UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

VIKRAM BHATIA, D.D.S., et al. on behalf of themselves and all others similarly situated, Plaintiffs, v. 3M Company, Defendant.	Case No. 0:16-cv-01304-DWF-DTS **PLAINTIFFS' OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS AND STRIKE PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT**

INTRODUCTION

3M has known, but concealed, the fact that crowns made using its Lava Ultimate material suffer from an inherent defect—a propensity to "debond" from teeth at rates that are magnitudes higher than those seen in any other crown material. Lava Ultimate's defect caused dentists to incur substantial damages because dentists have shouldered the costs associated with 3M's defective crowns, which can include costly procedures like root canals and tooth extractions. Rather than take responsibility for its own defective product and the damaged it has caused, 3M blamed dentists. Despite hundreds of complaints and the overwhelming evidence of debonds, 3M continued to market Lava Ultimate as a game-changing crown material, which allowed it to reap substantial profits. Eventually, 3M removed Lava Ultimate from the crown market, but 3M still refuses to acknowledge the defect or accept responsibility for the damages that its defective product caused.

As an initial matter, Plaintiffs submit that the Court need only address the Minnesota claims because this case arises under circumstances that make the application of Minnesota law to a nationwide class especially appropriate. 3M is headquartered in Minnesota; 3M developed Lava Ultimate in Minnesota; and 3M disseminated the false and misleading marketing statements about Lava Ultimate's suitability for crowns from Minnesota. In fact, 3M stated in a brief seeking transfer of a related action that Minnesota is the "epicenter" of this case. Further, the statutory claims arising under Minnesota law allow for the application of Minnesota law to non-resident class members. By evaluating the 3M's motion to dismiss under Minnesota law, the Court need not address the claims that the alternative, non-Minnesota, state subclasses assert.

The Court must also dispense with 3M's suggestion that this is just an "express-warranty case" based on the self-serving and improper incorporation of a purported "express warranty" attached to 3M's motion to dismiss. 3M has offered no proof that Plaintiffs have ever seen the purported warranty disclaimer or that it formed the basis of any bargain. 3M's attempts to invoke the waiver are procedurally improper because, at the pleading stage, the Court may not consider this purported disclaimer—let alone weigh it—because the Complaint never "embraces it."

More problematic, 3M's motion to dismiss disregards the Complaint's core allegations—the false representations that 3M made in its materials promoting Lava Ultimate as a revolutionary material suited for crowns. 3M advertised that Lava Ultimate was "new to the world" and that "its innovative characteristics make it especially impressive for implant-supported crowns" and crowns in general. These false

representations form the basis of Plaintiffs' claims for fraud, violations of state consumer protection statutes, and breach of express warranties. Such representations exist entirely independent of the limited warranty 3M tries to bring in. Simply put, 3M cannot use the disclaimer to shield it from the consequences of its misrepresentations.

3M also contends that Plaintiffs do not plead their fraud and state consumer protection statute claims with sufficient particularity. In doing so, 3M altogether ignores the numerous press releases, websites, and promotional materials that the Complaint specifically references. 3M cannot credibly claim ignorance of the misconduct that the Complaint alleges (misrepresentations that Lava Ultimate was appropriate for crown use) such that 3M cannot mount a defense, which is the fundamental purpose of Rule 9(b)'s heightened pleading standard. 3M does not cite a single on-point case holding that Plaintiffs' claims are not detailed enough. To the contrary, the relevant authority from within the Eighth Circuit and across the nation support the sufficiency of the Complaint's allegations. 3M's remaining arguments are also without merit, and this response addresses each below.

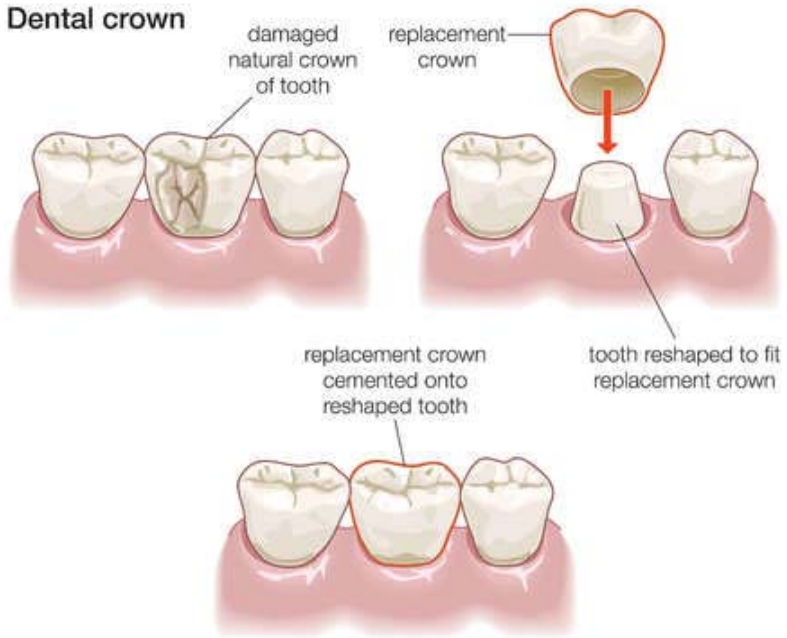
Indeed, a court has already rejected the exact legal arguments that 3M presents here. Illinois dentists brought an action in state court alleging that Lava Ultimate is defective and asserting causes of action based on the same misrepresentations that form the basis of Plaintiffs' claims in the present suit. 3M moved to dismiss, asserting the same legal defenses that it raises in this case, but the court rejected the motion to dismiss in its entirety after extensive briefing and oral argument.

In sum, the Court should reject 3M's attempts to impermissibly shift the costs of Lava Ultimate's defect to the dentists who purchased the product based on 3M's specific and widespread representations.

OVERVIEW OF ALLEGATIONS

A. 3M aggressively marketed Lava Ultimate for use in crowns, which induced Plaintiffs to purchase the product.

When damage to a tooth is extensive from a root canal or decay, a patient may require a full dental crown. As illustrated below, a dental crown is a tooth-shaped cap that completely covers a tooth or dental implant. (Consolidated Amended Complaint ("CAC"), doc. 63 ¶55.)



Traditionally, a patient needed multiple visits to the dentist to seat a permanent crown. The dentist initially took an impression of the damaged tooth, and the crown would be fabricated off-site. (CAC ¶56.) During a subsequent visit, the dentist seated the crown

on the patient's tooth. (CAC ¶58.) Technological advancements later allowed dentists to mill crowns chairside so that fabrication and seating could be done in one day.

3M introduced Lava Ultimate as a material for crowns that was durable, aesthetically pleasing, and capable of being seated in a single visit. (CAC ¶¶67-68.). A picture of Lava Ultimate blocks before they are milled into a crown is shown below:

3M emphasized that Lava Ultimate was particularly suited for crowns, describing Lava Ultimate as "strong, wear-resistant" and appropriate for "full crown restorations, including crowns on implants." (CAC ¶71 (emphasis added).) 3M also promoted the product's "innovative characteristics" as "especially impressive for implant-supported crowns." (CAC ¶78 (emphasis added).) 3M described Lava Ultimate as "especially advantageous for crowns over implants." (CAC ¶76.) In a July 2, 2012 press release, 3M stated:

> Lava Ultimate restorative is indicated for a full range of permanent adhesive, single-unit restorations, including crowns, onlays, inlays and veneers.

(CAC ¶80 & n.8 (citing a webpage containing the press release; emphasis added); CAC ¶85.)

In its "Clinical Preparation and Handling Guidelines for Dentists and Dental Labs," 3M represented:

> Lava Ultimate Restorative is a "new to the world" CAD/CAM material utilizing 3M's revolutionary nanoceramic technology …. Its innovative characteristics make it especially impressive for implant-supported crowns. And if it's reliable in that tough role, just imagine how it will perform in other challenging single-unit indications.

