NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

KURT SCHEUERMAN, individually and on behalf of all others similarly situated, Plaintiff, v. NESTLE HEALTHCARE NUTRITION, INC., Defendant.	Hon. Faith S. Hochberg Civil Action No. 10-3684 (FSH) **OPINION & ORDER** Date: August 1, 2011

MARIA JOHNSON, Plaintiff, v. NESTLE HEALTHCARE NUTRITION, INC., Defendant.	Hon. Faith S. Hochberg Civil Action No. 10-5628 (FSH) **OPINION & ORDER** Date: August 1, 2011

HOCHBERG, District Judge:

This matter comes before the Court upon Defendant Nestle Healthcare Nutrition, Inc.'s Motion to Dismiss the Consolidated Class Action Complaint. The Court has considered the submissions of the parties pursuant to Fed. R. Civ. P. 78.

BACKGROUND[1]

[1] The facts set forth here are drawn from the Consolidated Class Action Complaint. At the motion to dismiss stage, this Court accepts these facts as true. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

Plaintiffs Maria Johnson and Kurt Scheuerman bring this putative class action against Nestle Healthcare Nutrition, Inc. based on their purchases of BOOST Kid Essentials ("BKE"), a Nestle product.

In January 2008, Nestle began marketing BKE, a drink promoted as having a variety of health benefits for children. Plaintiffs are parents who purchased BKE for their children based on these purported health benefits.

The Complaint alleges that Nestle promoted BKE in a variety of media outlets to both parents and pediatricians as having "clinically shown" health benefits for children.[2] Plaintiffs argue that the claims of health benefits were deceptive or misleading and were designed to lure consumers into purchasing BKE.

Nestle made specific claims about that health benefits of BKE, including that BKE: (1) prevents upper respiratory tract infections in children; (2) strengthens the immune system; (3) protects against cold and flu; (4) reduces the duration of bouts of diarrhea; and (5) reduces absences from school or day care due to illnesses. These claims appear to have been made in a variety of national marketing materials, including a television commercial. The BKE label also represented that the product provided "immunity protection."

In 2010, Nestle settled a lawsuit filed by the Federal Trade Commission ("FTC") and related to Nestle's representations about the benefits of BKE. The FTC alleged in its complaint that "clinical studies do not prove that drinking [BKE] reduces the general incidence of illness in children, including respiratory tract infections, reduces the duration of acute diarrhea in children

[2] (Cmplt. ¶ 20)

up to the age of thirteen, strengths the immune system, thereby providing protection against cold and flu viruses."[3] Accordingly, the FTC alleges that Nestle's representations "were, and are, false and misleading."[4]

The consent order the parties entered into ended the case and directed Nestle to take the following steps over the course of the next 20 years: (1) not to make any representations that BKE "prevents or reduces the risk of upper respiratory tract infections, including, but not limited to, cold or flu viruses, unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990;" (2) not to make any representations that BKE "[r]educes the duration of acute diarrhea in children up to the age of thirteen; or reduces absences from daycare due to illness unless the representation is non-misleading and, at the time of making such representation, the respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true;" and (3) not to "misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study or research;" and (4) not to make an representations about the health performance, benefits, and efficacy of BKE unless based upon competent and reliable scientific evidence.[5]

Plaintiff Maria Johnson filed suit against Nestle in this Court on July 22, 2010. Plaintiff Kurt Scheuerman filed suit in New Jersey state court on September 26, 2010, and Nestle

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[3] (Cmplt. ¶ 36) (quoting from FTC Cmplt.)

[4] Id.

[5] (Cmplt. ¶ 39) (quoting from the FTC Consent Order)

removed the action to this Court on October 28, 2010. On December 10, 2010, Plaintiffs filed the Consolidated Class Action Complaint, alleging claims on behalf of a putative class under the New Jersey Consumer Fraud Act and for negligent misrepresentation and breach of warranty.

DISCUSSION

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

While courts must generally accept Plaintiff's factual allegations as true, they are also entitled to consider documents "integral to" the complaint. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). Additionally, courts may review documents explicitly relied on or incorporated by reference in the pleading. Id.

