency of Plaintiffs' damages pleadings; (2) application of the economic loss doctrine; (3) whether Plaintiffs properly pleaded Defendants' deceptive conduct; (4) the application of the states' safe harbor doctrines; and (5) whether Plaintiffs meet the requisite elements to establish standing. The Court now takes those arguments up in turn.

1. Insufficient Damages Pleadings

Defendants' first challenge to the state consumer protection claims is that Plaintiffs inadequately pleaded damages. (Doc. # 85, p. 38-41). Defendants contend that Plaintiffs cannot plausibly allege the value of the motor oil is zero, and therefore Plaintiffs' claims must be dismissed. (*Id.*). Implicit in Defendants' argument is an attempt to diminish the magnitude and nature of Plaintiffs' potential recoveries. The Court will address both aspects of Defendants' argument.

The Court is unsure why Defendants believe Plaintiffs cannot allege the motor oil was worthless, at least at the pleading stage. Defendants cite authority from Florida that provides, under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), generally:

> the measure actual damages in the difference in the market value of the product 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. . . . a notable exception to the rule may exist [only] when the product is rendered valueless as a result of the defect—then the purchase price is the appropriate measure of damages.

Rollins, Inc. v. Heller, 454 So.2d 580, 585 (Fla. Dist. Ct. App. 1984) (quotation omitted). However, the *Rollins* court is appealing a final judgment and requesting an appellate court reverse the trial court's award of damages. *See Id.* at 584-85. The court was not asked to review the sufficiency of that purchaser's pleadings. *Id.* Moreover, in Florida, "for the consumer to be entitled to any relief under FDUTPA, the consumer must not only plead and prove that the conduct complained of was unfair and deceptive but the consumer must also plead and prove that he or she was aggrieved by the unfair and deceptive act." *Macias v. HBC of Florida, Inc.*, 694 So.2d 88, 90 (Fla. Dist. Ct. App. 1997). Plaintiff sufficiently pleads those elements. The only additional requirement is that plaintiffs seeking recovery under FDUPTA must plead "recoverable damages." *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So.3d 178, 180-81 (Fla. Dist. Ct. App. 2010). Recoverable damages are those contemplated by the *Rollins* court, plus attorney's fees and court costs. *Id.* at 180. In the relevant prayer for relief, the CAC provides "[i]n addition to actual damages, Plaintiff and the Sub-Class are entitled to declaratory and injunctive relief as well as reasonable attorney's fees and costs pursuant to Fla. Stat. § 501.201, *et seq*." (CAC, ¶¶ 277, 289, 293). Defendants are correct. Plaintiffs must eventually demonstrate the difference between the fair market value of the motor oil and the amount charged; indeed, they may not be able to prove the fair market value was zero. However, that is

an error in the magnitude of the damages alleged, and not an error of the type of damages pursued. Plaintiffs' claims are not dismissed for failure to adequately state damages under the FDUTPA.

Defendants advance the same argument against nearly all of Plaintiffs' other state consumer protection act claims.[16] However, Defendants cite no controlling authority that forbids a consumer plaintiff seeking remedy under the various consumer protection acts from alleging a product was worthless at the time of purchase. In fact, at least one California court has expressly contemplated that the state's consumer protection acts apply to worthless products. *See, e.g.*, *Collins v. eMachines, Inc.*, 134 Cal. Rptr. 3d 588, 592 (Cal. Ct. App. 2011) (California statutes). Defendants' argument is unsatisfactorily broad and unspecific, and does not even apply to many of the consumer protection acts.