(CAC ¶83 (emphasis added).)

Relying on 3M's representations that Lava Ultimate was appropriate for crowns, Plaintiffs purchased the product for their patients' crowns. The Complaint is replete with specific allegations detailing Plaintiffs' purchases of Lava Ultimate in reliance on 3M's marketing materials and representations. For example, Dr. Angela Ferrari purchased approximately $25,000 worth of Lava Ultimate for use in crowns after reading and relying upon 3M's marketing materials promising, among other things, that Lava Ultimate's "innovative characteristics make it especially impressive for … crowns, that Lava Ultimate was indicated for crowns, and/or similar representations stating that the product was appropriate for crowns." (CAC ¶11.)

B. Lava Ultimate crowns are defective because they debond at shockingly high rates when exposed to conditions present in every person's mouth, causing Plaintiffs to incur substantial damages.

Lava Ultimate is inherently defective because its bond with the patient's existing tooth fails when exposed to conditions 3M knows exist in every patient's mouth (such as normal temperature fluctuations). (CAC ¶88.) The perimeter of the Lava Ultimate crown contracts and moves inward, resulting in a dimensional change that subjects the crown to additional tensile stress. (CAC ¶88.) This stress causes the bond between the crown and

tooth to weaken and eventually fail. All crowns made from Lava Ultimate have this inherent defect. (CAC ¶88.)

Dentists repeatedly complained to 3M about Lava Ultimate's tendency to debond, but rather than address the problem, "3M perpetuated its scheme by disclaiming any knowledge of Lava Ultimate's defects" and instead blamed the dentists' application protocols. (CAC ¶93.) For example, Dr. Ferrari complained about the high failure rate of Lava Ultimate to 3M over the telephone and also in person when an agent of 3M visited her office. (CAC ¶¶12-13.) 3M told her that Lava Ultimate was not the problem, instead blaming her installation techniques. (CAC ¶¶12-13.) When it was clear that the dentists were following 3M's protocols, 3M issued a new protocol, which, given Lava Ultimate's defect, made no difference. (CAC ¶93.)

3M was left with no choice but to remove Lava Ultimate from the crown market. 3M sent a letter stating: "3M Oral Care is removing the crown indication for Lava Ultimate CAD/CAM Restorative Product because crowns are debonding at a higher-than anticipated rate." In bold print, 3M warned:

> **IMPORTANT: Do not use Lava Ultimate restorative for any type of crown because there exists a potential for debonding.**

(CAC ¶96.)

But the damage was already done. Relying on 3M's representations, dentists across the country had already installed hundreds of thousands of Lava Ultimate crowns in their patients' mouths. 3M, however, refuses to acknowledge that the product is defective or take responsibility for the substantial expenses dentists incurred due to the debonds. Thus

far, dentists have borne the costs of these defective crowns, which can include the time and expense of reseating the crown or more expensive procedures such as root canals.

C. In an Illinois case where dentists asserted claims based on 3M's misrepresentations about Lava Ultimate's suitability for crowns, the court denied 3M's motion to dismiss in its entirety and rejected the very same arguments that 3M presents here.

Around the time that Plaintiffs filed the first lawsuits in this matter, which were later consolidated by the JPML, dentists in Illinois sued 3M in state court based on Lava Ultimate's high number of crown debonds. (*Boatman v. 3M Co.*, No. 2016-cv-01296, (Ill. Cir. Ct. Sept. 13, 2016) (the "*Illinois Action*").) Like the Plaintiffs in this action, the Illinois dentists asserted claims for, among other things, breaches of express and implied warranties, fraud, and violation of state consumer protection statutes. These claims are based on 3M's misrepresentations that Lava Ultimate was appropriate for crown use—the same misrepresentations that form the basis for Plaintiffs' allegations in the present case. (*Illinois Action* Compl., at ¶¶23, 132-138, 165-172, 185-190, attached as Exhibit 1 to the Decl. of Eric S. Taubel ("Taubel Decl.").)

In December 2016, 3M moved to dismiss the Illinois dentists' claims, asserting the same defenses it presents in its currently pending motion to dismiss, including contentions that the fraud allegations were not pleaded with sufficient particularity, invoking the purported disclaimer of implied warranties, and claiming a lack of direct privity between 3M and the dentists. (Taubel Decl., Ex. 2, 3M's Motion to Dismiss the *Illinois Action*, at 6-11.)

Following full briefing and a hearing, the Illinois court denied 3M's motion to dismiss in its entirety. (Taubel Decl., Ex. 3, *Illinois Action* docket sheet evidencing denial of 3M's motion to dismiss.)

ARGUMENT

I. The Court should apply Minnesota law when considering this motion to dismiss.

Deciding now that Minnesota law applies will significantly simplify this case and promote efficient resolution of the issues. Whether the Court decides to take an abbreviated approach or conduct a full choice of law analysis, Minnesota law would apply because the circumstances of this case make the application of Minnesota law to a nationwide class especially appropriate.

Minnesota law should apply based on the significant, ubiquitous, and undisputed contacts between Minnesota and these claims and this defendant. As the court recently recognized in the Target data breach case, where the defendant's contacts with Minnesota are so extensive (in *Target*, the location of the breached servers and the locus of Target's decision making), "application of Minnesota law to the claims of non-Minnesota class members [would not] offend[] either the Due Process Clause or the Full Faith and Credit Clause." *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482, 486 (D. Minn. 2015). Under such circumstances, the Court explained that "Target cannot claim surprise by the application of Minnesota law to conduct emanating from Minnesota. And applying Minnesota law undoubtedly comports with putative Plaintiffs' expectations: when dealing with a Minnesota corporation such as Target, it is possible and in fact likely

that Minnesota law will apply to those dealings" *Id.* The Court ultimately applied Minnesota law to all claims.

Similarly, in *Mooney v. Allianz Life Insurance Company of North America*, 244 F.R.D 531 (D. Minn. 2007), the court employed the same reasoning to apply Minnesota's consumer protection statute and unjust enrichment law to a nationwide class. *See id.* at 535 (stating "[a]s a Minnesota corporation, *Allianz* cannot claim surprise by the application of Minnesota law to conduct emanating from Minnesota, since Minnesota has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing') (internal quotations omitted).

3M's ties to Minnesota are just as extensive (if not more) than those in *Target* or *Allianz.* By 3M's own admission, it has the following deeply rooted ties to Minnesota:

- 3M is headquartered in St. Paul, Minnesota;
- 3M's research and development team developed Lava Ultimate in Minnesota;
- 3M's regulatory personnel in Minnesota controlled the FDA approval process;
- 3M made the labeling decisions in Minnesota;
- 3M maintained records of these relevant activities in Minnesota;
- 3M conducted quality control in Minnesota;
- 3M's false and misleading marketing statements emanated from Minnesota; and
- 3M's customer service was based in Minnesota.

(Taubel Decl., Ex. 3, *Pray v. 3M Company*, No. 16-cv-01231, Decl. John Tobin, Doc. No. 31-6 (N.D.N.Y. March 1, 2017) (filed by 3M in support of its motion to transfer a related

action from New York to Minnesota).) Under these circumstances, Minnesota law should apply to all claims.

Minnesota law would apply even if the Court were to analyze the *Milkovich* factors under an expanded choice of law analysis: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *See Milkovich v. Saari*, 203 N.W. 2d 408, 412 (Minn. 1973). Applying Minnesota law exclusively to claims based upon theories of consumer protection, breach of warranties (both express and implied) and unjust enrichment will enhance the predictability of results and simplify the judicial task.

Uniform remedies for the same conduct afforded to citizens of different states will also promote interstate order. After all, it would be fundamentally unfair if the same conduct led to liability and recovery for citizens of one state and not those of another. As 3M is a corporate citizen of Minnesota, and its conduct relevant to the claims here all emanated from Minnesota, this state has a strong governmental interest in ensuring that all those injured by such acts have a remedy under the law.