I. NEW JERSEY CONSUMER FRAUD ACT CLAIM

A. Choice of Law

Plaintiffs sue under the laws of the state of New Jersey, where Nestle Healthcare Nutrition has its principal place of business. Nestle argues that the laws of Plaintiffs' home states – California for Plaintiff Johnson and Pennsylvania for Plaintiff Scheuerman – should apply and, as a result, the New Jersey Consumer Fraud Act ("NJCFA") claim should be dismissed.

In diversity cases, courts apply the choice of law rules of the forum state, including its

choice of law rules. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941); see also Thabault v. Chait, 541 F.3d 512, 535 (3d Cir.2008).

New Jersey adheres to the "most significant relationship" test, as articulated in the Restatement (Second) of Conflict of Laws (1971), in resolving conflict disputes. P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 135-36 (2008).

"Under the first step of the analysis, the court must determine whether an actual conflict exists between the laws of the [relevant] states.... The second step is to weigh the factors in the Restatement corresponding to the plaintiff's cause of action." Cooper v. Samsung Electronics America, Inc., 374 Fed.Appx. 250, 254 (3d Cir. 2010). In fraud and misrepresentation cases, the relevant "point of departure for the second step of the choice-of-law inquiry is the Restatement (Second) of Conflict of Laws § 148." Id. at 254-55. Under subsection (2), the following contacts must be weighed:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
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> (b) the place where the plaintiff received the representations,
>
> (c) the place where the defendant made the representations,
>
> (d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
>
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
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> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Id. at 255 (quoting Restatement (Second) of the Conflict of Laws § 148(2)).

Here, the first step of the analysis is not in dispute. The parties agree that the consumer

fraud statutes of the states of New Jersey, California and Pennsylvania conflict.

Weighing the factors set forth in the Restatement favors the application of California law to Plaintiff Johnson's claim and of New Jersey law to Plaintiff Scheuerman's claim, if he is able to substantiate his allegations that he purchased BKE in New Jersey.

Some of the Restatement factors are common to both Plaintiffs. Specifically, Defendant Nestle is headquartered in New Jersey, and the marketing campaign and product design from which the alleged misrepresentations originated were developed in New Jersey.

1. Restatement Factors as Applied to Johnson

Plaintiff Johnson is a resident of California and appears to received the alleged misrepresentations and to have purchased BKE there. See Cmplt. ¶ 5. Accordingly, the only connection between Johnson's claims and the state of New Jersey is Nestle's presence in the state.

Courts in this district have split over the application of the "most significant relationship" test in circumstances such as these.

Plaintiffs rely on two relevant cases: In re Mercedes Benz Tele Aid Contract Litigation, 257 F.R.D. 46 (D.N.J. 2009), and Dal Ponte v. American Mortgage Express Corporation, No. 04-2152 (JEI), 2006 WL 2403982 (D.N.J. Aug. 17, 2006).[6] In both cases, the courts certified

[6] Plaintiff also relies on two cases which are not on point and thus do not weigh on this Court's analysis. In International Union of Operating Engineers Local # 68 Welfare Fund v. Merck & Co., Inc., 384 N.J. Super. 275 (App. Div. 2006), the court applied New Jersey law where "New Jersey's contacts with this dispute are both extensive and weighty," in part because "the plaintiff class representative [is] organized and operating in New Jersey." Id. at 297. Here, Johnson has no connection to New Jersey. Plaintiff also cites to O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266 (D.N.J. 2003). There, the court applied Pennsylvania choice of law rules to conclude that New Jersey law "may" apply to the class consumer fraud claims. Id. at 274 n.3. The court did not discuss the contacts of any of the various class members with New Jersey.

classes of consumers asserting NJCFA claims based on the presence in New Jersey of the defendant corporations and the fact that the alleged fraud was carried out by employees acting in New Jersey. See id. Each of the Mercedes Benz and Dal Ponte courts emphasized the policy goals of the New Jersey state legislature in enacting the NJCFA in reaching their decision. See Mercedes Benz, 257 F.R.D. at 67-68; Dal Ponte, 2006 WL 2403982, at *6-7.

More recently, however, courts have required more than the mere presence of the defendant in New Jersey in order to allow plaintiffs to take advantage of the NJCFA. Courts have repeatedly held that the mere fact that a defendant is headquartered in New Jersey is insufficient basis upon which to apply New Jersey law.