[16] Arkansas's Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 *et seq.*; California's Consumer Legal Remedy Act, Cal. Civ. Code § 1750 *et seq.*; California's False and Misleading Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*; California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; Colorado's Uniform Deceptive Sales Practices Act, Colo. Rev. Stat. § 6-1-105 *et seq.*; Florida's Misleading Advertising Law, Fla. Stat. § 817.41 *et seq.*; Illinois' Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. Ann. 510/1 *et seq.*; Kansas's Consumer Protection Act, Kan. Stat. Ann. § 50-623 *et seq.*; Kentucky's Consumer Protection Act, Ky. Rev. Stat. Ann. § 367.220 *et seq.*; Maryland's Consumer Protection Act, Md. Code. Ann. Com. Law § 13-101 *et seq.*; Michigan's Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.*; Minnesota's Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.43 *et seq.*; Minnesota's Prevention of Consumer Fraud Act, Minn. Stat. § 325F.68 *et seq.*; Missouri's Merchandising Practices Act, Mo. Rev. Stat. § 407.010; Nebraska's Consumer Protection Act, Neb. Rev. Stat. § 59-1601 *et seq.*; Nebraska's Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 *et seq.*; New Jersey's Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1 *et seq.*; New York's Deceptive Sales Practices Act, N.Y. Gen. Bus. Law § 349 and § 350; North Carolina's Consumer Protection Act, N.C. Gen. Stat. § 75-1.1 *et seq.*; Ohio's Consumer Sales Practices Act, Ohio Rev. Code Ann. § 1345.01 *et seq.*; Texas's Deceptive Trade Practices-Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.41; Vermont's Consumer Fraud Act, Vt. Stat. Ann. tit. 9 § 2451; Wisconsin's Deceptive Trade Practices Act, Wis. Stat. Ann. § 100.18; Wisconsin's Unfair Methods of Competition and Trade Practices Act, § Wis. Stat. Ann. § 100.20.

Other states, similar to Florida, provide that assessing damages under the respective acts involves proving, as a matter of fact, the difference between the fair market value of and the price paid for the relevant product or service. *See Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1171-72 (Colo. App. 210) (Colorado); *Gonzalez v. Pepsico, Inc.*, 489 F. Supp. 2d 1233, 1248-49 (D. Kan. 2007) (Kansas); *Reinke v. Harold Chevrolet-Geo, Inc.*, No. A03-1148, 2004 WL 1152700, at *4 (Minn. Ct. App. May 20, 2004) (Minnesota Consumer Fraud Prevention Act); *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883, 886 (Mo. Ct. App. 1994) (Missouri); *Mladenov v. Wegmans Food Mkt., Inc.*, 124 F. Supp. 3d 360, 375 (D.N.J. 2015) (New Jersey); *Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 288-89 (S.D.N.Y. 2014) (New York statutes); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997) (Texas); *Mueller v. Harry Kaufmann Motorcars, Inc.*, 859 N.W.2d 451, 613-14 (Wis. Ct. App. 2014) (Wisconsin). The Court's survey of this group's laws reveals no express bar to pleading a product was worthless as purchased.

Beyond the scope of proving actual damages, other states' acts allow the assessment of special or consequential damages, in addition to actual damages. Damage awards in these states are not limited by the narrow measure Defendants propose. *See Burton v. Linotype Co.*, 556 So.2d 1126, 1128-29 (Fla. Dist. Ct. App. 1989) (Florida Misleading Advertising Act); *Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 793-96 (Ill. App. Ct. 2008) (Illinois); *M.T. v. Saum*, 7 F. Supp. 3d 701, 704-705 (W.D. Ky. 2014) (Kentucky); *Mercedes-Benz of N. Am. v. Garten*, 618 A.2d 233, 242 (Md. Ct. Spec. App. 1993) (Maryland); *Avery v. Indus. Mortg. Co.*, 135 F. Supp. 2d 840, 842-45 (W.D. Mich. 2001) (Michigan); *Jenkins v. Pech*, 301 F.R.D. 401, 405 (D. Neb. 2014) (Nebraska Consumer Protection); *Williams v. Gray Guy Group, L.L.C.*, No. 16AP—321, -

- N.E.3d --, 2016 WL 7493709, at *5 (Ohio Ct. App. Dec. 29, 2016) (Ohio); *Carter v. Gugliuzzi*, 716 A.2d 17, 58-59 (Vt. 1998) (Vermont).