Finally, Minnesota consumer protection law is designed to protect not only its citizens, but citizens of other states who were damaged by Minnesota corporations acting within Minnesota. *See, e.g.*, *In re Lutheran Bhd.*, No. 99-md-1309, 2004 WL 909741, at *6 (D. Minn. April 28, 2004) ("[The Minnesota's Prevention of Consumer Fraud Act] is intended to apply … to the conduct of Minnesota companies that injures non-residents."); *Pugh v. Westreich*, No. A04-657, 2005 WL 14922, at *3 (Minn. Ct. App. Jan. 4, 2005)

("The MCFA is broadly construed to protect consumer rights.") Accordingly, Minnesota law should apply to all of Plaintiffs' claims.[1]

II. Plaintiffs have pleaded their claims with sufficient particularity—irrespective of whether Rule 9(b)'s heightened pleading standard applies.

A common theme in 3M's motion is it conclusory contention that Plaintiffs do not plead their fraud and consumer protection statute claims with sufficient particularity to satisfy Rule 9(b). This argument misstates the legal standard and ignores wholesale sections where the Complaint quotes and cites the sources of 3M's misrepresentations. Decisions from within the Eighth Circuit and elsewhere show that Plaintiffs' allegations far exceed the level of detail needed to survive a motion to dismiss. Because the analysis is generally the same under Minnesota law and the laws of the different states to which the alternative state subclasses belong, Plaintiffs address 3M's pleading arguments here, focusing on Minnesota law. This brief addresses any pleading issue unique to a certain state in the state-specific sections.

For purposes of this response, 3M assumes that Rule 9(b) applies to the fraud claims as well as the fraud components of the various states' consumer protection statutes. *Johnson v. Bobcat Co.*, 175 F. Supp. 3d 1130, 1145 (D. Minn. 2016) ("As a threshold

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[1] If the Court determines the Minnesota Prevention of Consumer Fraud Act applies to all Plaintiffs and purported class members, then it need not address the various claims under other state's consumer protection statutes. In that case, Plaintiffs would agree to amend their complaint. In that instance, it would be clear there is no conflict between Minnesota law and the laws of other states such that application of Minnesota law would clearly be appropriate all claims. (*See* Taubel Decl., Ex. 4, *In re: Syngenta Litig.*, No. 17-cv-15-3785, at 44 (Minn. 4th Jud. Dist., April 7, 2016).

matter, Rule 9(b) applies … to [the plaintiff's] surviving statutory consumer protection claims under the MCFA, MFSAA, and MUTPA.")

A. Rule 9(b)'s pleading standards are relaxed in cases where, as here, the defendant's misconduct was based on a widespread marketing campaign that occurred over months or years.

Even if Rule 9(b) applies, 3M overstates the pleading burden. 3M assumes that the rule requires a strict, one-size-fits-all pleading standard. In doing so, 3M disregards the important role the factual context of Plaintiffs' claims and 3M's misrepresentations play. 3M's broad-brush approach misstates Rule 9(b)'s standard in multiple ways.

First, this Court has stated that Rule 9(b) "must be read in harmony with the principles of notice pleading." *Blue Cross & Blue Shield of Minn. v. Wells Fargo Bank*, No. 11-2529, 2012 WL 1343147, at *4 (D. Minn. April 18, 2012) (Frank, J.). Rule 9(b) does not require that a complaint be pleaded with "surgical precision." *Id.*; *see In re Hardieplank Fiber Cement Siding Litig.,* No. 12-md-2359, 2013 WL 3717743, at *6 (D. Minn. July 15, 2013) ("Rule 9(b) does not require that a complaint be suffused with every minute detail of a misrepresentation.") (internal quotations omitted).

Fraud allegations are sufficiently particular when they "ensure that a defendant can adequately respond and prepare a defense to charges of fraud," especially when discovery has not yet commenced. *Bobcat*, 175 F. Supp. 3d at 1145; *see also Commercial Prop. Invs., Inc. v. Quality Inns Intern.*, 61 F.3d 639, 646 (8th Cir. 1995) (stating that the purpose of Rule 9(b)'s pleading standard to facilitate defendant's preparation of defense to charges of fraud).

Second, a court must consider Rule 9(b) in light of the factual context and circumstances of the specific case. *BJC Health Sys. v. Columbia Cas.*, 478 F.3d 908, 917 (8th Cir. 2007). Generally, "the complaint therefore must read like the opening paragraph of a newspaper article: it must contain the 'who, what, when, where and how' of the alleged fraud." *Bobcat*, 175 F. Supp. 3d at 1145. But when misleading advertising campaigns span a period of time, like the campaign in which 3M engaged, "the pleadings are not required to provide the date and time of every communication." *Lehman Bros. Commer. Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, No. 94-cv-8301, 1995 WL 608323, at *2 (S.D.N.Y. Oct. 16, 1995) ("Where the misstatements are alleged to have occurred over a period of time … the pleadings are not required to provide the date and time of every communication."); *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (stating that representative samples of fraudulent claims satisfy Rule 9(b) pleading requirements under the False Claims Act). Instead, plaintiffs in actions based on misleading marketing materials satisfy Rule 9(b)'s standard by pointing to representative examples of the materials containing the misrepresentations on which the plaintiffs base their claims.

Decisions from within the District of Minnesota and elsewhere illustrate this principle:

- ***Johnson v. Bobcat Co.*, 175 F. Supp. 3d 1130, 1145-46 (D. Minn. 2016)**

The defendant in *Bobcat* argued that the plaintiff's fraud claims and claims under the MCFA and other consumer protection statutes "lack particularity because they fail to identify the time, place, and contents of the alleged false representations, or any specific promotional materials." But the Court was "not persuaded" because the plaintiff identified

"specific promotional material" found on the defendants' website. Thus, the defendant had "more than enough information to adequately respond and prepare a defense, which is the critical inquiry under Rule 9(b)."

- ***Blue Cross & Blue Shield of Minnesota v. Wells Fargo Bank, N.A.*, No. 11-cv-2529, 2012 WL 1343147, at *3 (D. Minn. Apr. 18, 2012) (Frank, J.)**

The plaintiffs in *Blue Cross* satisfied Rule 9(b) by putting the defendant "on notice of which documents contained the allegedly fraudulent statements" and "identify[ing] the specific statements within those documents that they consider to be fraudulent." The plaintiffs were not required to provide minute detail into the misrepresentations; it was sufficient that they "alleged a series of ongoing misrepresentations and a fraudulent course of conduct."

- ***Select Comfort Corp. v. Sleep Better Store*, 796 F. Supp. 2d 981, 985 (D. Minn. 2011)**

In *Select Comfort,* the defendant argued that the plaintiff failed "to adequately support its allegations" of common law fraud and Minnesota's consumer protection statutes on the basis that the complaint did not "include an exhaustive list of any allegedly fraudulent statements to comport with Rule 9(b)." The Court noted the Eighth Circuit only requires that the plaintiff "allege some representative examples of the fraudulent conduct with particularity." (emphasis added) The plaintiffs did that by citing "an on-going practice of fraud and provid[ing] representative examples, quoting from [the defendant's] websites." By noting those "representative examples," the plaintiffs satisfied Rule 9(b) because they provided the defendant "with sufficient notice to respond specifically to the allegation."

- ***In re Hardieplank Fiber Cement Siding Litig.*, No. 12-md-2359, 2013 WL 3717743, at *6, *10 (D. Minn. July 15, 2013)**

The court rejected the defendant's contention that "misrepresentations … made through Defendant's warranty, sales brochures, and marketing literature, which were widely distributed to building professionals and available to Plaintiffs and the general public" were insufficiently pleaded. The court found that citing the marketing materials "put Defendant on notice of the basis for the fraud claims against it and [allowed] Defendant to craft a specific response."

