IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTENT, LAW DIVISION

Richard Bukowski and Gayle Bukowski,)
)
Plaintiffs,)
)
v.)
) No. 19 L 10529
Philip Morris USA, Inc., R.J. Reynolds)
Tobacco Company, Liggett Group, LLC,)
and Walgreen, Co.,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

Motions to dismiss require a court to read all well-pleaded allegations in favor of the non-moving party. The defendants have brought a variety of motions challenging the pleading sufficiency of the plaintiffs' first amended complaint. As explained below, some of the motions are well taken, while others are not; consequently, the defendants' motions are granted in part and denied in part.

Facts

Beginning around 1960, Richard Bukowski started smoking cigarettes. Over the years, Richard smoked various brands manufactured by Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, and Liggett Group, LLC (the "manufacturing defendants"). Richard eventually quit smoking in 2005. During the 45 years that Richard smoked, he purchased cigarettes from Walgreen.

In 2017, doctors diagnosed Richard with tongue cancer. Sometime thereafter, Richard became aware this his tongue cancer was related to his years of smoking. Armed with that knowledge, on September 24, 2019, Richard and his spouse, Gayle, filed a complaint

against the defendants, and on December 11, 2019, filed a first amended complaint.

The current complaint alleges that the manufacturing defendants designed, manufactured, advertised, marketed, distributed, and sold the cigarette brands Richard smoked. They are alleged, among other things, to have had knowledge that: (1) smoking increased the risk of cancer and other diseases; (2) the diseases were more likely to occur in persons who began smoking at an early age; (3) the use of tobacco was addictive and difficult to stop; (4) there were feasible alternatives in the design, composition, and manufacture of cigarettes to decrease the foreseeable risk to consumers; and (5) the Federal Trade Commission's method of measuring tar and nicotine did not accurately reflect the levels contained in cigarettes. For its part, Walgreen is alleged to have distributed and sold to Richard the manufacturing defendants' cigarette brands that are related to his injuries.

Based on these allegations, the Bukowskis raise nine causes of action. The first six counts are against the manufacturing defendants. Counts one and two are for negligence and strict products liability, respectively, and are not the subject of any defendant's motion to dismiss. Counts three and five present fraud claims – count three, fraudulent concealment; count five, fraudulent misrepresentation – while counts four and six present conspiracy theories related to the fraud claims – count four, conspiracy to commit fraudulent concealment; count six, conspiracy to commit fraudulent misrepresentation.

As to count three – fraudulent concealment – the Bukowskis allege the manufacturing defendants carried out and continue to carry out a campaign to deceive the public, including Richard, as to the dangers of cigarette smoking. They pursued this goal by concealing and suppressing facts, including their own research, about the health dangers of smoking, including addiction. The Bukowskis present various examples of information allegedly suppressed by the manufacturing defendants as early as 1953. The Bukowskis also cite to correspondence and internal documents indicating that the

manufacturing defendants knew of the dangers of cigarette smoking, including addiction and cancer. There are allegations that the manufacturing defendants concealed this information to induce Richard and others to smoke, fail to quit, or not reduce consumption. The Bukowskis also allege that, had this information not been concealed, Richard would not have started smoking, would have reduced his consumption over the years, or quit earlier.

As to count four – conspiracy to commit fraudulent concealment – the Bukowskis allege that the manufacturing defendants, along with the Tobacco Institute, the Tobacco Industry Research Committee, and the Council for Tobacco Research as well as their attorneys, unlawfully agreed to conceal or omit and did conceal and omit information regarding the health effects of cigarettes and their addictive nature with the intent that smokers, including Richard, would rely on this information to their detriment. The manufacturing defendants' conspiratorial acts included: (1) marketing filtered, low-tar, and ultra-light cigarettes as less hazardous to smokers' health; (2) continuing to market these types of cigarettes with different monikers after the 2010 federal ban on the use of "lights," "mild," and "low" tar descriptors; and (3) knowingly concealing from the public that filtered, low-tar, and ultra-light cigarettes were not safer than other cigarettes. Richard heard some or all of these false and misleading statements and relied on them to his detriment by continuing to smoke. The Bukowskis further allege that had the manufacturing defendants and their co-conspirators not concealed or omitted the information noted above, Richard would not have started smoking, would have reduced his consumption, or stopped smoking earlier; therefore, his risk of injury would have been reduced or eliminated. The Bukowskis allege that each of the manufacturing defendants' acts and omissions, along with their co-conspirators, constitute a successful conspiracy to commit fraud.