The Arkansas Supreme Court has discussed whether damages under the Arkansas Deceptive Trade Practices Act include those beyond actual damages, such as mental anguish. *FMC Corp., Inc. v. Helton*, 202 S.W.3d 490, 481-82 (Ark. 2005). Although the *Helton* court did not reach a conclusion regarding the scope of damages under the statute, relevant Arkansas authority indicates plaintiffs seeking recovery must simply plead adequate facts alleging actual damages. *Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 384 S.W.3d 540, 552 (Ark. Ct. App. 2011).

Wisconsin allows parties seeking remedy from the Unfair Methods of Competition and Trade Practices Act to obtain double damages under the Act, so long as they sufficiently allege a pecuniary loss. *Snyder v. Badgerland Mobile Homes, Inc.*, 659 N.W.2d 887, 894-95 (Wis. Ct. App. 2003). The Court is unaware of any authority from the state forbidding a plaintiff from pleading a product was worthless as purchased.

Finally, some statutes only provide for injunctive relief and costs associated with the litigation. *Thomas v. Betts Corp. v. Leger*, No. A04-260, 2004 WL 2711391, at *11 (Minn. Ct. App. Nov. 24, 2004) (Minnesota Deceptive Trade Practices); *Estate of Joyce Rosamond Petersen v. Boland*, 8:16CV183, 2016 WL 6102339 at *5 (D. Neb. Oct. 19, 2016) (Nebraska Deceptive Trade Practices). Plaintiffs sufficiently tailor their prayers for relief to the respective statutes. (Doc. # 44, ¶¶ 371, 421).

In sum, the Court finds that Plaintiffs' pleadings are not deficient for any failure to specify damages or for alleging the motor oil's value was zero instead of another arbitrary value. Further, the Court notes Defendants' challenges regarding the recoveries available under the

various consumer protection actions at play and finds Plaintiffs have sufficiently tailored their pleadings accordingly.

2. Economic Loss Doctrine

Defendants next contend that the economic loss doctrine bars consumer protection actions in eleven of the states in which Plaintiffs bring consumer protection action claims. (*See* Doc. # 85, pp. 41-42; Doc. # 85-10). Specifically, these states include California, Illinois, Kansas, Kentucky, Maryland, Michigan, Missouri, Nebraska, New York, North Carolina, and Texas. (*Id.*)

The economic loss doctrine generally "prohibits a party 'from seeking to recover in tort for economic losses that are contractual in nature.'" *Graham Constr. Serv. v. Hammer & Steel Inc.*, 755 F.3d 611, 616 (8th Cir. 2014) (quoting *Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc.*, 332 S.W.3d 184, 192 (Mo. Ct. App. 2010)). "Contract law, and the law of warranty in particular, is better suited for dealing with purely economic loss in the commercial arena than tort law, because it permits the parties to specify the terms of their bargain and to thereby protect themselves from commercial risk." *Id.* (quotation and alteration omitted). A review of the doctrine's history shows it arose "because courts became concerned the rise of implied warranties and strict liability for dangerous products would allow tort law to consume contract law." *Rinehart v. Morton Bldg., Inc.*, 305 P.3d 622, 627 (Kan. 2013). However, the doctrine's scope has and continues to expand beyond its original purpose. *Id.* at 626. For that reason, the economic loss doctrine's application and effect varies considerably from state to state, despite its widespread adoption.

Defendants' argument highlights these differences in states' laws. (*See* Doc. # 85-10). Despite these variances, the Court resolves this motion to dismiss on other grounds. Plaintiffs

argue that the doctrine does not apply, as they allege there were no express contracts governing the relevant transactions, nor are any of their claims based on a breach of an express contract. (Doc. # 89, p. 23). The Court accepts Plaintiffs' allegations as true, at this point in the litigation. The Court previously discussed that it was premature to determine whether unjust enrichment claims are precluded by the existence of a contract. *See*, *supra*, section (C)(2). As the economic loss doctrine is predicated on the existence of a contract between the opposing parties, the same factual issues that prevented the Court from granting Defendants' motion to dismiss on the unjust enrichment claims prevents the Court from granting Defendants' motion on the consumer protection claims. While the economic loss doctrine might eventually preclude recovery under consumer protection actions in several states, the Court cannot reach the merits of their argument at this stage because it must accept Plaintiffs' well-pleaded facts as true. *See Twombly*, 550 U.S. at 555-56.