- ***Carlson v. A.L.S. Enterprises, Inc.*, No. 07-cv-3970, 2008 WL 185710, at *3 (D. Minn. Jan. 18, 2008)**

The complaint in *Carlson* "contain[ed] enough particulars about the "what, when, where, and how" of defendants' purportedly fraudulent conduct to sufficiently apprise defendants of the nature of Plaintiffs' fraud claims and allow them to frame responses thereto." The complaint stated the "purported misrepresentations were made 'in advertising, marketing and promotional materials, on their websites, catalogs, on clothing tags, in packaging materials, in magazines and at point of purchase displays.'" Because the plaintiffs noted "the exact statements published in these media that they believe to be fraudulent, this information suffice[d] to prevent Defendants from simply having to guess about the precise contours of Plaintiffs' fraud claims."

- ***Rosales v. FitFlop USA*, 882 F. Supp. 2d 1168, 1175-77 (S.D. Cal. 2012)**

In *Rosales,* the plaintiffs satisfied Rule 9(b) for their California UCL and CLRA claims by alleging the defendant's misrepresentations were part of an extensive advertising campaign, noting the relevant time period of those misrepresentations, and providing

examples of the marketing materials that were representative of the alleged misrepresentations.

- ***Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066, 1077 (E.D. Cal. 2010)**

Allegations that included "examples" of the deceptive marketing and time frame in which the defendant allegedly deceived consumers were "sufficient to establish the 'time, place, and specific content' requirements of Rule 9(b)" for California's UCL and False Advertising Law.

1. Plaintiffs' fraud and consumer protection allegations against 3M are sufficiently particularized.

Against the backdrop of the proper pleading standard, the Complaint's allegations are more than adequate. The Complaint alleges, in detail, that 3M engaged in a uniform marketing campaign that misrepresented Lava Ultimate's appropriateness for crowns to induce Plaintiffs into purchasing the product. The Complaint identifies "specific promotional material," quotes the false and misleading statements directly, and provides context explaining why the misrepresentations were false and misleading. 3M has "more than enough information to adequately respond and prepare a defense." *Bobcat*, 175 F. Supp. 3d at 1145-46.

a. Plaintiffs have sufficiently pleaded the "who," "what," "where," and "when" of the fraud claims.

Plaintiffs allege that 3M falsely represented that Lava Ultimate was appropriate for crowns through a marketing campaign that included representations on 3M's website, brochures, sponsored "news" stories, press releases, sales representatives, and other forms

of communication." (CAC ¶¶73-86, 89-94.) The Complaint identifies the specific advertisements and representations in which 3M highlighted Lava Ultimate's use in crowns:

- 3M's "Technical Product Profile" stated that Lava Ultimate was for "[p]ermanent, adhesive, single-tooth restorations including crowns [and crowns] over implants." (CAC ¶91.)
- 3M's "Quick Reference Guide" for Lava Ultimate represented that the product was for "Full Coverage Crowns," and listed all the characteristics that supposedly gave Lava Ultimate an edge over competing products. (CAC ¶82.)
- 3M's promotional piece noted Lava Ultimate's properties and then stated that the product was appropriate for a "for a full range of permanent adhesive, single-unit restorations including crowns, onlays, inlays and veneers…." (CAC ¶85.)
- 3M's "Lava Ultimate Restorative Brochure for Dentists" represented that Lava Ultimate's "elastic modulus" makes it "especially advantageous for crowns over implants." (CAC ¶76.)
- 3M's marketing materials in bold language represented that Lava Ultimate's "innovative characteristics make it especially impressive for implant-supported crowns." (CAC ¶¶78, 83.)

Plaintiffs also allege that 3M concealed Lava Ultimate's defect despite the product's repeated failures, contending that 3M "omitted material information" and "perpetuated its scheme by disclaiming any knowledge of Lava Ultimate's defects" despite Plaintiffs' repeated "complain[ts] about Lava Ultimate's high failure rate." (CAC ¶93). Alleging 3M's material omission of critical information provides another basis for satisfying Rule 9(b). *See Blue Cross*, 2012 WL 1343147, at *3 (finding that the plaintiffs adequately pleaded fraud based on allegations "that Wells Fargo fraudulently concealed vital information concerning the portfolio's overexposure to risky and illiquid investments").

As to the "when," Plaintiffs allege that 3M's misleading marketing campaign took place when 3M launched Lava Ultimate in 2011 and continued until 3M finally acknowledged the product defect in June 2015. The Complaint also notes the specific days in which some of the misrepresentations were made, for example, a press release on July 2, 2012. (CAC ¶80.)

Taken individually or together, Plaintiffs have more than sufficiently identified the "documents containing the misrepresentations at issue and give[n] approximate dates on which each of the documents were issued." *See Blue Cross*, 2012 WL 1343147, at *3. Accordingly, Plaintiffs satisfy Rule 9(b)'s pleading requirements. 3M's position is especially unpersuasive because it is well aware of the contents of its own marketing materials and representations about Lava Ultimate, and therefore it can easily ascertain the time and place it made the misleading statements. *See Bobcat*, 175 F. Supp. 3d at 1146 (stating that the plaintiff's fraud and consumer protection statute claims were adequately pleaded because, even though "Johnson does not cite the specific webpage that he visited, this level of additional detail is not required by Rule 9(b)" because "Bobcat can navigate its own website").

Moreover, 3M's own conduct belies any contention that it lacks "information to adequately respond and prepare a defense." *Id.* 3M bases a substantial part of its defense on a purported disclaimer 3M claims is effective. Yet the Complaint does not mention or refer to that disclaimer in any material way. By going outside the Complaint to submit new evidence in support of its defense, 3M cannot credibly claim that it has "to guess about the precise contours of Plaintiffs' fraud claims." *Carlson*, 2008 WL 185710, at *3.

b. Plaintiffs have sufficiently pleaded the "how" and "why" of the fraud claims.

Plaintiffs also properly allege the "how" and "why" of the fraud. This is not a complicated fraud. 3M knowingly advertised Lava Ultimate as appropriate for crowns. 3M knew Lava Ultimate was not suited for crowns because the material failed at an exceedingly high rate. This is clearly pleaded throughout the Complaint, and 3M cannot plausibly feign ignorance of this theory.

To the extent 3M suggests that Plaintiffs' need also plead elements of intent or state of mind with heightened particularity, it ignores the plain language of the Rule 9 stating that while the "particularity the circumstances constituting fraud or mistake" must be alleged specifically, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b); *see also Hashw v. Dep't Stores Nat'l Bank*, 986 F. Supp. 2d 1058, 1062 (D. Minn. 2013) (noting that willfulness, malice, intent, and knowledge may be alleged generally).

But even if such additional particularity were required, the Complaint pleaded it. The Complaint alleges that "3M intentionally and successfully deceived Plaintiffs and the class members into believing that Lava Ultimate was an effective material for crowns when in fact 3M knew it was a defective product that resulted in harm to dentists and patients." (CAC ¶90.) Likewise, Plaintiffs allege "3M knew that Lava Ultimate was defective and unsuitable for crowns and failed to disclose its inherent defectiveness to Plaintiffs and the class members prior to purchase despite 3M's knowledge of the defect." (CAC ¶94.) Plaintiff also alleged that 3M made these misrepresentations to "induce dentists to purchase

Lava Ultimate for use in crowns." (*E.g.*, CAC ¶89; *see generally* CAC ¶¶89-95.) 3M's omission and concealment of Lava Ultimate's defect provide further allegations of intent. *See Blue Cross*, 2012 WL 1343147, at*3 (noting allegations that "Wells Fargo fraudulently concealed vital information concerning the portfolio's overexposure to risky and illiquid investments" as proof that Plaintiffs "sufficiently pled the how of the fraud").