Count five – fraudulent concealment – alleges that the manufacturing defendants and their co-conspirators have and are continuing to carry out a campaign to deceive the public, including Richard, as to the health hazards of smoking. These public misrepresentations number in the hundreds made over the last 50

years and include: (1) agreeing to represent falsely that questions about smoking would be answered by an unbiased and trustworthy source; (2) misrepresenting that there existed insufficient research to determine if cigarettes cause disease; (3) using attorneys to misdirect what purported to be objective scientific research; (4) conducting scorched earth litigation tactics to discourage litigation and to distort evidence; and (5) designing and marketing "light," "mild," "low-tar," and filtered cigarettes as safer alternatives despite knowing that they were not. The Bukowskis allege that the manufacturing defendants made these misrepresentations knowing of their falsity and in reckless disregard for the truth. The manufacturing defendants made the false statements to induce Richard to rely on them and, therefore, smoke, fail to quit, or reduce consumption. Richard heard some or all of the false and misleading statements and believed some or all of them to his detriment. Had the manufacturing defendants not made these statements, Richard would not have started smoking or would have reduced the amount of cigarettes that he consumed, or stopped smoking at an earlier age. As a result of making these false and misleading statements and Richard's reliance on them, he started and continued to smoke, leading to his injuries, including tongue cancer.

Count six – conspiracy to commit fraudulent misrepresentation – is similar to count four in that the Bukowskis allege that the manufacturing defendants, along with their co-conspirators unlawfully agreed to make false statements or fraudulent misrepresentations concerning the health effects of cigarettes and their addictive nature with the intent that smokers, including Richard, would rely on this information to their detriment. The conspiracy to make these material, false, and misleading statements continued for decades. Richard heard and relied to his detriment on these false statements and fraudulent misrepresentations. Had the manufacturing defendants and their co-conspirators not made these statements, Richard would not have started smoking or would have reduced his consumption or stopped smoking at an earlier age. As a direct result of the conspiracy, Richard smoked and continued to smoke the manufacturing defendants' cigarette products that caused his injuries, including tongue cancer.

Count seven – negligence – is predicated on Walgreen's broad knowledge that cigarettes are a dangerous product and that Walgreen participated in the tobacco industry's created controversy to dispute the harmful effects of tobacco products. Various communications between Walgreen and co-conspirators memorialize Walgreen's knowledge and participation in this controversy. Armed with that knowledge, Walgreen owed Richard a duty not to sell a defective and dangerous product, a choice that had been made by other retailers, including CVS and Target. Walgreen breached its duty by placing into the stream of commerce a product that Walgreen knew was unreasonably dangerous and defective when put to the use for which it was designed, manufactured, distributed, marketed, and sold. Had Walgreen not sold Richard cigarettes that Walgreen knew were unreasonably dangerous and defective, he would not have started smoking, smoked less, or would have stopped at an earlier age. Walgreen's sale of cigarettes proximately caused Richard's injuries, including tongue cancer.

Count eight – strict liability – is also predicated on Walgreen's knowledge of the unreasonably dangerous nature of cigarettes and their defective condition as well as Walgreen's continued sales of cigarettes to Richard. Walgreen sold cigarettes despite its actual knowledge that: (1) tobacco products contained tar, nicotine, toxic gases, additives, ingredients, and other carcinogens that are poisonous and highly unsafe when put to use in a reasonably foreseeable way considering the nature and function of cigarettes; (2) the use of filters and manufacturing and engineering methods made cigarettes more tasteful and pleasurable and less likely to trigger a smoker's self-defense mechanisms to alter behavior; (3) cigarettes were an unreasonably dangerous product and not suitable for the uses intended and were defective; (4) cigarettes failed to perform as safely as an ordinary consumer would expect when used in the manner reasonably foreseeable by Walgreen; and (5) the risk of danger of cigarettes outweighed the benefits. As a result of the sale of an unreasonably dangerous product by Walgreen and Richard's purchase and consumption of them, Richard suffered injuries, including tongue cancer.