3. Deceptiveness of Defendants' Conduct

Defendants also argue that Plaintiffs have not alleged any cognizable deceptive practice. (Doc. # 85, pp. 25-30). Defendants' argument focuses on the deceptiveness of discrete aspects of the motor oil marketing scheme, including whether the product placement, labeling, and language on the bottle were deceptive on a standalone basis. However, Plaintiffs' claim does not focus on the individual aspects of the motor oil marketing, but rather alleges that these actions collectively constitute a systematic deceptive practice as defined under the various states' consumer protection actions. The Court interprets Plaintiffs' pleadings accordingly.

Again, Defendants' arguments turn on contested facts, and cannot be determined as a matter of law. Defendants argue that, in order to succeed, "'the business practice in question must be misleading and stand outside the norm of reasonable practice in that it will not victimize

the average consumer.'" (Doc. # 85, p. 48 (quoting *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 98 (D.N.J. 2011) (emphasis omitted)). However, Defendants fail to provide the above-quoted portion's context. The *Smajlaj* court went on to state:

> Defendants argue that their labels were literally true, if understood to refer to either the old formulation of the regular tomato soup or to an average of condensed soups, and therefore the labels cannot constitute unlawful conduct.
>
> Defendants' argument lacks merit. First, the key factual premises of Defendants' argument rely on information outside the scope of this motion, including facts about the introduction of the reformulated soup. And second, even if the Court could consider the facts Defendants ask it to consider, *the fact that the labels were literally true does not mean they cannot be misleading to the average consumer*.

Smajlaj, 782 F. Supp. 2d at 98 (emphasis added). The Court agrees with the broader analysis from *Smajlaj*. Defendants argue that the font is legible, in large letters, set against a sufficiently contrasted background, and on the permitted face of the container. (Doc. # 85, pp. 30-34). Defendants further argue that it is impossible any reasonable consumer would be deceived by the product placement. (*Id.*) Both arguments invite the court to assume facts outside the pleading, and opine on the mental state of the average consumer and reasonable business practices, both as matters of law. This is beyond the Court's task on a 12(b)(6) motion.

Defendants also contend that Plaintiffs' claims must fail, as the phrase "Lubricates and protects your engine" is mere puffery, and not actionable at law. As discussed above, Defendants' argument might have merit, had all of Plaintiffs' claims been directed at this language alone. However, Plaintiffs' claims target a wide-ranging marketing scheme that is greater than the practice's individual components.

Plaintiffs allege that Defendants sold obsolete motor oil to unsophisticated customers by purposefully placing the motor oil beside widely-useful motor oils that are produced by well-known manufacturers. Plaintiffs further contend that this marketing scheme deceptively induced

these customers into buying a worthless product that would likely damage their vehicles. Accepting these claims as true, it follows that Defendants' motion to dismiss Plaintiffs' consumer protection claims for failure to recite a cognizable deceptive practice must fail. The Court makes no conclusive finding as to the deceptiveness of Defendants' product placement or label conspicuousness at this procedural stage.

4. Comprehensive Federal and State Regulatory Scheme and the Effect of the Safe Harbor Doctrine

Defendants also argue that the consumer protection claims should be dismissed, as the labeling of the Motor Oil complies with a comprehensive federal and state regulatory scheme, and the various consumer protection acts provide safe harbors from liability to defendants that comply with such regulatory schemes. (Doc. # 85, pp. 11-16).