3M finally argues that it "is illogical and implausible to suggest that 3M deliberately sold supposedly defective material to dentists whom it wanted to be good, long-term customers for 3M's dental products." (Doc. 89 at 16.) 3M provides no legal support why this contention even if true, which it is not, is relevant. This contention improperly assumes that 3M and companies never make misrepresentations to customers, even repeat customers. Obviously this is false. The body of cases in which consumers have sought and obtained substantial redress for fraud and violations of state consumer protection statutes show that it is not uncommon for companies to abuse their customers. *See, e.g.*, *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices Litig.*, No. 15-md-2672, (N.D. Cal.), doc. 2102 at 19 (providing for $10.033 billion settlement related to Volkswagen's misrepresentations concerning its "clean diesel" vehicles).

c. Plaintiffs have sufficiently pleaded reliance and causation.

In *Blue Cross & Blue Shield of Minnesota*, this Court rejected the argument—similar to the one 3M asserts here—that plaintiffs "must state the specific individual for each Plaintiff who received and relied on the alleged false representations." *Blue Cross*, 2012 WL 1343147, at *4. This Court ruled that the complaint was sufficient where it

alleged "a series of ongoing misrepresentations and a fraudulent course of conduct" and "reliance generally" on that "series of misrepresentations." *Id.*

The Complaint meets this standard because it specifies the misrepresentations and alleges that 3M knowingly misrepresented Lava Ultimate's appropriateness for crowns in an effort to "induce dentists to purchase Lava Ultimate." (*E.g.* CAC ¶¶89-95.) Further, Plaintiffs uniformly allege that they relied on 3M's representations, alleging that they would not have purchased Lava Ultimate had they known the product's true characteristics. (*E.g.* CAC §11.) The Complaint also describes the damages resulting from 3M's misrepresentations. Plaintiffs clearly allege that, but for 3M's misrepresentations, Plaintiffs would not have incurred those damages. (*E.g.*, CAC §11.)

3M's reliance on *Nunez v. Best Buy*, 315 F.R.D. 245 (D. Minn. 2016), is misplaced. (Doc. 89 at 15-16.) In *Nunez*, the plaintiff failed to identify specific facts regarding the alleged misrepresentations, such as an approximate date of purchase, the model purchased, or the kind of marketing on which the plaintiff relied. *Id.* at 249. By contrast, here, Plaintiffs specifically identify the following: that 3M misrepresented the character and quality of the Lava Ultimate (the who); the specific content of 3M's misrepresentations (the what); the timeframe of 3M's misrepresentation and the date 3M publicly acknowledged the Lava Ultimate's defects (the when); the various manner of such misrepresentations (the where); and the specific ways in which 3M's misrepresentations were false (the how). (*See* CAC ¶¶5, 73-90, 92, 93, 96.) Further, the plaintiff in *Nunez* based certain allegations on "information and belief," which failed to satisfy Rule 9(b)—a stark contrast to Plaintiffs' detailed Complaint.

Based on the detail with which Plaintiffs have pleaded their misrepresentations about Lava Ultimate's defect and 3M's misrepresentations, 3M has "more than enough information to adequately respond and prepare a defense." *Bobcat*, 175 F. Supp. 3d at 1145-46. Plaintiffs have satisfied Rule 9 under any metric.[2]

III. Minnesota

A. Plaintiffs have properly pleaded a claim under the Consumer Fraud Act ("MCFA").

The MCFA prohibits "[t]he act, use, or employment by any person of any fraud, … misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise." Minn. Stat. § 325F.69. The MCFA is "generally very broadly construed to enhance consumer protection." *Securian Fin. Grp. v. Wells Fargo Bank, N.A.*, No. 11-cv-2957, 2014 WL 6911100, at *5 (D. Minn. Dec. 8, 2014) (Frank, J.) (internal quotations omitted).

3M argues that Plaintiffs' claims fail because 1) Plaintiffs are merchants and not consumers, 2) Plaintiffs have not pleaded a common benefit, and 3) Plaintiffs' claims are not pleaded with particularity. Each argument fails.

1. Plaintiffs are consumers of Lava Ultimate entitled to protection under MCFA.

3M contends that Plaintiffs, which comprise individual dentists and dental practices, are precluded from recovering under the MCFA because they are "'merchants' and not

[2] If this Court disagrees that Plaintiffs have satisfied Rule 9(b), Plaintiffs request leave to amend, as permitted in the cases that 3M cites in its motion to dismiss. *See Nunez*, 315 F.R.D. at 250 (dismissing the plaintiff's fraud claim without prejudice).

'consumers.'" (Doc. 89 at 10.) This argument rests on the faulty premise that Minnesota law contains a "blanket prohibition" against merchants asserting claims under the MCFA. But no such prohibition exists.

In fact, this Court noted that "the Minnesota Supreme Court has not issued a blanket prohibition on merchants for all MCFA or MUTPA claims." *Securian*, 2014 WL 6911100, at *6. "'Any person injured' by a violation of these statutes may bring a civil action as provided in the Private Attorney General Statute." *Kinetic Co. v. Medtronic*, 672 F. Supp. 2d 933, 945 (D. Minn. 2009). "For example, it covers the individual purchaser of a restaurant in a one-on-one business transaction … but it is not limited to individual consumers." *Id.* In fact, there is no broad bar against "merchants" bringing claims under the MCFA.

Instead, the analysis turns "on whether a party can be considered a sophisticated merchant in the specific skills or goods at issue, and only those parties that are in fact deemed to be sophisticated merchants in the specific skills or goods at issue have been precluded from asserting Minnesota consumer claims." *Securian*, 2014 WL 6911100, at *6. Being sophisticated in certain matters does not necessarily make one a sophisticated merchant in all matters. *Id.*

In *Securian*, this Court rejected an argument strikingly similar to the one 3M has articulated in this case. *Securian*, 2014 WL 6911100, at *5-8. There, Wells Fargo could not establish as a matter of law for summary judgment purposes that a group of "institutional investor clients" who served "millions of clients" and managed over $50 billion were "sophisticated merchants" under the MCFA. *Id.* Despite "being sophisticated

in certain matters," the plaintiffs "were not sophisticated in the matters of securities lending." *Id.* at 7.

Here, 3M has failed to establish how the Complaint establishes as a matter of law that the Plaintiffs are sophisticated parties under the MCFA. In fact, 3M devotes no meaningful discussion to explaining why the dentists are sophisticated merchants. 3M apparently assumes that because the dentists seated crowns, the dentists are necessarily experts in the complex structural characteristics of Lava Ultimate and should have known that it was inherently defective. Not only is this argument without evidence, but it is belied by 3M's massive marketing campaign and the importance that 3M's sales representatives play in promoting products like Lava Ultimate. *See id.* (noting that the defendant's marketing materials undercut the argument that plaintiffs were "sophisticated parties"). 3M made numerous representations in the marketing materials that Lava Ultimate was appropriate for crowns and that it was "a unique, patented resin nano ceramic milling material" created using a "proprietary process." (CAC ¶80.) 3M does not explain how Plaintiffs should be considered "sophisticated merchants" familiar with the highly technical characteristics of 3M's proprietary products.

3M's bare-bones argument amounts to little more than a conclusory contention: Plaintiffs "are sophisticated purchasers of dental product" because "they bought the product for business purposes" instead of for "personal, family, or household use." (Doc. 89 at 10.) But as discussed above, the MCFA contains no such distinction between products

for household versus business purchases. *See* Minn. Stat. §325.68 (providing definitions for MCFA).[3]

In fact, a recent class action applying Minnesota law illustrates that entities who purchased exclusively for business purposes can nonetheless assert a claim under the MCFA. In *In re Caterpillar, Inc., C13 & C15 Engine Prod. Liab. Litig.*, No. 14-cv-3722, 2015 WL 4591236, at *34 (D.N.J. July 29, 2015), the plaintiffs comprised commercial truck and bus drivers who purchased engines for commercial purposes. The Court rejected essentially the same argument that 3M presents here and allowed the MCFA claim to proceed. *Id.* ("The Court is unable based on the pleadings to conclude that the Minnesota Plaintiffs fit within the narrow sophisticated merchant exception [the same exception upon which 3M relies here] to the Minnesota consumer protection[] statutes.").