Count nine – loss of consortium – is brought on Gayle's behalf as a derivative cause of action directed against each of the defendants.

In late 2019, the defendants presented motions to dismiss the complaint. Rather that issue a briefing schedule at that point, this court offered the Bukowskis the opportunity to file an amended complaint to rectify what this court saw as various factual gaps in the pleading. The Bukowskis took advantage of that opportunity, and on December 11, 2019 filed a first amended complaint. Philip Morris and R.J. Reynolds renewed their positions by filing a joint, partial motion to dismiss counts three through six. Liggett Group LLP joined in that motion. Walgreen also filed its own combined motions to dismiss counts seven through nine. The parties then filed the appropriate response and reply briefs.

Analysis

I. Walgreen's Motions

A. Section 2-621 Motion To Dismiss Count Eight – Strict Liability

A cause of action for strict liability based on a product defect consists of the following elements: "(1) a condition of the product as a result of manufacturing or design, (2) that made the product unreasonably dangerous, (3) and that existed at the time the product left the defendant's control, and (4) an injury to the plaintiff, (5) that was proximately caused by the condition." *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 543 (2008). A plaintiff has the burden of proving each element. *Id.* Each entity in the distributive chain – including manufacturers, supplies, distributors, wholesalers, and retailers – is potentially liable for injuries resulting from a defective product. *See Cassidy v. China Vitamins, LLC*, 2017 IL App (1st) 160933, ¶ 19

(citing *Hammond v. North Am. Asbestos Corp.*, 97 Ill. 2d 195, 206 (1983)).

The Code of Civil Procedure provides a non-manufacturing defendant in a strict products lawsuit with a potential means of escaping liability. Under the so-called "seller's exception," a non-manufacturing defendant may be dismissed if it files an affidavit certifying the correct identity of the product manufacturer. *See* 735 ILCS 5/2-621(a). If a non-manufacturing defendant complies with the statutory requirements, the circuit court must dismiss that party from the lawsuit. *See Lamkin v. Towner,* 138 Ill. 2d 510, 532 (1990).

The seller's exception is, itself, subject to three exceptions. A plaintiff may defeat the seller's exception by showing one of the following:

> (1) That the defendant has exercised some significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or
> (2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or
> (3) That the defendant created the defect in the product which caused the injury, death or damage.

735 ILCS 5/2-621(c)(1)-(3). In this instance, the parties do not contest the first and third exceptions; consequently, the sole focus is whether the Bukowskis have sufficiently pleaded a cause of action based on Walgreen's alleged actual knowledge of the defect in co-defendants' cigarettes sold at Walgreen's stores.

The law governing the answer to this issue is found in *Murphy v. Mancari's Chrysler Plymouth, Inc.,* 381 Ill. App. 3d 768 (1st Dist. 2008). The *Murphy* court considered whether the actual-knowledge-of-the-defect exception required knowledge of the characteristics of the product or that such characteristics made the product dangerous. *See id.* at 772. The court conducted a statutory

interpretation of the section, including an examination of the legislature's intent and various definitions of the word "defect." *See id.* at 774-75. Based on that analysis, the court concluded that:

> the obvious interpretation of section 2-621(c)(2) requires a plaintiff to show that a presumptively dismissed defendant had actual knowledge of the unreasonably dangerous nature of the physical characteristics/design of the product, not just actual knowledge that the physical characteristics/design existed in order to avoid dismissal of that defendant.

Id. at 775.