The National Institute of Standards and Technology ("NIST") is a federal agency within the Department of Commerce that is tasked with "cooperat[ing] with the states in securing uniformity in weights and measures laws and methods of inspection." (Doc. #85-3, p. iii). As part of this mandate, the NIST promulgates various model regulatory schemes, and recommends states adopt the model schemes. (*Id.*). Together with the Society of Automotive Engineers, the NIST has publishes Handbook 130, which recommends, among other things, labeling language for motor oil. Defendants argue that all of the relevant states have adopted the NIST model regulatory scheme, or at least recognize the NIST's expertise. (Doc. # 85, pp. 11-13). Further, Defendants allege their labeling complies with all relevant recommendations. However, it is beyond the scope of the present Rule 12(b)(6) motion to determine whether the Defendants' motor oil labeling complies with the NIST recommendations. Moreover, the analysis is unnecessary.

Safe harbor doctrines generally protect defendants from incurring liability under consumer protection acts when they comply with regulatory schemes. *See, e.g.*, Colo. Rev. Stat. § 6-1-106(1)(a) (providing that "[the Colorado Consumer Protection Act] does not apply to [c]onduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local government agency. . . ."). However, Defendants' argument again assumes that compliance with one body of regulations that affects part of Plaintiffs' claim provides a total defense. Instead, courts in many states observe that deceptive conduct, viewed as a whole, is often broader than the otherwise regulated conduct; therefore, in those circumstances, the doctrine does not apply. *See Loeffler v. Target Corp.*, 324 P.3d 50, 76 (Cal. 2014) (California) (quoting *Cel-Tech Commc'n, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999)) (stating "[t]o forestall an action under the unfair competition law, another provision must actually 'bar' the action or *clearly permit* the conduct.'"); *see also Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 41 (Ill. 2005) (Illinois) (providing example where the challenged conduct was broader than the regulated conduct). Similar in spirit to California and Illinois, other states impose safe harbor doctrines only when conduct is extensively regulated. *Burton v. William Beaumont Hosp.*, 373 F. Supp. 2d 707, 720 (E.D. Mich. 2005) (Michigan) (stating question is whether every aspect of transaction is thoroughly regulated); *Johnson v. MFA Petrol. Co.*, 10 F. Supp. 3d 982, 997 (W.D. Mo. 2014) (Missouri) (stating question is whether the transaction is *expressly* and *extensively* regulated); *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 3 F. Supp. 2d 518, 536 (D.N.J. 1998) (providing that the act only applies when the particular act or transaction is regulated specifically, concretely, and pervasively); *Duke v. Flying J, Inc.*, 178 F. Supp. 3d 918, 926 (N.D. Cal. 2016) (applying North Carolina and Texas law) (stating both states offer safe harbors when conduct is specifically authorized); Ohio Rev. Code Ann. §

1345.12(A) (stating the act does not apply to "[a]n act or practice required or specifically permitted by [law]").

Other courts recognize that every business is subject to regulation, and conduct can be deceptive despite compliance with that regulation. *See Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 56 (Colo. 2001) (en banc) (stating "we hold that [the Colorado Consumer Protection Act] exempts only those actions that are 'incompliance' with other laws. Conduct amounting to deceptive or unfair trade practices, however, would not appear to be 'in compliance' with other laws."); *see also Degutis v. Fin. Freedom, LLC*, 978 F. Supp. 2d 1243, 1264-65 (M.D. Fla. 2013) (Florida); *Kuntzelman v. Abvo Fin. Serv. of Neb., Inc.*, 291 N.W.2d 705, 707 (Neb. 1980) (stating "[c]onduct is not immunized merely because the person so acting falls within the jurisdiction of a regulatory body").