In Cooper, the Third Circuit weighed in on this issue, albeit in an unpublished opinion.[7] There, the court considered a NJCFA claim brought by the purchaser of a defective television. 374 Fed. Appx. at 251-52. The plaintiff "purchased the television in his home statute of Arizona." Id. at 255. The Third Circuit concluded that plaintiff was "not entitled to sue under the New Jersey consumer fraud statute" because "the transaction in question bears no relationship to New Jersey other than the location of Samsung's headquarters. Cooper's claim

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See id.

[7] Though Cooper is nonprecedential, this Court looks to it for guidance as to the application of Third Circuit precedents in this area. See e.g., United States v. Mosley, 454 F.3d 249, 256 (3d Cir. 2006) (noting that "the recently adopted amendment to Fed. R. App. Proc. 32(a)," which permitted the citation of unpublished opinions, "confirms the utility of looking to unpublished cases to determine how precedential cases are applied"); United States v. Payne, 591 F.3d 46, 58 (2d Cir. 2010) (noting that "denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases"); Harris v. United Fed'n of Teachers, New York City Local 2, No. 02 Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002) (finding an unpublished appellate opinion "highly persuasive" and "eminently predictive of how the Court would in fact decide a future case such as this one").

bears the most significant relationship with Arizona, the state in which the television was marketed, purchased, and used."[8] Id.

The reasoning in Cooper is consistent with that adopted by other courts in this district. In Crete v. Resort Condominiums Int'l, LLC, No. 09-5665, 2011 WL 666039 (D.N.J. Feb. 14, 2011), the court dismissed plaintiffs NJCFA claim where:

> outside of Plaintiffs's allegations with respect to Defendants' corporate ties to New Jersey, Plaintiffs have failed to establish the connection this dispute maintains with New Jersey. Ms. Crete is from Vermont. Mr. Giustiniani [*16] is from New York. The incidents in question took place in the Dominican Republic. The facts of this case do not involve New Jersey

Id. at *5. Similarly, in Heindel v. Pfizer Inc., 381 F. Supp. 2d 364 (D.N.J. 2004), the court held that New Jersey law did not apply in a consumer products liability action where, inter alia, "some corporate and marketing functions" took place in New Jersey but the products "were marketed, advertised, distributed, prescribed, and purchased" in another state. Id. at 378.

This Court is persuaded by the reasoning of Cooper and the line of cases finding that the mere presence of a defendant corporation and the accompanying corporate activities in New Jersey is insufficient to make New Jersey the state with the most significant relationship to a consumer fraud action. To hold otherwise would permit any plaintiff, regardless of their ties to New Jersey, to avail themselves of New Jersey's comprehensive consumer fraud law.

Here, Johnson resides in California, was exposed to promotion and marketing for BKE in California, purchased and used BKE in California and, presumably, suffered an injury that resulted in California. Accordingly, California is the state with the most significant interest in

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[8] The Cooper court also concluded that the district court's resolution of the choice of law issue at the motion to dismiss stage, rather than at the class certification stage, was appropriate. 374 Fed. Appx. at 255 n. 5.

the resolution of Johnson's claims, and Johnson's NJCFA claim is dismissed. Johnson may seek permission to amend her Complaint should she seek to assert a consumer fraud claim under California law.

2. Restatement Factors as Applied to Scheuerman

Plaintiff Scheuerman is a resident of Pennsylvania who claims to have received the alleged misrepresentations and to have purchased BKE in both Pennsylvania and New Jersey.[9] See Cmplt. ¶ 6.

Here, Nestle's contacts with New Jersey are not the only relevant contacts with the state. Scheuerman claims that he was a consumer in New Jersey and claims to have been defrauded in New Jersey[10] – in addition to Nestle's headquarters being in New Jersey and to the company engaging in corporate activities in the state – New Jersey is the forum with the most significant relationship to his claim. Accordingly, Scheuerman has plead his consumer fraud claim under the relevant New Jersey statute. As this case progresses, it will be his burden to prove that he was a consumer of BKE in New Jersey.

B. Sufficiency of Scheuerman's NJCFA Allegations

Nestle also seeks dismissal of Scheuerman's NJCFA claim for failure to state a claim.