The first amended complaint alleges that Walgreen had knowledge superior to that of the average consumer with regard to the dangers of cigarettes. First Amd. Cmplt. ¶ 161.[1] Such a statement actually alleges too much. According to *Murphy*, the standard is not whether Walgreen had superior knowledge, but whether it had actual knowledge of the product's dangerous nature. As to that standard, the complaint alleges that Walgreen had a "broad range of knowledge about the components of cigarette smoke and how those components were unreasonably dangerous to its consumers. . . ." *Id.* ¶ 160. The Bukowskis further allege that as early as 1977, Walgreen knew the tobacco industry had created a controversy to dispute the harmful effects of tobacco products. *Id.* ¶ 168. The Bukowskis further cite specifically to communications between Walgreen, tobacco industry executives, and the Tobacco Institute that raise a fair inference that Walgreen had actual knowledge of the dangers of cigarettes. *Id.* ¶¶ 168-79. Some, all, or none of these allegations may prove to be true, untrue, or somewhere in the middle, but that is for discovery, not a motion to dismiss based on the sufficiency of a complaint's allegations.

Walgreen's legal argument that "Illinois law is clear that Plaintiffs cannot make a 'showing' with mere allegations" is, of

[1] Each allegation cited in this paragraph comes from count 7 – negligence – but is incorporated into count 8 – strict liability. *See* First Amd. Cmplt. ¶ 185.

course, incorrect. Reply Br. at 1 (citing *Logan v. West Coast Cycle Supply Co.*, 197 Ill. App. 3d 185, 191-92 (2d Dist. 1990)). *Logan* addressed the evidentiary support needed to reinstate a previously dismissed defendant, *see id.*, not the dismissal of a party in the first instance. Apart from that legal distinction, *Murphy* is a far more recent decision than *Logan* and sets out the specific standards applicable to a section 2-621(c)(2) motion to dismiss. In sum, the Bukowskis' allegations are sufficient to trigger the section 2-621(c)(2) exception; consequently, Walgreen's motion to dismiss count eight must be denied.

B. Section 2-615 Motion To Dismiss Count Seven – Negligence

A section 2-615 motion to dismiss attacks a complaint's legal sufficiency, *see DeHart v. DeHart*, 2013 IL 114137, ¶ 18, and a court considering such a motion is to consider only the allegations presented in the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). All well-pleaded facts and reasonable inferences arising from them must be accepted as true, *see Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, *see Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action for which relief may be granted. *See Bonhomme v. St. James*, 2012 IL 112393, ¶ 34.

To plead a legally recognized cause of action for negligence in tort, a plaintiff must allege facts, not conclusions, which, if proven, would establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; (3) the breach proximately caused an injury; and (4) the plaintiff suffered that injury. *See Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011) (citing *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007)). That is all a plaintiff is required to do at the pleading stage of the case. In contrast, Walgreen's section 2-615 motion attempts to set a pleading standard that does not comport with Illinois law.

Under Walgreen's standard, the Bukowskis would, in essence, have to prove their case at the pleading stage; that is simply not the law. Count seven alleges that Walgreen had a broad range of knowledge about the dangers associated with smoking cigarettes. First Amd. Cmplt. ¶ 160. The Bukowskis further allege that, armed with that knowledge, Walgreen had a duty to use reasonable care not to place into the stream of commerce a known dangerous and defective product. *Id.* ¶ 181. Walgreen breached that duty by continuing to sell cigarettes. *Id.* ¶ 182. But for Walgreen selling cigarettes, Richard would not have started smoking, smoked less, or stopped at an earlier age. *Id.* ¶ 183. As a result of Walgreen's negligence in continuing to sell cigarettes, Richard developed tongue cancer and other injuries and Gayle suffered a loss of consortium. *Id.* ¶¶ 184 & 191.

The Bukowskis' allegations and the inferences they raise are on their face sufficient to plead the four elements of a negligence cause of action. It bears repeating that, through the course of discovery, these allegations may prove to be true, untrue, or somewhere in the middle. That determination is, however, properly made through a summary judgment motion, not a section 2-615 motion to dismiss. Walgreen's motion must be denied.