Finally, although courts in Minnesota have seldom opined on the exact nature of the safe harbor provision embedded in Minnesota's Uniform Deceptive Trade Practices Act, at least one court applying Minnesota law has stated that whether a party is complying with an order contemplated by the act is a matter of fact. *Laysar, Inc. v. State Farm Mut. Auto. Ins. Co.*, No. Civ. 04-4584JRTFLN, 2005 WL 2063929, at *3 (D. Minn. Aug. 25, 2005). The *Laysar* court accordingly denied the defendant's motion to dismiss. Courts in New York have similarly declined to dismiss consumer protection actions when they are based on disputed regulation compliance issues. *See, e.g.*, *Singleton v. Fifth Generation, Inc.*, 5:15-CV-474 (BKS/TWD), 2016 WL 406295, at *5-8 (N.D.N.Y. Jan. 12, 2016)

As discussed in previous sections, Plaintiffs' claims go beyond alleging Defendants did not comply with the relevant NIST recommendations. Many state safe harbor doctrines do not apply when facts demonstrate the deceptive conduct extends beyond the regulated conduct.

Further the parties' arguments regarding whether Defendants complied with relevant regulations involve contested matters of fact that go beyond the complaint. For those reasons, Defendants' motion to dismiss based on the application of the eleven states' safe harbor doctrines is denied.

F. Rule 9(b)

Defendants additionally challenge Plaintiffs' pleadings as insufficient under Federal Rule 9(b) as they relate to the various consumer protection actions. (Doc. # 85, p. 26). Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). "Required facts include the who, what, when, where and how surrounding the alleged fraud and what was obtained as a result." *OmegaGenesis Corp. v. Mayo Found. For Med. Educ. and Research*, 851 F.3d 800, 804 (8th Cir. 2017) (quotation and ellipsis omitted). Plaintiffs clearly allege that Dollar General engaged in deceptive marketing and labeling during a specific time period in stores throughout the United States. *See*, *supra*, section (D)(2). To the extent Plaintiffs' consumer protection actions sound in fraud, the Court finds these allegations meet the requisites of Rule 9(b).

G. Standing

Defendants challenge whether Plaintiffs have standing to pursue injunctive relief. "To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an 'injury-in-fact,'[17] (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[17] "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, -- U.S. --, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560)).

Defendants are correct, that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (alteration omitted).

However, when a motion to dismiss challenges standing, standing is assessed based on the factual allegations in the pleadings. *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 570 (8th Cir. 2007). Plaintiffs allege Defendants' conduct is ongoing. (CAC ¶¶ 38, 42-46, 59-60, 63-69, 72, 77). Further, throughout the complaint, Plaintiffs seek remedies contemplating future damages to members of the respective classes. (*See* CAC ¶¶ 134, 204, 262, 313, 338, 371, 380). Taking Plaintiffs' allegations as true, Plaintiffs have stated sufficient facts to establish standing to request injunctive remedies for future damages. Defendants will have the opportunity to challenge standing on the basis of Plaintiffs' class assertions, but the Court will abstain from ruling on the matter until the class certification stage. *See In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 616 (8th Cir. 2011).

H. Subject Matter Jurisdiction over the Texas Plaintiffs

Defendants argue that the Court does not have subject matter jurisdiction over the Texas Plaintiffs, Preas and Johnson. (Doc. # 85, p. 89). The Court previously dismissed Preas claim based on Defendants' breach of implied warranties for failure to give pre-suit notice. *See* section (D)(1)(c). However, Preas and Johnson's remaining claims are unaffected by the notice pleadings that proved fatal to their UCC claims. The Court now discusses Defendants' subject matter challenge to Preas and Johnson's remaining claims.

Defendants Preas and Johnson became involved with this case at the filing of the CAC on August 29, 2016. (*See* CAC, ¶ 478-91; Docket Sheet). Previously, the Texas sub-class had been represented by Milton M. Cooke Jr. (*See* No. 4:16-cv-00533-GAF, Doc. # 5). However, after

adding Defendants Preas and Johnson to the suit, Cooke voluntarily dismissed his claim with prejudice on August 31, 2016, in relation to other ongoing issues with litigation. (*See* Docs. ## 48-49). Defendants argue that adding Preas and Johnson represents both a deviation from the conventional MDL transfer processes, and a violation of the Court's previous order denying Plaintiffs' request to directly file new actions into this MDL. (Doc. # 85, pp. 67-68).