To state a claim under the NJCFA, a plaintiff must adequately allege: 1) unlawful conduct

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[9] The Complaint pleads that Scheuerman, a resident of Elkins Park, Pennsylvania, which is just over the New Jersey border, "regularly purchased the BOOST Kid Essentials drink at various retail outlets in Pennsylvania and New Jersey." Cmplt. ¶ 6. The allegations in the Complaint that Scheuerman is a New Jersey consumer of BKE are minimally specific in nature.

[10] Because Scheuerman lives in Pennsylvania and purchase BKE there, Nestle is entitled to test the proofs behind Scheuerman's claim that he is a New Jersey consumer. If these proofs do not appear to be sufficient, Nestle may renew its application to apply Pennsylvania law to Scheuerman's claims in an appropriately timed summary judgment motion.

by the defendant; 2) an ascertainable loss to the plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss. Bosland v. Wardock Dodge, Inc., 197 N.J. 543, 557 (2009).

Because NJCFA claims are grounded in allegations of fraud, plaintiffs seeking relief under the statute must satisfy the requirements of Fed. Rule Civ. P. 9(b), which 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). This rule "requires, at a minimum, that plaintiffs support their allegations of [] fraud with all of the essential factual background that would accompany 'the first paragraph of any newspaper story' – that is, the 'who, what, when, where and how' of the events at issue." In re Alpharma Inc. Sec. Litig., 372 F.3d at 148 (quoting In re Rockefeller Center Properties, Inc. Sec. Litig., 311 F.3d 198, 217 (3d Cir. 2002)).

1. Unlawful Conduct

Unlawful practices under the NJCFA fall into three general categories: (1) affirmative acts, (2) knowing omissions, and (3) regulation violations. Frederico v. Home Depot, 507 F.3d 188, 202 (3d Cir. 2007). If the unlawful practice in question is an affirmative action, proof of intent is not required; if the unlawful practice is an omission, intent is a necessary element. See Torres-Hernandez v. CVT Prepaid Solutions, Inc., No. 08 Civ. 1057, 2008 WL 5381227, at *6 (D.N.J. Dec.17, 2008).

Scheuerman alleges that Nestle knowingly misrepresented the health properties of BKE on its packaging and in print and television advertisements. The Complaint also sets forth in detail how and why the representations at issue were false. At the motion to dismiss stage, this is

sufficient to allege unlawful conduct under the NJCFA.[11]

2. Ascertainable Loss

An ascertainable loss is a loss that is "quantifiable or measurable," rather than "hypothetical or illusory." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248 (2005). "[E]ither out-of-pocket loss or a demonstration of loss in value will suffice to meet the ascertainable loss hurdle." Id.

Scheuerman alleges that he would not have purchased BKE but for Nestle's misrepresentations about its health benefits. Scheuerman also argues that even if he purchased a similar product to BKE, he would have purchased a less expensive alternative in the absence of Nestle's claims. These allegations are sufficient to sustain Scheuerman's NJCFA claim at the motion to dismiss stage.[12] See e.g., Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496, 528 (2010)

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[11] Nestle relies upon Nelson v. Xacta 3000, Inc., No. 08 Civ. 5426 (MLC), 2009 U.S. Dist. LEXIS 109580 (D.N.J. Nov. 23, 2009), which is inapposite. There, the court dismissed plaintiff's NJCFA claim for failure to adequately plead unlawful conduct because the complaint did not set forth what the "allegedly 'misleading themes and representations' in the company's advertising and packaging were, nor what "material facts" the company failed to disclose. Id. at *11-12. The same cannot be said of the Complaint in the instant action, which elaborates extensively on what representations are at issue and the basis upon which Plaintiffs believe those representations are false.

[12] Nestle argues that Scheuerman's claims of ascertainable loss are not sufficiently specific. The cases upon which Nestle relies, however, do not support dismissal here. In Solo v. Bed Bath & Beyond, Inc., No. 06 Civ. 1908 (SRC), 2007 U.S. Dist. LEXIS 31088 (D.N.J. Apr. 26, 2007), the plaintiff alleged that the sheet set he purchased was advertised as having "a 1000 Thread Count" but actually "had a thread count of only 492." Id. at *9-11. The court found that the bare allegations in the complaint did not suffice to plausibly allege that this difference in thread count represented a loss of quality that resulted in ascertainable loss to the plaintiff. Id. Here, however, Scheuerman has alleged that Nestle claimed BKE had several health benefits which it did not in fact provide, a loss of value, however minimal. Nestle also cites to Mason v. Costco Wholesale Corporation, No. 09 Civ. 361 (JLL), 2009 U.S. Dist. LEXIS 76176 (D.N.J. Aug. 25, 2009), in which the plaintiff, a Costco member, alleged that Costco had violated the NJCFA by making representations about the benefits of its Auto Program. Id. at *2-4. The