3M's reliance on *Klinge v. Gem Shopping Network, Inc.*, No. 12-cv-2392, 2014 WL 7409580 (D. Minn. Dec. 31, 2014), is misplaced because Plaintiffs do not resell Lava Ultimate but rather seat it as a crown. The plaintiff in *Klinge* formed a business "in which she would purchase items from [the defendant Gem Shopping Network] and resell them." *Id.* at *1. She purchased over $600,000 worth of gemstones from the Gem Shopping Network and attended trade shows to learn how to sell them. *Id.* As a result, the court reasoned that she was merchant under the MCFA because she "form[ed] … a business dealing in gems and jewelry." *Id.* at *3. Here, however, there is no allegation that Plaintiffs

[3] The "personal, family, or household" exception may apply in other states, but no such distinction applies under Minnesota law.

ever bought Lava Ultimate from 3M intending to resell it to third parties, nor did they received specific training on how to resell the same unadulterated product to other consumers, rendering *Klinge* inapposite.

2. There is an obvious and real public benefit to enforcing the MCFA.

3M argues that there is no public benefit in the present case for three reasons: first, the circle of persons affected is small, second, 3M removed the crown indication thereby mooting injunctive relief, and third, Plaintiffs request for monetary relief runs counter to a public benefit. These arguments, however, overstate the MCFA's public benefit requirement and multiple decisions applying the law.

Satisfying "the 'public benefit' requirement is not onerous." *Kinetic*, 672 F. Supp. 2d at 946. Multiple courts have recognized that "[m]isleading advertising to the general public supports a finding that a claim benefits the public." *Summit Recovery, LLC v. Credit Card Reseller, LLC*, No. 08-cv-5273, 2010 WL 1427322, at *5 (D. Minn. Apr. 9, 2010); *Kinetic*, 672 F. Supp. 2d at 946 ("[T]here is a public benefit in eliminating false or misleading advertising.").

"[G]enerally, courts examine the degree to which the defendants' alleged misrepresentations affected the public; the form of the alleged misrepresentation; the kind of relief sought; and whether the alleged misrepresentations are ongoing." *Id.* (citations and internal punctuation omitted); *see also Collins v. Minn. Sch. of Bus.*, 655 N.W.2d 320, 330 (Minn. 2003) (finding public benefit requirement satisfied where the defendant "made misrepresentations to the public at large by airing a television advertisement" and "made

numerous sales and information presentations" to students). In *Klinge*, for example, the court found a plaintiff who "relied on misrepresentations that were made to the public at large" and purchased the defendants' products based on false statements of their quality showed a public benefit. *Klinge*, 2014 WL 7409580, at *3. Thus, whether a consumer protection violation is ongoing is not dispositive during a motion to dismiss. *Khoday v. Symantec Corp.*, 858 F. Supp. 2d 1004, 1017 n.16 (D. Minn. 2012).

Moreover, Plaintiffs have pleaded specific benefits that would accrue to the public because of this case. (CAC ¶¶129-30, 145.) The Complaint alleges that 3M had a widespread marketing campaign aggressively pushing Lava Ultimate as a durable, aesthetically pleasing, and convenient material that was especially suited for crowns. (CAC ¶¶71-85.) Plaintiffs have made numerous allegations as to the breadth and affect that 3M's misrepresentations had on the thousands of dentists that purchased Lava Ultimate and tens of thousands of patients who had Lava Ultimate crowns seated in their mouths. (*E.g.*, CAC ¶¶87-88, 99-102.) Plaintiffs have easily met their burden under the low bar needed to plead a public benefit. *Kinetic*, 672 F. Supp. 2d at 946 ("noting that the "public benefit' requirement is not onerous").

Further, 3M's misrepresentations exemplify the type of harm that drafters of Minnesota's private attorneys-general statute sought to address through the MCFA. The inquiry is not whether an action seeks injunctive relief or money damages. Instead, the drafters were "more concerned with the degree to which defendants' alleged misrepresentations affect the public." *In re Levaquin Prods. Liab. Litig.*, 752 F. Supp. 2d 1071, 1078 (D. Minn. 2010). "The Private AG Statute thus advances the legislature's intent

to prevent fraudulent representations and deceptive practices with regard to consumer products by offering an incentive for defrauded consumers to bring claims in lieu of the attorney general." *Ly v. Nystrom*, 615 N.W.2d 302, 311 (Minn. 2000). 3M's course of action was taken in search of profits and with disregard for the interest and rights of Plaintiffs and their patients. (CAC ¶¶89-95.) 3M's refusal to compensate dentists for the damage that Lava Ultimate caused is precisely the type of harm the MCFA is supposed to address.

3. Plaintiffs have pleaded their MCFA with sufficient particularity.

Plaintiffs explained in detail why they have pleaded their fraud claims with sufficient particularity. Plaintiffs incorporate by reference those arguments in their entirety herein.

B. Plaintiffs have properly pleaded a claim under the Minnesota Deceptive Trade Practices Act ("MDTPA").

3M's only argument against the MDTPA claim is that Plaintiffs have "not alleged a likelihood of future harm" because "3M removed the crown indication for Lava Ultimate." (Doc. 89 at 11.) This argument should be rejected because it is premature and disregards the ongoing and future harm that Lava Ultimate and 3M's misrepresentations continue to present.

The argument is premature because whether a likelihood of future harm exists for purposes of the MDTPA is properly addressed on summary judgment, not a motion to dismiss. *See Ferrari v. Best Buy Co.,* No. 14-cv-2956, 2015 WL 2242128, at *10 (D. Minn. May 12, 2015) ("Plaintiff should be allowed to conduct discovery to attempt to uncover

evidence showing that he may be harmed in the future by [defendant's] alleged misrepresentations"); *In re Target Corp. Customer Data Sec. Breach Litig.*, 66 F. Supp. 3d at 1161 (noting that standing to seek injunctive relief best addressed on summary judgment). Because this case is at the pleading stage, evaluating the likelihood of future harm is premature.

Second, simply removing the "crown indication for Lava Ultimate" does not eliminate the potential for ongoing and future harm. Using injunctive relief, the Court can order 3M to a) acknowledge that Lava Ultimate is inherently defective, b) prevent 3M from reintroducing Lava Ultimate for crown sales, and c) order 3M to correct its prior misrepresentations. 3M thus far has refused to acknowledge that the debonds were due to Lava Ultimate's defect. And, absent an injunction, nothing prevents 3M from reintroducing Lava Ultimate back into the market for crown use.

Further, 3M may have voluntarily "removed" the crown indication for Lava Ultimate, but it only did so after marketing and selling the product "for years" knowing that it was inherently defective and despite numerous complaints about the product's failures. (CAC ¶5.) 3M's decision to remove the crown indication, does not, however, moot Plaintiffs' request for injunctive relief because absent an order 3M "is free to return to [its] old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Indeed, it is well settled that voluntary cessation of an activity does not moot the request for injunctive relief aimed at stopping such activity. *E.g.*, *Ctr. for Special Needs Tr. Admin. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012), *Minn. State Archery Ass'n I, Inc. v. Minn. State Archery Ass'n*, No. 02-cv-4290, 2003 WL 1589868, at *6 (D. Minn. Mar. 20, 2003), *Tom T., Inc. v. City*

of Eveleth, No. 03-cv-1197, 2003 WL 1610779, at *9 (D. Minn. Mar. 11, 2003), *ComputerUser.com, Inc. v. Tech. Pubs.*, No. 02-cv-832, 2002 WL 1634119, at *9 (D. Minn. July 20, 2002); *cf. Ferrari*, 2015 WL 2242128, at *10-11 (motion to dismiss denied where future harm consisted of a lack of assurance that defendant would be truthful in future transactions).