The Eighth Circuit has previously discussed the substitution of a class representative lead plaintiff prior to class certification. *See Plubell*, 434 F.3d at 1071. In *Plubell*, plaintiff Carol Richardson brought an action, as representative of a proposed class, against defendant Merck, alleging deceptive trade practices and marketing surrounding Vioxx, an anti-inflammatory drug. *Id.* at 1071. During discovery, Richardson's counsel determined that Richardson was mistaken about drug she was prescribed by her doctors. *Id.* The state court granted leave for plaintiff's counsel to substitute Mary Plubell as class representative. *Id.* However, Congress passed the Class Action Fairness Act of 2005 ("CAFA") between the filing of the original complaint and the amendment substituting Plubell as class representative. *Id.* CAFA provides that federal district courts have original jurisdiction over class actions, so long as class actions meet certain criteria. *See* 28 U.S.C. § 1332(d). Operation of CAFA would have allowed Merck to remove the Vioxx litigation to federal court, so the legal question was whether Plubell's substitution related back and allowed her to assume the allegations and claims from the original complaint. *Plubell*, 424 F.3d at 1071.

Applying Rule 15(c)(3),[18] the Eighth Circuit determined that Plubell's amended petition related back to the original filing, stating the relevant test is whether "the defendant knew or

[18] The Eighth Circuit reasoned that although Missouri Rule 55.33(c) controlled whether Plubell's substitution related back to the original filing, "[t]he Missouri Supreme Court interprets [Missouri] Rule 55.33(c) to embody [Federal] Rule 15(c)'s rationale." *Plubell*, 434 F.3d at 1072.

should have known that it would be called on to defend against claims asserted by the newly-added plaintiff, unless the defendant would be unfairly prejudiced in maintaining a defense against the newly-added plaintiff." *Id.* at 1072 (quotation omitted). The Eighth Circuit reasoned that Plubell was a member of the putative class as it was defined in the original petition. *Id.* at 1073. Further, Merck was not prejudiced, as both the original and amended pleadings were "exactly the same, reprinted verbatim." *Id.* "Merck was clearly advised by the original petition that the plaintiff class sued for deceptive trade practices in developing and marketing Vioxx. Thus, Merck was in no way prejudiced by the identical allegations in the amended pleading." *Id.*

The current case presents an analogous fact pattern. The original complaint from the Southern District of Texas proposes a class consisting of "[a]ll persons in the State of Texas who purchased Defendant's DG-branded motor oil . . . for personal use and not for re-sale, since December 2011." (*See* No. 4:16-cv-00533-GAF, Doc. #5, ¶ 47). Plaintiffs alleged Preas and Johnson are members of this class. (CAC, ¶¶ 30-31). Further, as in *Plubell*, the allegations in the CAC are identical to the allegations originally advanced by Plaintiff Cooke.[19] Accordingly, the Court finds that Preas and Johnson's claims relate back to the filing of the original complaint, and the Court retains subject matter jurisdiction over the Southern District of Texas plaintiffs. Preas and Johnson's unjust enrichment and consumer protection act claims should not be dismissed for lack of subject matter jurisdiction.

[19] The panel in *Plubell* additionally noted that "a court could deny leave to amend if it thought the plaintiff (or counsel) had acted in bad faith." *Plubell*, 434 F.3d at 1074. In the present case, the Court ordered Plaintiffs' counsel to investigate whether any lead plaintiffs of state sub-classes had been improperly recruited. (*See* Doc. # 58, ¶ 23). Plaintiff Cooke voluntarily dismissed his claims, pursuant to the findings of the investigation. As Plaintiffs' and Plaintiffs' counsel have acted in accordance with the Court's orders thus far, the Court does not find that Plaintiffs meet the bad faith exception contemplated by *Plubell*.