(finding that "the ascertainable loss here is the purchase price of a bottle of broken promises" and concluding that "[e]ach purchase of [the product at issue] – not refunded – is an out-of-pocket loss").

3. Causation

To establish causation, a consumer merely needs to demonstrate that he or she suffered an ascertainable loss "as a result of" the unlawful practice. N.J.S.A. 56:8-19; see also Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988).

Scheuerman alleges that he "saw and relied on" the alleged misrepresentations made by Nestle in its advertising and packaging when he "regularly" purchased BKE for his children.[13] Nestle suggests that in the absence of allegations that Scheuerman saw specific misrepresentations at particular times and in particular places, his NJCFA claim cannot be sustained. This position is not supported by the case law. Indeed, when a company is accused of false advertising, "a trier of fact may fairly infer that a consumer purchasing the product was influenced, in some way or other, by the false-marketing scheme. When all the representations about the product are baseless, a trier of fact may infer the causal relationship between the unlawful practice – the multiple deceptions – and the ascertainable losses, the purchases of the

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Mason court found that Costco's representations about the benefits of the program were not false because "[t]he facts as plead demonstrate a quick, no-haggle, no-hassle experience, saving [the plaintiff] time," id. at *12, and because the plaintiff had "not alleged any facts to support that her loss, paying more than $ 500 over invoice [for the purchase of a car], was related to the conduct by Costco she alleges was unlawful or that her loss was caused by Costco rather than the dealer or her own actions." Id. at *17-18. The holding of Mason is wholly inapplicable here, where Scheuerman has alleged that Nestle made representations that turned out to be false and that made the product he purchased of less or no value to him.

[13] Cmplt. ¶ 6.

worthless product." Lee, 203 N.J. at 527-28. Here, the extensive allegations in the Complaint about the falsity of Nestle's representations, coupled with Scheuerman's allegation that he repeatedly purchased BKE in reliance on those representations, is sufficient to allow the NJCFA claim to proceed.[14]

II. NEGLIGENT MISREPRESENTATION

Though it submitted fifty-five pages of briefing on this motion, Nestle mentions Plaintiffs' claim for Negligent Misrepresentation only in passing. While Nestle claims to seek dismissal of the claim, it fails to discuss even the elements of a negligent misrepresentation claim under New Jersey law – or the law of either California or Pennsylvania, the states whose law Nestle seeks to have applied here. Because Nestle has not identified a single element of Plaintiffs' negligent misrepresentation claim that is inadequately pled, its motion to dismiss this claim is denied at this time. Nestle may make an appropriately timed summary judgment motion as to this claim.

III. BREACH OF WARRANTY

Nestle claims that Plaintiffs have failed to state a breach of warranty claim under the any

[14] The case relied upon by Nestle, Dewey v. Volkswagon AG, 558 F. Supp. 2d 505 (D.N.J. 2008), is not to the contrary. There, multiple groups of plaintiffs brought suit, and one set's NJCFA claim was dismissed because they presented only a conclusory allegation that misrepresentations on Volkswagon's website and in the owner's manual caused them to purchase a car. Id. at 526-27. The court found that without an indication that the representations had been made around the time of the purchase or that the plaintiffs had actually read the website or the manual, the claim could not proceed. Id. Here, by contrast, Nestle does not appear to contest the timing of the representations, and Scheuerman alleges they were prominently displayed on the packaging of BKE, which he was surely exposed to as an allegedly regular purchaser of the product.

of the potentially applicable states' laws.[15]

New Jersey law "explains that a seller creates an express warranty through an affirmation of fact or promise to the buyer which relates to the goods and becomes part of the basis of the bargain. The seller does not have to use formal words such as 'warrant' or 'guarantee,'" in order to create such a bargain. Newman v. Axiom Worldwide, No. 06 Civ. 5564 (WHW), 2010 U.S. Dist. LEXIS 53731, at *9-10 (D.N.J. June 2, 2010) (citing N.J. Stat. § 12A:2-313 (2010); Cipollone v. Liggett Group, Inc., 893 F.2d 541, 574 (3d Cir. 1990)).