Further underscoring the need for injunctive relief is the fact that 3M has thus far refused to acknowledge a defect in Lava Ultimate and instead attributes any debonds to improper techniques by a "small percentage" of dentists. (*See* doc. 89 at 1 ("Indeed, the product worked well for all but a small percentage of dentists. These dentists occasionally had crowns made from the product 'debond' . . . when this small percentage of dentists continued to report difficulties in using this technique sensitive product**,** 3M took action to protect its customer relationships and voluntarily removed the crown indication[.]" (emphasis added).)

Besides correcting the prior misrepresentations, injunctive relief ordering 3M to acknowledge the defect is especially important because class members may not yet be aware of Lava Ultimate's dangers and may still be using Lava Ultimate for crowns. (CAC ¶¶73-86.) This is important because when a Lava Ultimate crown undergoes dimensional changes, the likelihood of decay under the crown increases as bacteria enter and wreak havoc on the existing tooth and jaw. Injunctive relief will alert dentists to monitor their patients with greater diligence and help protect patients from developing conditions that would require costly and more severe procedures like tooth extraction. Thus, injunctive relief requiring 3M to notify dentists about Lava Ultimate's defect will provide important

relief to the class and their patients and mitigate the ongoing harm that Lava Ultimate poses. *Masterson Pers., Inc. v. The McClatchy Co.*, No. C05-cv-1274, 2005 WL 33132349, at *7 (D. Minn. Nov. 22, 2005).

C. Plaintiffs have properly pleaded a claim under the Minnesota Unlawful Trade Practices Act ("MUTPA").

3M asserts four bases why the MUTPA claim should be dismissed, each of which has been previously addressed. First, 3M again improperly invokes the purported merchant exception to Minnesota's consumer protection claims. This brief provided in the section discussing the MCFA claim multiple reasons why the merchant exception does not apply to Plaintiffs, reasons that are equally applicable to the MUTPA claim.[4]

Second, 3M states that Plaintiffs' have not alleged a threat of future harm. As stated above, Plaintiffs' complaint makes specific allegations of ongoing and future harm that will result absent an order prohibiting further sales of Lava Ultimate and notifying dentists of Lava Ultimate's defect.

Third, 3M contends that Plaintiffs have failed to allege a public benefit. Plaintiffs noted above that the public benefit requirement is not onerous and is easily met where, as here, the defendants' conduct is based on a widespread marketing campaign affecting thousands of dentist and tens of thousands of patients.

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[4] Like Minnesota's other consumer protection statutes, the MUTPA is liberally construed and allows any "person" harmed by the actions of another to bring claims under the statute. *See* Minn. Stat. § 325D.10(a) (defining person as "any individual, firm, partnership, corporation or other organization, whether organized for profit or not."); *Pugh*, 2005 WL 14922, at *3.

Finally, 3M erroneously contends that Plaintiffs' MUTPA claim fails for not pleading fraud with particularity. Again, 3M has overstated the burden Plaintiffs face and understated the extent to which the Complaint pleads with great detail 3M's misrepresentations. Plaintiffs have pleaded their consumer protection statute claims under Minnesota law with more than sufficient particularity to survive a motion to dismiss.

D. Plaintiffs have stated a claim for breach of implied warranties.

3M erroneously claims that Plaintiffs' breach of implied warranty claim should be dismissed on the basis that it "adequately disclaimed any implied warranties for Lava Ultimate" through a warranty disclaimer that is found nowhere in the Complaint. (Doc. 89 at 13.) This argument is procedurally unripe and substantively meritless.

1. The Court cannot consider the purported disclaimer at the motion to dismiss stage.

3M contends that Plaintiffs' implied warranty claims must be dismissed, relying on a purported waiver that 3M attached to its motion to dismiss. But courts "ordinarily [do] not consider matters outside the pleadings." *Khan v. CC Serv., Inc.*, No. 13-cv-1649, 2014 WL 3013015, at *2 (D. Minn. Jul. 3, 2014). Consideration of such materials is only appropriate when the complaint "necessarily embrace[s]" them; for example, when a plaintiff sues for breach of contract, the "contracts upon which his claim rests" are "evidently embraced" by the pleadings. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). Further, extrinsic evidence is only appropriate when "no party" questions the evidence's "authenticity." *Id.* (quoting *Kushner v. Beverly Enters.*, 317 F.3d 820, 831 (8th Cir. 2003).

In fact, Eighth Circuit has cautioned that the circumstances under which a defendant can present extrinsic evidence for consideration on a motion to dismiss are rare. A court may not consider extrinsic evidence that is brought in solely to "discredit and contradict [the plaintiff's] allegations":

> Where a defendant provides the district court with documentary evidence "in opposition to the pleading" that could not have been offered for any purpose "other than to discredit and contradict [the plaintiff's] allegations," such evidence comprises "matters outside the pleadings" that cannot be considered without converting the motion to dismiss into a motion for summary judgment.

Schill v. Pederson, No. 16-cv-01280, 2016 WL 7404743, at *8 (D. Minn. Nov. 22, 2016), *report and recommendation adopted sub nom. Alexander Schill v. Joey Pederson, Lt.*, No. 16-cv-1280, 2016 WL 7404682 (D. Minn. Dec. 21, 2016) (quoting *BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 688 (8th Cir. 2003) (brackets in the original); *see also Folger v. City of Minneapolis*, 43 F. Supp. 3d 922, 940 n.17 (D. Minn. 2014) ("But this Court may not consider, on a Rule 12 motion, a newspaper article cited by Defendant to contradict the allegations of the Complaint. For what purpose would the defendant have provided the documents to the district court, other than to discredit and contradict the plaintiff's allegations?") (internal quotations and brackets omitted).

Here, the Court cannot consider the purported warranty disclaimer 3M attaches to its motion to dismiss without converting the motion to dismiss to a summary judgment motion. The Complaint does not mention or allude to the disclaimer in any material way. At most, the Complaint provides an oblique reference that 3M "provided an additional express warranty against fracturing." (*E.g.*, CAC §160 n.16.) But Plaintiffs expressly stated

that they do not "assert claims based on that warranty," (CAC §160 n.16), and therefore 3M cannot demonstrate that it is a "contract[] upon which [Plaintiffs'] claim rests," *see Mattes*, 323 F.3d at 697 n.4. Under the reasoning in *Mattes*, an oblique reference in a footnote to an irrelevant express warranty upon which none of the claims in the complaint rest does not "necessarily embrace" the materials such that they can be considered on a motion to dismiss.

Moreover, invocation of the purported warranty disclaimer is inconsistent with Eighth Circuit precedent because the disclaimer "goes well beyond merely reiterating what was stated in the complaint." *Schill v. Pederson,* No. 016CV01280DWFKMM, 2016 WL 7404743, at *8. 3M submits the disclaimer for nothing more than "written evidence intended to discredit [Plaintiffs'] allegations," which "is not permitted without converting the motion to one for summary judgment." *Id.*

Consideration of the purported warranty disclaimer is further inappropriate because 3M cannot establish that Plaintiffs concede its "authenticity." *See Mattes*, 323 F.3d at 697 n.4. Indeed, 3M simply provides a copy of the disclaimer accompanied by the declaration of 3M's attorney stating in the most conclusory terms that it is a "true and correct copy of 3M's warranty for Lava™ Ultimate CAD/CAM Dental Restorative." (Wildung Decl., Doc. 91.) The declaration does not state such critical foundational facts as where the document was obtained and the date it was created. 3M also fails to establish that the document was communicated to Plaintiffs, that it was conspicuous, or that it formed the basis of the bargain—all necessary factual points that 3M must prove for the disclaimer to be considered at the summary judgment stage, let alone the motion to dismiss stage. *Noel*

Transfer & Package Delivery Serv., Inc. v. Gen. Motors, 341 F. Supp. 968, 970 (D. Minn. 1972) ("[T]he burden is upon the party asserting the disclaimer to establish that the disclaimer was delivered at the time of sale and constituted an integral part of the transaction."). Moreover, 3M makes no effort to show that the disclaimer it tries to invoke is the one Plaintiffs reference in the Complaints' footnote.