C. 2-619 Motion to Dismiss – Federal Preemption

A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co.*, 159 Ill. 2d at 485. The motion must be directed against an entire claim or demand. *See id.* A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true, *see Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995), and in the light most favorable to the nonmoving party. *See Porter v. Decatur Mem'l Hosp.*, 227 Ill. 2d 343, 352 (2008). At bottom, "[t]he purpose of a section 2-

619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

One of the enumerated grounds for a section 2-619 motion is the introduction of "affirmative matter" that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. A statute is considered affirmative matter for purposes of a section 2-619 motion to dismiss. *See, e.g., Armagan v. Pesha*, 2014 IL App (1st) 121840, ¶ 38 & ftn. 1 (statue of frauds is affirmative matter properly raised in a section 2-619 motion).

Walgreen's motion to dismiss argues that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts the Bukowskis' claims. *See* 15 U.S.C. §§ 1331, *et seq.* Questions of federal preemption and statutory interpretation present questions of law. *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 39 (2010) (citing cases). Since the potential for federal preemption raises affirmative matter outside the four corners of the pleadings, motions to dismiss on that basis are properly brought pursuant to section 2-619. *See generally Norabuena v. Medtronic, Inc.*, 2017 IL App (1st) 162928.

The preemption doctrine derives from the United States Constitution's supremacy clause that provides: "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Quite simply, "[s]tate law is null and void if it conflicts with federal law." *Performance Mktg. Ass'n v. Hamer*, 2013 IL 114496, ¶ 14 (citing *Sprietsma v. Mercury Marine*, 197 Ill. 2d 112, 117 (2001)). There are three ways in which federal law preempts state law under the supremacy clause:

> (1) express preemption – where Congress has expressly preempted state action; (2) implied field preemption – where

> Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state realm; or (3) implied conflict preemption – where state action actually conflicts with federal law.

Carter, 237 Ill. 2d at 40 (citing *Sprietsma*, 197 Ill. 2d at 117). Regardless of the type of preemption, the focus of any preemption analysis is to determine Congress's intent. *Id.* (citing *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 231 Ill. 2d 399, 405 (2008)); *Coram v. State of Illinois*, 2013 IL 113867, ¶ 71.

Congress's intent is manifest in the FCLAA. As amended in 1970, the statute's expressly stated policy is to:

> establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby –
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. The statute's preemption provision provides that:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334.

Walgreen makes two preemption arguments. The first is that the FCLAA preempts the Bukowskis' allegation that Walgreen owed them a duty to warn. Mtn. at 2-4. The second is that implied preemption bars the Bukowskis' attempts to impose liability based on Walgreen's sale of cigarettes because Congress has never banned the sale of tobacco products from the market. *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-38 (2000)).

The error inherent in the first argument is the fact that neither count seven nor eight alleges that Walgreen owed the Bukowskis a duty to warn or that Walgreen breached that duty. Rather, the counts allege that Walgreen, based on its broad knowledge of the dangers of cigarette smoking, had a duty not to sell cigarettes. The legal error in the second argument is that Walgreen reads the *FDA* case far too expansively. The Bukowskis are not seeking a ban on the sale of cigarettes, something far beyond this court's authority. Rather, they are making the narrow argument that Walgreen, with its broad knowledge of the dangers of smoking as well as being a tobacco products retailer, had a duty not to sell cigarettes. In other words, other retailers might have been able to sell Richard cigarettes, but Walgreen should have known better. The other cases relied on by Walgreen are also off point. *See DeLuca v. Liggett & Myers, Inc.*, 2001 U.S. Dist. LEXIS 6733 at *10 (N.D. Ill. May 18, 2001) (plaintiff's fraudulent misrepresentation claims properly seen as failure to warn claims); *Espinosa v. Philip Morris USA, Inc.*, 500 F. Supp. 2d 979, 984 (plaintiff seeking "to impose new warning requirements"); *Miles v. S.C. Johnson & Son, Inc.*, 2001 U.S. Dist. LEXIS 6733, *15 (additional warnings for Drano preempted by Federal Hazardous Substances Act and Poison Prevention Packaging Act).