"[T]o prevail on a breach of express warranty claim [under California law], the plaintiff must prove (1) the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached." Weinstat v. Dentsply Internat., Inc., 180 Cal. App. 4th 1213, 1227 (Cal. App. 1st Dist. 2010) (internal quotations omitted).

Pennsylvania law provides that:

a seller issues a warranty under the following circumstances:

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[15] Each of New Jersey, California and Pennsylvania's express warranty statutes is based on the Uniform Commercial Code. See Cipollone v. Liggett Group, Inc., 893 F.2d 541, 563 (3d Cir. 1990); Weinstat v. Dentsply Internat., Inc., 180 Cal. App. 4th 1213, 1227 (Cal. App. 1st Dist. 2010); Woolums v. Nat'l RV, 530 F. Supp. 2d 691, 696 (M.D. Pa. 2008). However, as a court in this district recently acknowledged, "[s]tate laws regarding breach of express and implied warranty also differ greatly with regard to '(1) whether plaintiffs must demonstrate reliance, (2) whether plaintiffs must provide notice of breach, (3) whether there must be privity of contract, (4) whether plaintiffs may recover for unmanifested...defects, (5) whether merchantability may be presumed and (6) whether warranty protections extend to used [goods].'" Payne v. FujiFilm U.S.A., Inc., No. 07-385 (GEB), 2010 U.S. Dist. LEXIS 52808, at *27 (D.N.J. May 28, 2010) (quoting Cole v. GMC, 484 F.3d 717, 726 (5th Cir. 2007)). Because Nestle seeks to dismiss Plaintiffs' breach of warranty claim without regard to which state's law applies, this Court need not conduct a full choice of law analysis as to this claim at this time.

> (1) 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.
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> (2) 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.

Woolums v. Nat'l RV, 530 F. Supp. 2d 691, 696 (M.D. Pa. 2008).

A. Warranty

Nestle argues that Plaintiffs have failed to set forth a specific warranty on which they relied and a basis for believing that that warranty was breached. Plaintiffs contend that Nestle represented that BKE had "clinically shown" health benefits and allege, with reference to particular evidence, that scientific studies do not support that conclusion. This is sufficient to allege the existence of a warranty – that BKE had clinically shown health benefits for children – and a plausible claim that the warranty was breached.

B. Reliance

Nestle also argues that Plaintiffs have not adequately plead reliance on any particular warranty made by the company. As set forth above, Plaintiffs allege that they saw and relied on the representations made in Nestle's advertising and BKE packaging in making their decision to purchase BKE. Taking this allegation as true, as this Court must do on a motion to dismiss, satisfies the reliance element of a breach of warranty claim.[16] See Gladden v. Cadillac Motor Car Div., General Motors Corp., 83 N.J. 320, 325 (1980) ("Particular reliance on such statements of

[16] The cases upon which Nestle relies find no material issue of fact as to reliance at the summary judgment stage, which is a fundamentally different inquiry than that before this Court. See Jeter v. Brown & Williamson Tobacco Corp., 113 Fed. App'x 465 (3d Cir. 2004); Visual Communs., Inc. v. Konica Minolta Bus. Solutions U.S.A., Inc., 611 F. Supp. 2d 465 (E.D. Pa. 2009).

description or quality need not be shown and the warranty issue will be normally a factual one.") (citing N.J.S.A. 12A:2-313, Comment 3).

CONCLUSION

For the reasons set forth above,

IT IS on this 1st day of August, 2011,

ORDERED that Defendant Nestle Healthcare Nutrition, Inc.'s Motion to Dismiss the Consolidated Class Action Complaint is **GRANTED** in part and **DENIED** in part; and it is further

ORDERED that Plaintiff Johnson's claim pursuant to the New Jersey Consumer Fraud Act is dismissed; and it is further

ORDERED that all other claims asserted in the Consolidated Class Action Complaint will proceed.

The Clerk of the Court is directed to terminate the motion: Civil Action No. 10-3684, Docket No. 32.

/s/ Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.