2. Consideration of the disclaimer is substantively improper because fraudulent behavior is a "circumstance" that voids implied warranty disclaimers under Minnesota law

3M cannot invoke the disclaimer when its fraudulent behavior omitted knowledge of Lava Ultimate's defect. *See Sorchaga*, 2017 WL 1050585, at *10. In *Sorchaga*, the Minnesota Court of Appeals addressed whether a fraudulent misrepresentation was properly characterized as a "circumstance" that would nullify an implied warranty disclaimer. *Id.* The court held "that a merchant's fraudulent misrepresentation about the condition, value, quality, or fitness of the goods for any purpose is a 'circumstance' under Minn. Stat. § 336.2-316(3)(a) that may invalidate a warranty disclaimer." *Id.* Likewise, in *Carlson v. General Motors Corp.*, 883 F.2d 287, 296 (4th Cir. 1989), the court rejected a defendant's attempt to invoke a disclaimer when the "manufacturer [wa]s aware that its product [wa]s inherently defective, but the buyer has no notice of or ability to detect the problem … thereby rendering such limitations unconscionable and ineffective." (internal quotations omitted).

The same reasoning applies in this case: 3M fraudulently concealed Lava Ultimate's defect, and therefore it cannot invoke the disclaimer.

3. 3M cannot establish as a matter of law that the purported disclaimer was "conspicuous"

3M's attempt to disclaim the implied warranty lacks further merit because it fails to meet the requirements of the statute 3M tries to invoke, Minn. Stat. § 336.2-316a. Under that statute, a disclaimer of implied warranties must be "conspicuous." Conspicuous terms include:

> (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and
>
> (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

Minn. Stat. § 336.1-201(10). At a minimum, there must be more than "'a slight contrast with the balance of the instrument.'" *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 909 (D. Minn. 1985).

3M suggests its disclaimer was conspicuous because it came under the bolded heading "Limited Warranty and Limited Remedy" and was set out in a "contrasting and elevated blue background." (Doc. 89 at 4.) But 3M glosses over the fact that this section is the warranty. What 3M fails to recognize (or acknowledge) is that Minnesota law requires the disclaimer of the warranty itself to be conspicuous. Here it is not:

> **Limited Warranty and Limited Remedy**
> 3M ESPE warrants for 10 years from date of placement that restorations made from Lava™ Ultimate CAD/CAM Restorative will not fracture if fabricated using a 3M ESPE recommended milling machine in strict compliance with approved indications and instructions for use. 3M ESPE makes no other warranties including, but not limited to, any implied warranty of merchantability or fitness for a particular purpose.

(Doc. No. 98 at 5).

The purported disclaimer is in the same font, same size, and on the same background as the rest of the warranty. In fact, the language of this section never "disclaims" anything, is not set out in a separate section with its own heading, and makes no attempt to draw any special attention to it, much less to the fact that it is "disclaiming" or "limiting" any implied warranties. *Dougall v. Brown Bay Boat Works & Sales*, 178 N.W.2d 217, 222 (Minn. 1970). Moreover, use of the word "limited" in the heading refers to the duration of the warranty being offered and does not further alert the Plaintiffs to the disclaimer of implied warranties. Because the disclaimer does not meet the requirements of Minn. Stat. § 336.2-316a, it is ineffective. And, regardless, the Court should not undertake such a fact-intensive analysis at the motion to dismiss stage.

E. Plaintiffs have properly pleaded a claim for unjust enrichment under Minnesota law.

3M's arguments for dismissing Plaintiffs' unjust enrichment claim are meritless. First, 3M argues that a "general rule" under Minnesota law precludes recovery under quasi-contract theories when an express contract controls. This misstates the law. This rule does not apply when a plaintiff pleads alternative causes of action. *See Cummins Law Office v. Norman Graphic Printing Co.*, 826 F. Supp. 2d 1127, 1130 (D. Minn. 2011) ("[A] plaintiff

may plead alternative claims in its complaint, even if those claims are inconsistent with one another … Courts, therefore, routinely permit the assertion of contract and quasi-contract claims together."). Therefore, it is permissible for Plaintiffs to plead both claims for contract and unjust enrichment. *United States v. R.J. Zavoral & Sons*, 894 F. Supp. 2d 1118, 1127 (D. Minn. 2012).

Second, 3M claims that the availability of other remedies bars Plaintiffs' unjust enrichment claim. A recent decision from the District of Minnesota characterized this argument as "simply wrong." *See Roth v. Life Time Fitness*, No. 15-cv-3270, 2016 WL 3911875, at *4 (D. Minn. Jul. 14, 2016) ("[T]he Court notes that the Restatement finds that the 'conclusion' that an unjust enrichment claim 'may be dismissed if the plaintiff has an adequate remedy at law … is simply wrong.'").

Third, 3M contends Plaintiffs fail to state how 3M was unjustly enriched. (Doc. 89 at 14.) 3M, however, mischaracterizes the pleadings because all a claim for unjust enrichment requires, as the name suggests, is a showing that one party has been enriched and that the process by which they were enriched was unjust. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). The scope of conduct that is "unjust" under Minnesota law is very broad. *See id.* at 729-30 ("While respondents argue that their conduct has not been shown to be illegal, the cause of action for unjust enrichment has been extended to also apply where, as here, the defendants' conduct in retaining the benefit is morally wrong; *see also Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992) (unjust enrichment may be shown by circumstances that would make it unjust to permit retention); *Park-Lake Car Wash v. Springer*, 394 N.W.2d 505, 514

(Minn. App. 1986) (unjust enrichment may be found absent fraud where a party's conduct has been "unconscionable by reason of a bad motive, or where the result induced by [that] conduct will be unconscionable either in the benefit to himself or the injury to others.).

Here, the Complaint makes specific allegations that 3M engaged in a widespread marketing campaign in which it misrepresented Lava Ultimate's appropriates for crowns, which enabled it to extract large profits from Plaintiffs. (CAC ¶¶87-93, 99-102.) It would be manifestly unjust to permit 3M to enrich itself through its fraud while the Plaintiffs bear the costs. Plaintiffs have pleaded a proper claim for unjust enrichment.

F. Plaintiffs have pleaded a proper claim for fraud under Minnesota law

Plaintiffs have already explained above why, under Minnesota law, the Complaint pleads fraud with sufficient particularity. Plaintiffs incorporate that section by reference in its entirety.

IV. California[5]

A. The California Unfair Competition Law ("UCL") claim is properly pleaded because equitable relief remains available.

Plaintiffs allege that 3M violated the UCL by engaging in unfair, unlawful, and deceptive business practices and seek relief that includes injunctive relief and other equitable remedies, such as restitution. (CAC at ¶¶222-228.) "The remedies or penalties provided by [the UCL] are cumulative to each other and to the remedies or penalties available under all other laws of this state." Cal. Bus. & Prof. Code § 17205.

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[5] Respectfully, Plaintiffs are no longer pursuing their claim under the CLRA, Cal. Civ. Code § 1750, and the Song-Beverly Act, Cal Civ. Code § 1791.