One final point is that "there is no general, inherent conflict between federal pre-emption of state warning requirements [under the FCLAA] and the continued vitality of state common-law damages actions." *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992). The Bukowskis do not run afoul of federal warning requirements because their causes of action are based on a state common law theory of recovery – negligence. *See Murphy*, 381 Ill. App. 3d at 772-773. Since

a duty to warn of a dangerous product bears no equivalence to a duty to stop selling a dangerous product, the FCLAA does not preempt the Bukowskis' causes of action against Walgreen. Further, since Richard's underlying claim is not preempted, Gayle's cause of action for consortium is also valid. Walgreen's section 2-619 motion to dismiss must, therefore, be denied.

II. Manufacturing Defendants' Motion

The manufacturing defendants have filed a section 2-615 motion to dismiss. They argue, in essence, that the allegations added to the first amended complaint are still insufficient to state claims for fraudulent concealment, fraudulent misrepresentation, and conspiracy. The manufacturing defendants point out that the Bukowskis: (1) added mere boilerplate causation allegations that are insufficient; and (2) failed to add allegations identifying the specific statements made by the manufacturing defendants on which Richard relied to his detriment.

A. Section 2-615 Motion To Dismiss Count Three – Fraudulent Concealment

A cause of action for fraudulent concealment requires a plaintiff to plead that:

> (1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently had he or she been aware of it; and (5) the plaintiff's reliance resulted in damages.

Abazari v. Rosalind Franklin Univ. of Med. & Sci., 2015 IL App (2d)

140952, ¶ 27 (quoting *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902-03 (2d Dist. 2005)); *see also Lidecker v. Kendall College,* 194 Ill. App. 3d 309, 314 (1st Dist. 1990). A duty to disclose a material fact may arise if: (1) the parties are in a fiduciary or confidential relationship, (2) the plaintiff places trust and confidence in defendant, thereby placing the defendant in a position of influence and superiority; or (3) a position of superiority has arisen by reason of friendship, agency, or experience. *See Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 500 (1996) (citing cases).

Despite these plain pleading requirements, the Bukowskis' current allegations are either incomplete or misdirected and the some of the manufacturing defendants' arguments off point. Fraudulent concealment does not require a plaintiff to plead that a defendant's disclosed misleading information caused the plaintiff's detrimental reliance. Rather, proper pleading is that the defendant concealed information it otherwise had a duty to disclose and, as a result, the plaintiff detrimentally relied on that lack of information. Allegations such as those contained in paragraph 101 do not, therefore, belong in a cause of action for fraudulent concealment. On the other hand, the Bukowskis have sufficiently pleaded numerous examples of information the manufacturing defendants withheld from the public and Richard over a period of decades and that they intended those omissions to induce Richard's false beliefs.

The first amended complaint also omits necessary facts going to the third element – that the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from doing so and, therefore, detrimentally relied on the defendant's silence. While the Bukowskis have sufficiently pleaded reliance, they have not pleaded that Richard could not have discovered the truth through reasonable inquiry or inspection or was prevented from doing so. Without those allegations, the Bukowskis have not yet pleaded all of the elements necessary to raise a claim for fraudulent concealment.

The manufacturing defendants also argue that the Bukowskis merely added boilerplate allegations to plead proximate cause. That argument is rarely a good one because not much more than

boilerplate language is necessary. A sufficient allegation of proximate cause is one stating that:

> [t]he injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen as likely to occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which resulted from his act.

Neering v. Illinois Central R.R. Co., 383 Ill. 366, 380 (1943) (citing cases). Since proximate cause is nearly always a question of fact, *see Lindenmier v. City of Rockford,* 156 Ill. App. 3d 76, 90 (2d Dist. 1987), more detailed allegations of proximate cause would, doubtless, do nothing to cause the manufacturing defendants to accede on the point. In short, the Bukowskis' proximate causation allegations are sufficient in all counts.