I. Political Question Doctrine

Defendants next argue that Plaintiffs are essentially asking the Court to determine whether Congress should allow retailers to use the labels employed by Defendants. (Doc. # 45, pp. 68-70). Generally, the political question doctrine bars a court from ruling on a matter that has "in any measure been committed by the Constitution to another branch of government." *See Baker v. Carr*, 369 U.S. 186, 211 (1962). However, the primary inquiry is whether there is an inherent conflict between the judicial branch and the executive or legislative branch. *Id.* at 210 ("in . . . political question cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government . . . ."). The political question must be inextricable to warrant dismissal. *Id.* at 218.

Here, Plaintiffs do not petition the Court to rewrite, modify, or disallow any government entity's adoption of NIST standards for labeling motor oil. While many of Plaintiffs' claims may be affected by relevant regulatory frameworks, Plaintiffs' claims are directed at Defendants' actions — not Congress's. Therefore, this case does not involve a conflict between the coordinate branches of the federal government, and thus does not implicate a non-justiciable political question.

J. Preemption

Finally, Defendants argue that all Plaintiffs' claims are preempted by the existence of a comprehensive federal scheme through either field or conflict preemption. "The preemption doctrine derives from the Constitution's supremacy clause, which states that laws of the United States made pursuant to the Constitution are the 'supreme Law of the Land.'" *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 886 (8th Cir. 2005) (quoting U.S. Const. Art. VI, cl. 2. "State

laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid, or preempted." *Id.* (quotation and alteration omitted).

Field preemption arises when "Congress intends that a federal statute preempt a field of law so completely that state law claims are considered to be converted into federal causes of action." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996). "[Field] preemption is thus quite rare." *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 248 (8th Cir. 2012). "The Supreme Court has recognized [field] preemption in only three areas: § 301 of the Labor Management Relations Act; § 502(a) of ERISA; and §§ 85 and 86 of the National Bank Act." *Id.* (internal quotations omitted). "Where [the Supreme Court] has found complete pre-emption . . . the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Conversely, conflict preemption "occurs when it is impossible for a private party to comply with both state and federal law, and when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the relevant agency." *Wuebker*, 418 F.3d at 887.

Most importantly "[t]he intent of Congress is the ultimate touchstone guiding preemption analysis." *Johnson*, 701 F.3d at 248 (quotation omitted). Defendants argue that Congress has exclusive authority to fix the standard of weights and measures, and allowing Plaintiffs to challenge Defendants' allegedly deceptive conduct would have a disruptive effect on the accomplishment of that end. (Doc. # 85, p. 71). However, Defendants misstate the NIST's role. The NIST's congressional mandate is not to promulgate mandatory statutory authority, but to draft model recommendations to promote uniformity across state and local jurisdictions. (Doc. # 85-3, p. 1). Further, Congress charges the NIST "to cooperate with other departments and

agencies of the Federal Government, with industry, with State and local governments, with the governments of other nations and international organizations, and with private organizations in establishing standard practices, codes, specifications, and voluntary consensus standards." 15 U.S.C. § 272(b)(10). Congress's mandate does not envision an agency with independent legislative, regulatory, or enforcement power.

Defendants' failure to demonstrate a federal statute at issue that provides an exclusive cause of action is fatal to their field preemption defense. Defendants only offer federal advisory recommendations that states choose whether to adopt. The Court finds that Plaintiffs' claims are not preempted by complete federal preemption within the field. Additionally, conflict preemption requires a conflicting federal and state law. As this matter instead involves state laws adopted from non-mandatory federal recommendations, there is no conflict. Plaintiffs' claims are not preempted under a conflict preemption theory.

CONCLUSION

Taking the factual allegations as true, the Court concludes that dismissal is inappropriate at this time for of Plaintiffs' unjust enrichment claims. With the exception of Plaintiff Preas's claims for breach of implied warranties of merchantability and fitness for a particular purpose, all other claims for breach of implied warranties are sufficiently pleaded. Plaintiffs' claims based on state consumer protection acts are sufficiently pleaded and survive Defendants' motion to dismiss. For these reasons, and for the reasons set forth above, Defendants' Motion to Dismiss is DENIED, in part, and GRANTED as to Plaintiff Preas's claims under Texas's UCC.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: August 3, 2017