B. Section 2-615 Motion To Dismiss Count Five – Fraudulent Misrepresentation

To plead a cause of action for fraudulent misrepresentation, a plaintiff must allege:

> (1) a false statement of material fact; (2) knowledge or belief of the falsity by the person making it; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance.

Doe-3 v. McLean County Unit Dist. No. 5, 2012 IL 112479, ¶ 28 (citing *Board of Ed. v. A, C & S, Inc.*, 131 Ill. 2d 428, 452 (1989)). Given these pleading requirements, the Bukowskis have sufficiently pleaded a cause of action. They detail numerous examples of information disclosed by the manufacturing defendants over a period of decades that they allegedly knew were either wholly or partly inaccurate. The Bukowskis also allege that the manufacturing defendants made these material misrepresentations intending the public in general, and

Richard in particular, to rely on them and continue smoking. As noted above, the Bukowskis have sufficiently pleaded Richard's reliance and damages. In short, the first amended complaint adequately pleads a cause of action for fraudulent misrepresentation.

C. Section 2-615 Motion To Dismiss Counts Four and Six – Conspiracy

The manufacturing defendants argue that the Bukowskis conspiracy counts fail solely because the underlying fraud-based counts fail as a matter of law. In fairness to the manufacturing defendants, this court's decision that count five – fraudulent misrepresentation – has been sufficiently pleaded leaves open the possibility for them to present other arguments as to count six – conspiracy to commit fraudulent misrepresentation. And since this court has found that the fraudulent concealment count has not been sufficiently pleaded, a decision on the adequacy of both counts three and four – fraudulent concealment and conspiracy to commit fraudulent concealment – must await further pleading. The motion to dismiss as to counts four and six is denied without prejudice.

D. Request for Punitive Damages

The Code of Civil Procedure prohibits a plaintiff in a products liability action from including in the complaint a prayer for relief seeking punitive damages. *See* 735 ILCS 5/2-604.1. A plaintiff desiring to present a claim for punitive damages must first seek leave of court to amend the complaint to add such a prayer. *See Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 499 (2011). "A court may allow the amendment only when a plaintiff has established at a hearing that he or she has 'a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.'" *Id.* (quoting 735 ILCS 5/2-604.1). As a result, the Bukowskis' prayer for punitive damages is stricken, without prejudice to file a motion for leave once an evidentiary basis has been established.

Conclusion

For the reasons presented above, it is ordered that:

As to Walgreen's motions:

1. The section 2-619 motion to dismiss count eight is denied;
2. The section 2-615 motion to dismiss count seven is denied; and
3. The section 2-619 motion to dismiss based on federal preemption is denied.

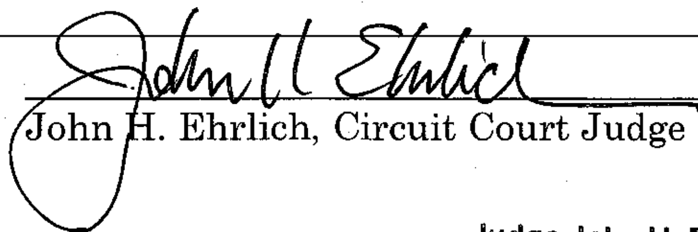
As to the manufacturing defendants' motion:

1. The 2-615 motion to dismiss count three is granted without prejudice for plaintiffs to replead;
2. The 2-615 motion to dismiss count five is denied;
3. The 2-615 motion to dismiss counts four and six is denied without prejudice for future motions based on plaintiffs' repleading; and
4. The motion to dismiss the prayer for punitive damages is granted without prejudice for plaintiff to file a motion for leave once an evidentiary basis exists for the motion.

As to the plaintiffs:

1. The plaintiffs have until May 22, 2020 to file an amended complaint in compliance with the rulings in this memorandum opinion and order.

This case will next be heard for case management on a date to be scheduled by notification to the parties.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

APR 20 2020

Circuit Court 2075